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THE
FEDERAL REPORTER.
VOLUME 92.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 92.

JUDGES

OF THE

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¹ Additional Circuit Judgeship created by act approved January 25, 1899.

² Additional Circuit Judgeship created by act approved January 25, 1899.

³ Retired February 21, 1899.

⁴ Commissioned March 3, 1899.

⁵ Resigned, to take effect on appointment of successor.

⁶ Commissioned September 23, 1898.

⁷ Deceased December 10, 1898.

⁸ Commissioned January 23, 1899.

⁹ Resigned, to take effect upon his qualifying as Circuit Judge.

¹⁰ Commissioned February 28, 1899.

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¹ Resigned February 28, 1899.

² Commissioned February 13, 1899.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

NICHOLS v. NICHOLS.

(Circuit Court, E. D. Missouri, E. D. February 13, 1899.)

No. 4,175.

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP.

The first clause of the fourteenth constitutional amendment, declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," was not intended to make residence within a state the equivalent of citizenship therein, and it cannot be given that effect for the purpose of conferring jurisdiction on a federal court on the ground of diversity of citizenship.¹

2. SAME—HUSBAND AND WIFE.

A husband and wife, not living apart under a legal separation, cannot be citizens of different states in such sense as to authorize a federal court to entertain jurisdiction of a suit between them, the domicile of the husband being in legal contemplation that of the wife also.

This is a suit commenced in a state court by Dora H. Nichols, by her next friend, against Frank B. Nichols, the parties being husband and wife. The cause was removed by the defendant.

E. T. & C. B. Allen, for complainant.

George M. Block and Noble & Shields, for defendant.

Before THAYER, Circuit Judge, and ADAMS, District Judge.

THAYER, Circuit Judge. Section 5 of the judiciary act of March 3, 1875 (18 Stat. 472, c. 137), which is still in force, makes it the duty of the circuit court, if it appears to its satisfaction at any time after a suit has been removed thereto from a state court that it does not really and substantially involve a controversy within the jurisdiction of said court, to remand it to the court from which it was removed. In this case the original complaint filed in the state court,

¹ As to diverse citizenship as a ground of federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 249, and, supplementary thereto, notes to *Mason v. Dullaghan*, 27 C. C. A. 298, and *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 479.

as well as the bill which has since been filed in this court, show on their face that the plaintiff and the defendant are husband and wife, having been married on December 10, 1890, in the city of St. Louis, state of Missouri. The petition on the strength of which a removal was obtained by the defendant alleges that the plaintiff, the wife, at the commencement of the action was, and still is, a citizen of the state of Missouri, and that the husband, at the commencement of the suit, resided at the city of Bessemer, in the state of Alabama, and was a citizen of the state of Alabama. The question is therefore presented upon the face of the record (and under the act of congress heretofore cited the court is required of its own motion to notice and determine it) whether the respective parties are, or can be, citizens of different states, within the meaning of the removal act, and whether this court has jurisdiction of the case. It has been suggested that jurisdiction may be sustained under the first clause of the fourteenth amendment to the constitution of the United States, which declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside." As we understand the suggestion of counsel, it is, in substance, that since the adoption of the amendment actual residence within a state by a person born or naturalized in the United States constitutes that person a citizen of the state where he or she thus resides, and that, as applied to the present case, the fact that the plaintiff, at the time of the institution of this suit, was residing in the state of Missouri, constituted her a citizen of Missouri, although her husband was at the time domiciled in, and a citizen of, the state of Alabama. We think that this contention is unsound, and that the fourteenth amendment to the constitution of the United States was not intended to have that effect, but was framed for an entirely different purpose, namely, to make it clear that all colored persons born in this country in a state of servitude, and that the children of certain aliens who were born in the United States, and subject to its jurisdiction, should thenceforth be regarded as citizens of the United States, and entitled to its protection. *U. S. v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456. It has never before been suggested, so far as we are advised, that the fourteenth amendment to the constitution was intended to have any other or different force or effect, or to establish the rule that residence within a state was equivalent to being a citizen of the state. On numerous occasions since the fourteenth amendment was adopted, cases have been dismissed both by the federal supreme court and various circuit courts because the jurisdictional averment relied upon was an averment of residence within a state, rather than an averment of citizenship. We think, therefore, that the jurisdiction of this court over the case at bar cannot be maintained under or by virtue of any declaration found in the aforesaid amendment.

The question remains whether a husband and wife who are not living apart under a legal separation can be citizens of different states in such a sense as to authorize a federal court to entertain jurisdiction of a controversy which has arisen between them. It is

a well-established rule of law that, whether a husband and wife are living together or apart, the wife's domicile, in the eye of the law, is that of her husband, and that she is not capable of establishing a separate domicile. The husband has the right to choose the domicile, and the wife must abide by his decision, except, perhaps, in some special cases where the husband acts in bad faith; and, if the wife refuses to take up her abode in the place of domicile chosen by the husband, this is an act of desertion on her part. All of the text writers and authorities, so far as we have examined them, agree substantially on these propositions. *Barber v. Barber*, 21 How. 582; *Bennett v. Bennett*, 3 Fed. Cas. 212; *Ashbaugh v. Ashbaugh*, 17 Ill. 476; *Greene v. Greene*, 11 Pick. 410-414; *Bish. Mar. Wom.* § 157; *Schouler, Dom. Rel.* §§ 37, 38, and cases cited. As a corollary from these propositions, it follows, we think, that, in a legal sense, the plaintiff's present domicile, like that of her husband, is in the state of Alabama, and that, he having gone there with an intent to make it his home, and being a citizen of that state, the plaintiff must also be regarded, in a legal sense, as domiciled in the state of Alabama, and as being a citizen of that state. The laws of Missouri have enlarged the power of married women to acquire, hold, and control property, but, in the absence of a legal separation, they have not empowered them to establish a domicile different from that of their husbands. In the latter respect their disabilities remain the same as at common law. The court is therefore constrained, of its own motion and upon the facts appearing upon the face of the record, to remand the case to the state court, and it will be so ordered.

ADAMS, District Judge, concurs.

CHRISTIE et al. v. DAVIS COAL & COKE CO. et al.

(District Court, S. D. New York. February 20, 1899.)

JURISDICTION—SERVICE OF PROCESS—FOREIGN CORPORATION—LOCAL AGENT.

The Mexico Central Railway Company, a Massachusetts corporation, having its principal office in Boston and its railroad operations in Mexico, had a local agent for many years in New York City, where it maintained continuously a local office, and where a portion of the regular business of the company was conducted by the agent in making rates for through freight, and procuring business contracts. *Held*, that service of process upon the local agent was sufficient to give this court jurisdiction for the purpose of making the corporation a third party defendant, upon a petition on the analogy of the fifty-ninth rule in admiralty.

In Admiralty. Service on foreign corporation.

Convers & Kirlin, for libelants.

Cowen, Wing, Putnam & Burlingham, for petitioner Davis Coal & Coke Co.

Evarts, Choate & Beaman and Tredwell Cleveland, for petitioner Mexican Cent. Ry. Co.

BROWN, District Judge. Upon the petition of the original defendant, the Davis Coal & Coke Company, the Mexican Central Rail-

way Company was brought in as an additional defendant upon the analogy of the fifty-ninth rule of the supreme court in admiralty. The latter company is a Massachusetts corporation. Service of process was made by the marshal upon Mr. Carson, the "Eastern Agent" of that company in this city. A special plea or exception has been interposed to the jurisdiction of the court, on the ground that such service was insufficient, because Mr. Carson was neither an officer, nor a director nor a manager of the company. The plea is accompanied by the affidavit of Mr. Carson, and other affidavits have been submitted in behalf of the petitioners. The papers thus submitted leave no doubt that the principal places of business of the corporation are in Massachusetts, where its main office is situated and where its officers and directors all reside, while its railroad and the property connected therewith are in Mexico. The company, however, has maintained an office in this city with a local Eastern agent for 15 years past, during all which time, with the exception of 1885 and 1890, it has regularly appeared in the City Directory with an office in Broadway or Exchange Place with a named agent or manager. Mr. Carson for several years past has been named as manager at No. 1 Broadway, where the company exhibits a conspicuous sign above and at the side of the entrance, with Mr. Carson's name stated as "Eastern Agent." Letters are also submitted signed by Mr. Carson as Eastern agent during November and December, 1898, headed with the company's name at the same address, and at the "office of the Eastern agent," making rates for freight and treating of the handling of coal and coke at Tampico.

The fact that an office should be thus maintained in this city for 15 years with a person always acting as an agent for the company for business purposes and in the actual transaction of its business, is in my judgment sufficient to authorize the lawful service of process upon this agent, as a true representative and agent of the company here. The company does transact and has long transacted business here; and though the business transacted here by the local agent may be, and probably is, but a minor portion of its whole business, it is evidently a regular part of its business, and not in the least accidental or temporary. The agent here represents the company for the regular transaction of a portion of its business, and that is sufficient under the federal authorities. *St. Clair v. Cox*, 106 U. S. 350, 359, 1 Sup. Ct. 354; *Goldey v. Morning News*, 156 U. S. 518, 522, 15 Sup. Ct. 559, and cases there cited; *Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526. It would seem to be sufficient also to constitute a "managing agent" within the state law, although that would not be essential here. See *Tuchband v. Railroad Co.*, 115 N. Y. 437, 440, 22 N. E. 360.

Exceptions overruled.

TEXAS CONSOL. COMPRESS & MANUFACTURING ASS'N v. STORROW
et al.¹

(Circuit Court of Appeals, Fifth Circuit. February 21, 1899.)

No. 793.

1. CIRCUIT COURT OF APPEALS—RIGHT OF APPEAL.

An appeal may be taken to the circuit court of appeals from an order appointing a receiver for a corporation, and granting an injunction restraining its officers from interfering with him.

2. SAME—QUESTIONS PRESENTED FOR REVIEW.

An appeal to the circuit court of appeals from an order appointing a receiver for a corporation, and enjoining its officers from interfering with him, carries up the entire order and merits of the case for review.

3. CORPORATIONS—INSOLVENCY—RECEIVERS—APPOINTMENT—PREFERRED STOCK-HOLDERS—RIGHT TO APPLY.

Preferred stockholders of a corporation are not entitled to the appointment of a receiver pending an action for its dissolution, etc., in the absence of a clear showing that it is insolvent, and that its affairs have been, and are likely to be, mismanaged, to the detriment of stockholders and creditors.

4. SAME.

In the absence of statutory authority, a court of equity should not appoint a receiver, with a view to the dissolution of a corporation, at the instance of a stockholder, unless the corporation is insolvent, or its affairs are being fraudulently mismanaged.

5. SAME—APPLICATION BY CREDITOR.

In United States courts a creditor of a corporation, whose claim has neither been reduced to judgment nor admitted, has no standing in equity to apply for the appointment of a receiver therefor, though the corporation is insolvent.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

This case was before the court at its last term, and was decided May 17, 1898. A statement of the facts up to that date, together with the opinion of the court, will be found in 31 C. C. A. 139, 87 Fed. 612. On a return of the case to the circuit court the complainants filed a supplemental bill, and thereupon renewed their motion for a receiver. In addition to the matters which had been alleged in the several pleadings before the court on first appeal, the supplemental bill contains, in substance, the following allegations:

(1) That on the 3d day of July, 1897, while this suit was pending, the board of directors, contrary to the rights of preferred shareholders, and without authority in fact or law, authorized the president and secretary and treasurer to sell and dispose of the press at Bowie, and said press was then and there sold for \$15,000 to the El Reno Compress & Storage Company, a foreign corporation doing business in Oklahoma territory, and said El Reno Company removed the property beyond the jurisdiction of this court. The terms of sale were \$7,500 cash, and a note for \$7,500, which note was discounted, and sold for \$7,000 cash; the total sum realized being \$14,500. That complainants were thus deprived of their rights in said press, and a portion of the assets in which they have an interest were unlawfully dissipated. That when this press was sold and removed, it was held under a lease, or claim of lease, by a party at Bowie; and because same was removed said party has instituted suit against the defendant company in the district court of Montague county, claiming a large amount of damages for breach of said lease contract, which suit is undetermined.

(2) That in May, 1897, it was ascertained that the net profits from the business for the current year 1896-97 was sufficient to pay the dividend which ought to be paid upon preferred stock; and said dividend which ought to have been declared, to wit, the sum of \$21,000, then and there became a charge

¹ Rehearing denied March 14, 1899.

upon the net earnings of said association, not only for the current year 1896-97, but upon all the previous net earnings of said association.

(3) That at the annual meeting of stockholders in May, 1898, it was shown by report of the president that the sum of \$66,936.09 had been expended in betterments and extraordinary improvements, which should have been appropriated as dividends, and which, in fact, represented net earnings which might have been paid as dividends upon the preferred stock. That, in addition to this amount, the defendant had purchased additional ground, to wit, several lots in Tyler, and paid for the same out of the net earnings.

(4) That the entire compress plant at Greenville has been rebuilt out of the net earnings and money received from insurance, which insurance and net earnings should have been applied to and paid upon the claim of the preferred shareholders, the preferred stock having, by the terms of their contract, a lien upon said insurance money; and, the same having been diverted and spent in the erection of the new plant, the preferred shareholders are entitled to have their lien fixed upon said plant.

(5) That since the original and amended bills were filed, H. H. Rowland, who was manager, and J. D. Moody, who was secretary and treasurer, charged in the previous pleadings to be controlling spirits in the conduct and management of defendant's affairs, had resigned their positions, and pretended to have sold out and disposed of all interests in the company. That a certain pretended sale (described in the pleadings) was made to one J. E. Tucker, a kinsman of Moody, by which the control of the company was transferred to Tucker. But, while the stock appears in Tucker's name, it is in fact and in truth the property of Moody, Rowland, and Clark, merely being held in trust for said parties by Tucker, because said parties are notoriously insolvent, and cannot hold said stock in their own names, and because said parties are charged to be responsible for the conditions of said defendant association, and not proper parties to control the same. That Tucker, moved and directed by said parties, at said annual meeting in 1898 elected certain friends and relatives as directors and officers, who have no substantial interest in the property, but who are and will be guided in their management by the wishes of Tucker, who is acting for Moody, Rowland, and Clark, as aforesaid. That Tucker was elected as president, and J. G. Blaine, who resides at Taylor, Tex., also a relative of J. D. Moody, was elected secretary and treasurer. That in the early part of 1898, on several occasions, and at several different times and places, H. H. Rowland, pretending to act in behalf of his brother, B. W. Rowland, attempted to purchase the preferred stock belonging to complainants at a nominal value, said Rowland stating to complainants' attorney that his brother had acquired the stock belonging to the International & Great Northern Railway, and would have the majority of all the common stock in said association when the annual meeting should occur; and that John M. Duncan, who was president, and Claud Wiley, who was secretary and treasurer, would be ousted, and new officers would be elected, such officers to be suggested by his said brother. That at the meeting in 1898 said officers were ousted, and J. E. Tucker elected the directors and officers, he being made president, and Blaine secretary, as aforesaid.

(6) That at said annual meeting, May 10, 1898, a resolution was adopted by which the common stock authorized the directors within six months from that date to issue 6 per cent. bonds, with a first mortgage upon the property of the association, to take up all the preferred stock at its face value, but making no provision for the accumulated dividend; and this, too, notwithstanding at a previous meeting in May, 1897, it had been ascertained that the total value of all the property was \$240,000, and there was a floating debt of about \$50,000, leaving the net value less than \$200,000, and there was preferred stock then outstanding amounting to \$310,000; and in said meeting of May, 1897, it was the opinion of the stockholders and directors that the corporation ought to be wound up and disintegrated. That there was then an accumulated dividend, which was a charge upon the net earnings, of \$126,000, which dividend was constantly increasing, while the properties were depreciating and decreasing in value. That two of the presses, Dublin and Bowie, are out of the association, the former destroyed by fire, and the latter sold, and removed out of the state. Two of the other presses, to wit, Mar-

shall and Gatesville, cannot be operated without loss, and another of the presses, to wit, the one at Greenville, is badly worn, and a new and powerful press is being built, which, by reason of local influence and difference in physical condition, will make it impossible for the Greenville press to be operated at a profit. That there are only three presses left in the association capable of making money, to wit, Corsicana, Tyler, and Mt. Pleasant. That all the assets of the defendant will not now exceed \$200,000, and the liabilities are over \$36,000 (complainants believe are over \$50,000), and, after deducting the floating debt, the net value of all the property will not exceed \$150,000. Since May 4, 1897, when seven presses were in the association, valued at \$240,000, the annual report of operations for 1897-98 has been made, which shows gross earnings \$56,620.34; and, in addition to this, the Bowie press had been sold for \$15,000. Nevertheless, after paying out all money on hand except \$10,000, there was a floating debt of over \$36,000.

The defendant below filed answers, on the original order to show cause, to the bill and intervening bills, and before the hearing on the last application for a receiver the defendant filed a supplemental answer. In these pleadings the defendant directly and specifically denied every material allegation in the bills of complainants, and alleged what was claimed to be the truth as to each of the complainants' charges relating to the management of the affairs of the defendant company. The original answer is verified by the affidavits of the president, vice president, and treasurer of the defendant company, and the supplemental answer by the affidavits of J. E. Tucker, president, and John M. Duncan. The defendant denied specifically all allegations of the complainants as to net earnings applicable to the payment of guaranteed dividends on the preferred stock, and specifically denied that the defendant company was insolvent. Luminous exhibits and affidavits were submitted on both sides, a specific analysis of which is not necessary at this time. On the hearing of a rule to show cause why a receiver and auditor should not be appointed as prayed for, the circuit court entered an order appointing a receiver, the material portions of which are as follows: "Upon reading and considering the verified bills in this cause, together with the answers of defendant and the evidence adduced on motion of counsel for the complainant, the defendant having been duly notified, and appearing by its counsel, it is ordered by the court that L. A. Pires, of Dallas, in the state of Texas, be, and he is hereby, appointed receiver of this court of all and singular the property, assets, rights, and franchises of the Texas Consolidated Compress & Manufacturing Association of every description, wherever situated, and all money, claims in action, credits, bonds, stocks, leasehold interests, or operating contracts, and all other assets of every kind, and all other property, real, personal, or mixed, held or possessed by said association; to have and to hold the same as officer of, and under the order and directions of, this court. The said receiver is hereby authorized and directed to take possession of all and singular the property above described, and to continue the business of said association. And the said Texas Consolidated Compress & Manufacturing Association, and each and every of its officers, directors, agents, and employés, are hereby required and commanded forthwith to turn over and deliver to such receiver, or his duly-constituted representative, any and all books of accounts, vouchers, papers, deeds, leases, contracts, bills, accounts, money, or other property in his or their hands, or under his or their control; and they are hereby commanded and required to obey and conform to such orders as may be given them from time to time by the said receiver, or his duly-constituted representative, in conducting the said business and in discharging his duty as such receiver; and they and each of them are hereby enjoined from interfering in any way whatever with the possession or management of any part of the business or property over which said receiver is so appointed, or from in any way preventing or seeking to prevent the discharge of his duties as such receiver. Said receiver is hereby fully authorized to continue the business of said association, and manage all its property, at his discretion, in such manner as will, in his judgment, produce the most satisfactory results, and to collect and receive all income therefrom, and all debts due said association of every kind, and for such purpose he is hereby invested with full power, at his discretion, to employ and dis-

charge and fix the compensation of all such agents and employés as may be required for the proper discharge of the duties of his trust."

The defendant company, claiming the order to be an interlocutory one granting an injunction, sued out this appeal, assigning some twenty-one errors, all attacking the order as not justified under the pleadings and evidence. The second, third, seventh, twelfth, and thirteenth assignments need only be recited, and they are as follows: "(2) All of the allegations in complainants' intervening bills, and amendments and supplements thereto, alleging diversion of net earnings into repairs, renewals, and betterments, having been fully met on the part of defendant by uncontradicted proof that all such repairs, renewals, and betterments were proper and necessary to the continued and efficient operation of the property, were made at a reasonable cost, openly and fairly, by the board of directors, in the exercise of an honest discretion, and with the knowledge and acquiescence of defendant's stockholders, and upon their ratification and approval, and neither complainants nor either of the interveners offering any proof whatever in support of their bills upon this point, the court erred in making and entering said order and decree granting said injunctions and receiver. (3) Defendant's answers and proofs conclusively showing that there had been no net earnings properly distributable as dividends to the preferred stockholders for any of the years for which complainants claim dividends, and that the stockholders and directory of defendant, in the exercise of a reasonable and honest discretion, had made all the repairs, improvements, and renewals complained of from earnings of defendant, and had further used such earnings in the payment of the valid indebtedness of defendant, and that defendant, through all these years for which dividends are claimed, was largely indebted on claims having priority over those of stockholders, and such payments for repairs, renewals, and improvements and on indebtedness leaving no surplus with which to pay dividends, and complainants offering no proof whatever to sustain their allegations on these points, the court erred in making and entering the aforesaid order granting injunctions and appointing a receiver." "(7) Because the pleadings and uncontradicted proof show that defendant was not insolvent, the court erred in the making and entering of said order and decree granting said injunctions and receiver." "(12) Because it appears from the proofs on said hearing that the holders of a large majority of both the preferred and common stock protest against the appointment of a receiver, indorsed the management of defendant, and wish the corporation to continue in the conduct and management of its own affairs, the court erred in granting said injunction, and in appointing said receiver. (13) Because the preferred stock certificates, the resolutions and by-laws under and in pursuance of which they were issued, constitute their holders only stockholders, and not creditors of defendant as to the face of their stock, and there being full proof on the part of defendant that there were no earnings properly distributable as dividends on the preferred stock, the court erred in granting said injunctions and receiver."

The appellees filed in this court a motion to dismiss the appeal, on the ground that the order sought to be reviewed is an order appointing a receiver, and not a distinct order granting or continuing an injunction; that part of the order claimed to be an injunction being merely incidental to the order appointing a receiver, and not the sole or principal part of said order or decree.

John M. Duncan and J. M. McCormick, for appellant.

W. S. Herndon, Ben B. Cain, and W. Frank Knox, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

'After stating the case as above, the opinion of the court was delivered by PARDEE, Circuit Judge.

The first question to be passed upon is the motion to dismiss the appeal. The order appealed from was granted on an order to the defendant to show cause, if any it could, why a receiver and auditor should not be appointed as prayed for; and, as set forth in the state-

ment of facts, it is directed mainly, if not entirely, to the appointment of a receiver. The only—in terms—unjunctive feature contained in the order is a paragraph to the effect that they, and each of them (that is, the defendant company and its officers), are enjoined from interfering in any way whatever with the possession or management of any part of the business or property over which said receiver is appointed, or from in any way preventing, or seeking to prevent, the discharge of his duties as such receiver. There is strong reason to hold that this provision is surplusage. An inhibition to the company and its officers, as well as to all other persons, to interfere, necessarily results from the order appointing the receiver. Any person connected with the company, or independent of the same, who interferes with the possession of a receiver appointed by the court, or hinders him in the discharge of his duties, is amenable to process for contempt, whether such inhibition is contained in the order appointing the receiver or not. If, after making the above order, the trial court had entered, or if this court now should enter, an order in terms setting aside only the appointment of the receiver, all the other parts of the original order would immediately and without specific mention disappear, and cease to have any force.

In *Highland Ave. & B. R. Co. v. Columbia Equipment Co.*, 168 U. S. 627, 18 Sup. Ct. 240, the supreme court held that an order appointing a receiver, and containing no distinctive injunctive features, was not appealable. After quoting the section of the act creating the circuit courts of appeals (26 Stat. 517, as amended 28 Stat. 666), the court says (page 630, 168 U. S., and page 241, 18 Sup. Ct.):

"Under this section it has been decided that, when an appeal is taken from an interlocutory order or decree granting or dissolving an injunction, the whole of such interlocutory order or decree is before the court of appeals for review, and not simply that part which grants or dissolves the injunction; and that on the hearing in the court of appeals that court may consider and decide the case upon its merits. *Smith v. Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407; *In re Tampa Suburban R. Co.*, 168 U. S. 583, 18 Sup. Ct. 177. But each of those cases proceeded upon the fact that there was a distinct order granting, continuing, or dissolving an injunction. In the case at bar there is no such order. It is true, following the order of appointment, there is a direction to the defendant, its officers, directors, and agents, to turn over to Campbell the property of which he is appointed receiver; but that is only incidental and ancillary to the receivership. This is obvious, for, if the court subsequently entered an order in terms setting aside only the appointment of the receiver, all the other parts of the original order would immediately and without specific mention disappear, and cease to have any force. Indeed, the mere appointment of a receiver carries with it the duty on his part of taking possession, and the further duty of those in possession of yielding such possession. So that while, as a part of an order appointing a receiver, there is something in the nature of a mandatory injunction,—that is, a command to the receiver to take, and to the defendant to surrender, possession,—yet such command is not technically and strictly an order of injunction."

In *Re Tampa Suburban R. Co.*, referred to above, which is relied upon to maintain the appeal in this case, it is stated in the headnotes that: "Where, as in this case, an order is made by a circuit court, appointing a receiver, and granting an injunction against interfering with his management of the property confided to him, an appeal may be taken to the circuit court of appeals, carrying up the entire order."

An examination of the facts in that case will show that there was a preliminary order of injunction issued before the appointment of a receiver, and that such preliminary order of injunction was continued at the time the receiver was appointed; and that the order appointing a receiver contained a provision "enjoining the officers, directors, and agents of the defendant companies from interfering in any manner whatever with the possession and management of any part of the property over which the receiver is hereby appointed, or from interfering in any way to prevent the discharge of the duties of such receiver," language nearly identical with the order appointing a receiver in the present case. In the opinion of Mr. Justice Fuller it is stated that a review was sought of two interlocutory orders,—one a preliminary restraining order, and the other appointing a receiver, and continuing the injunction, in aid of the receivership; and he says:

"By the seventh section of the judiciary act of March 3, 1891, c. 517 (26 Stat. 826, 828), as amended by the act of February 18, 1895, c. 96 (28 Stat. 666), it is provided: 'That where, upon a hearing in equity, in a district court or a circuit court, an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction to the circuit court of appeals.' The suit in which the orders complained of were entered is one in which an appeal from a final decree might be taken to the circuit court of appeals, and this even though the question of the jurisdiction of the circuit court was involved. *U. S. v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39. An appeal to the circuit court of appeals might, therefore, have been taken from these orders, or from an order refusing to set them aside and dissolve the injunction. We are not called on to say that an appeal would lie from an order simply appointing a receiver, but, where the order also grants an injunction, the appeal provided for may be taken, and carries up the entire order, and the case may, indeed, on occasion, be considered and decided on its merits. *Smith v. Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407."

Considering these cases adjudged in the supreme court, I entertain grave doubts as to whether an appeal will lie in the instant case; but the majority of the court are of opinion that the appeal is warranted by the decision in *Re Tampa Suburban R. Co.*, *supra*. The motion to dismiss the appeal is therefore denied.

Upon an appeal from an interlocutory order containing an injunction the circuit court of appeals may consider and decide upon the propriety of the entire order, and even upon the merits of the case. See *Smith v. Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407. This case was before the court at the last term on appeal from a final decree dismissing the complainants' original bill for want of equity, and in that case (31 C. C. A. 139, 87 Fed. 612, 616) Judge Swayne, delivering the opinion of the court, said:

"The bill alleges, and the demurrer admits, that during the time in question the association had earned sufficient net profits from the operation of the compresses to pay the 6 per cent. dividend on its preferred stock. It also states that the said association wrongfully and willfully diverted the net profits earned by it, and has used and appropriated the same in divers and sundry ways, for the purpose of depriving the complainants of their dividends, and of destroying the value of the preferred stock; and this was done by the majority of holders of the common stock, in fraud of the rights of

complainants. While it has been determined that the claim of the holders of the preferred stock against the corporation is not strictly a debt, but is contingent upon the existence of sufficient net profits to pay, it is evident that preferred stock is only a security for a loan, upon which a certain and definite interest was to be paid while the corporation existed, and the full amount thereof returned to the lender when it was dissolved, before the holders of the common stock should receive anything. The preferred stockholder has no vote or voice in the management of the corporation. He possessed none of the rights of a common stockholder as such, and about the only difference between him and the ordinary lender of money was that he was not to receive his interest unless there were sufficient net profits to pay the same. Therefore, so far as the face value of the preferred stock is concerned, it is in the nature of a debt against the corporation, and the interest thereon becomes a debt as soon as it can be shown that there were profits wherewith to pay it, and becomes a lien prior to the rights of the holders of common stock upon the net earnings, if there were such, for the amount of the dividend, and can be allowed wherever invested by the company. This contention is further maintained by the fact that the company reserved the right to issue, in lieu of the preferred stock, first mortgage bonds, bearing interest at the rate of 6 per cent. per annum, secured by a mortgage upon all the compresses of the association; thus making this loan represented by the preferred stock payable at any time upon the will of the corporation. The other allegations in complainants' bill in regard to judgments; the insolvency of the corporation; 'that it could not be operated as a going concern with profit, and ought to be disintegrated, and the assets divided, and that part of the property had been sold without authority; that their right to have a dividend declared on their stock had been neglected and refused; that their right to receive the full face value thereof had been denied by the corporation,'—are matters that can only be investigated and determined by a court of equity. The investigations of the amount of the net income, and the proper disposition thereof, the marshaling of assets, the priority of liens, and the foreclosure of same, as well as the prayer for injunction and receiver pendente lite, are proper matters for the consideration of the chancellor, and cannot be proceeded with in a court of law. The case made by the bill, if sustained by proof, would undoubtedly entitle complainants to relief."

While holding that the original bill, if maintained, showed equities justifying the interference of the court, our former decision did not undertake to point out particular remedies; but from what was said it is easy to see that there might result an accounting to ascertain if there had been net earnings to such an extent as to warrant the payment of dividends upon the preferred stock, and also that, if certain contemplated acts of mismanagement were insisted upon, an injunction might be issued; but from nothing contained in the opinion does it follow that, if the matters alleged in the original bill should be established, the complainants would be entitled pendente lite to have the entire management of the company's business and property taken out of the hands of its board of directors by the appointment of a receiver; certainly not unless it should also be clearly shown that the company was insolvent, and that its affairs had been, and were likely to be, mismanaged, to the great detriment of the stockholders and creditors. On the case in the present transcript it is an open question with us whether the affairs of the company have lately been managed well or ill, but it does appear that nearly all the holders of preferred stock are also large holders of common stock, and that a large majority of both, the common and the preferred, indorse and approve the management of the company's affairs since 1893, have confidence in the present board of directors and its pur-

poses, and strongly oppose the appointment of a receiver. Whether the company is insolvent depends upon whether or not its past net earnings have been such as to require a dividend on the preferred stock for the years 1893 to 1898, inclusive, in which event the debts due for dividends on such preferred stock, added to the conceded outstanding indebtedness, would probably exceed in amount the value of all the company's property. The test suggested by counsel for appellees, that the preferred stock and the guaranteed dividends accruing since 1892 amount to a sum largely in excess of the value of all the company's property, and that, in fact, the common stock has no interest whatever in the company's property, is not the correct test to apply, for, as a matter of fact, at no time since the company was organized has the value of its property been equal to the amount of the preferred stock. Viewing the complainants below (appellees here) as stockholders applying for a receiver, the case made does not show that the company is insolvent in any such sense as will allow a stockholder to maintain a suit for the dissolution of the corporation, and the winding up of its affairs. Unless the corporation is insolvent, or its affairs are being fraudulently mismanaged by its officers in authority, to the detriment of creditors or stockholders, a court of equity ought not, at the instance of a stockholder, in the absence of statutory authority, to interfere to appoint a receiver, with a view to the winding up of the affairs of the corporation. So far, then, as the present suit is one brought by stockholders of a corporation for the protection of its assets and the liquidation of its affairs, no proper case is presented for the appointment of a receiver. The complainants, as creditors, have no equity authorizing them to apply for and obtain the appointment of a receiver, for the simple reason that their claims against the corporation have not been liquidated by decree or judgment, and are denied as existing, exigible debts. It is not necessary to cite authorities to the effect that in the courts of the United States a creditor who has no lien, and whose demand has neither been adjudicated nor admitted, has no standing in equity for the appointment of a receiver of his debtor's property, even if the debtor be insolvent. A discussion of the pleadings and evidence in the record on all the points argued by the very able counsel at the bar and by brief would extend this opinion to great length, and would, in our view of the case, be unnecessary. In our opinion, the case shown does not warrant the appointment of a receiver in the interest of either creditors or stockholders. If the complainants have an accounting as to the net earnings from 1893 to 1898, inclusive, and are allowed injunctions against any fraudulent or ultra vires acts proposed by the management of the company, their rights will be fully protected, at least up to such time as they can show to the court adjudicated demands entitling them to payment, and, failing that, to the liquidation of the corporation as insolvent.

The order appealed from is reversed, and the case is remanded, with instructions to discharge the receiver, pass his accounts, and thereafter proceed in conformity with the views herein expressed, and as equity may require.

BARTOL v. WALTON & WHANN CO. et al.

(Circuit Court, D. Delaware. February 17, 1899.)

No. 169.

1. CORPORATIONS—CONTRACT OF SUBSCRIPTION TO STOCK—SUIT TO RESCIND FOR FRAUD.

In a suit by a stockholder for the rescission of his contract of subscription, on the ground of fraud inducing the same, the bill must set out specifically the facts which constitute the fraud relied upon.

2. SAME—MISREPRESENTATIONS.

To authorize the rescission of a subscription to stock, as having been induced by misrepresentations, it must be alleged and proved that there was a false statement of facts, made with a fraudulent intent, and which was relied on.

3. SAME.

The setting forth, in a prospectus of a corporation, of plans which would require that the whole amount of a proposed issue of preferred stock should be subscribed and paid for, is not a representation, to one subscribing to such stock, that none will be issued until it is all taken, nor of any existing fact which would invalidate the contract of subscription if all the stock is not taken; nor will an untrue statement by the officers that it is all taken, made after a subscriber's stock is issued, affect the validity of his subscription.

4. SAME—DISCOVERY OF FRAUD—LACHES.

A stockholder who, over two years after he became such, and after the corporation has become insolvent, brings suit for the rescission of his contract of subscription, on the ground that it was induced by fraud, must show that he acted with diligence after he discovered the fraud, and that it was such discovery, and not the failure of the enterprise, that impelled his action.

This is a suit in equity by Henry W. Bartol, individually and as trustee, against the Walton & Whann Company, a corporation, and James P. Winchester and Francis N. Buck, as receivers of said company, for the rescission of a contract of subscription to the stock of the defendant company.

Charles G. Rumford and James W. M. Newlin, for complainant.
Lewis C. Vandegrift and Arthur W. Spruance, for defendants.

DALLAS, Circuit Judge. On June 27, 1892, the complainant purchased, in his own right, 100 shares, and, as trustee, 10 shares, of the preferred stock of the Walton & Whann Company, a Delaware corporation, party defendant. About three months prior to this purchase a prospectus had been issued by a firm of bankers, who were the agents of the Walton & Whann Company in that behalf. The bill charges that:

"This prospectus, for the purpose of fraudulently inducing your orator and others to buy the preferred stock of the Walton & Whann Company, made certain material representations as to the financial condition of the Walton & Whann Company, which your orator has since discovered to have been false, and which he charges were then known by the officers of said Walton & Whann Company to be false."

It further charges that:

"The plan outlined by the said prospectus required that the whole contemplated issue of preferred stock, viz. \$300,000, should, in good faith, be subscribed and paid for before any of it would be issued to purchasers thereof, and your orator subscribed for and paid for said stock in reliance upon

his belief that thereby the said company would, simultaneously with his subscription, receive new cash capital amounting to \$300,000; and this consideration, together with the alleged financial condition of said Walton & Whann Company, set forth in said prospectus of March 24, 1892, were the reasons which induced him to purchase said one hundred and ten shares of its preferred stock."

The bill prays:

"First, that his subscriptions, individually and as trustee, for said one hundred and ten shares of stock, be declared void, as having been procured by fraud on the part of the said Walton & Whann Company; second, that your orator individually be declared a creditor of the Walton & Whann Company for the sum of \$10,000, with interest from June 27, 1892, and that your orator, as trustee, be declared a creditor of said company for \$1,000, with interest from June 27, 1892;" third, for process; and, fourth, for general relief.

From the preceding statement, it appears that the object of the suit is to obtain a decree annulling the complainant's subscriptions for the stock in question, "as having been procured by fraud," and for restitution of the money paid by him in pursuance thereof. The bill is founded solely upon the ground of fraud, and such a bill must always be specific. It is not enough to charge fraud in general terms. The facts constituting the fraud must be stated. *Brooks v. O'Hara*, 8 Fed. 529-532; *Patton v. Taylor*, 7 How. 132-159; *Very v. Levy*, 13 How. 345-361; *Noonan v. Lee*, 2 Black, 499-508; *Voorhees v. Bone-steel*, 16 Wall. 16-29. The pleader, in drafting this bill, did not overlook this requirement. He embodied in it a copy of the prospectus, which the plaintiff avers "induced him to purchase," and it specifies the particulars in which that prospectus is alleged to have been false, and these specifications I will consider after some principles of law which seem to be generally pertinent shall have been briefly adverted to. To maintain a suit for the rescission of a subscription to stock, as having been induced by misrepresentation, it must be alleged and proved, not only that the representation was false, but also that the defendant made it "knowing it to be false, or with such conscious ignorance of its truth as to be equivalent to a falsehood." "The scienter must not only be alleged, but proved." *Griswold v. Gebbie*, 126 Pa. St. 353-362, 17 Atl. 673. Fraud consists in intention, and that intention is a fact which must be pleaded, either by an express averment or by such words as necessarily imply such intent. *Moss v. Riddle*, 5 Cranch, 351-357; *Brooks v. O'Hara*, 8 Fed. 529-532. Fraudulent intent may, of course, be found upon proof of a false statement of fact made as of the party's own knowledge, but not (if an actual intent to deceive be not shown) where the matter stated was only of opinion, estimate, or judgment, unless such statement was based, by the person making it, upon his assertion of some fact which he knew to be false, or of the truth of which he was so ignorant as to make his assertion of it equally culpable. In short, there must be a false statement of fact, made with fraudulent intent, which, being believed and acted upon, causes damage.

The bill sets forth that the financial condition of the Walton & Whann Company was stated in the prospectus as follows:

"Statement.

"At the instance of Messrs. Elliot, Johnson & Co., Messrs. Heins & Whelen, public accountants and auditors, of No. 508 Walnut street, Philadelphia, have

thoroughly examined the books and accounts of the Walton & Whann Co. and its associated companies. Their detailed statements can be seen at the office of Elliot, Johnson & Co., Wilmington, Delaware. Letters from most prominent banks and bankers, recommending Heins & Whelen for this purpose, can also be seen there. These statements show an excess of assets over liabilities of \$412,000. Valuations of assets were tested and borne out by appraisements of the Wilmington plant by Job H. Jackson, Esq., of Jackson & Sharp Co.; Thomas H. Savery, Esq., of Pusey & Jones Co.; Alfred D. Poole, Esq., of J. Morton Poole Co.; and by bids received for the shares of the Etiwan Phosphate Company and Keystone Chemical Co.,—all of which can be examined upon application. The stockholders of the present company here agreed to guaranty the payment of all bills receivable and debts due, as carried over in the statements above referred to. No estimate of value has been made, and no charge included, for good will, patents, trade-marks, etc., which company owns. The stockholders of the present company receive, of the above capitalization, in lieu of their present holdings, all of the 4,000 (\$400,000 par value) general stock, and 120 shares (\$12,000 par value) of the preferred stock. The \$288,000 preferred stock is issued to take up present liabilities, and, when issued, will increase the above \$412,000 excess of assets over liabilities that much, or to about \$700,000.

"June 23, 1892.

Elliot, Johnson & Co.

"Mr. Ephraim T. Walton and Mr. Francis N. Buck have agreed not to engage or become interested in the business of manufacturing or selling fertilizers, chemicals, etc., or any similar business, during the continuance of the said Walton & Whann Company, in any part of the United States in which the said company is now carrying on said business, and to serve the said Walton & Whann Co. to the best of their ability, for a term of ten years."

In the prospectus of March 24, 1892, it is further stated, viz.:

"Certificate of Earnings.

"Philadelphia, Pa., March 14, 1892.

"Messrs. Elliot, Johnson & Co., Wilmington, Del.—Gentlemen: We have examined the books and accounts of Walton & Whann Co. for the three years ending October 31, 1891, of the Etiwan Phosphate Co. for the three years ending May 31, 1891, and of the Keystone Chemical Co. of New Jersey for the three years ending December 31, 1891, and found the profits of the Walton & Whann Co., and of its interests in the said other two companies, after providing for the cost of all materials, wages, bad debts, expenses, renewal and repairs to plant and machinery, to have averaged, for the said three years, \$77,436.68; and for the last year of the three, \$75,466.63. Allowing a saving of interest of \$20,625.00 per annum, which the proposed new capital would yield, the profits, in lieu of those above mentioned, would be: For the three years, \$98,061.68; and for the last year, \$96,091.63.

"Very respectfully yours,

[Signed] Heins & Whelen."

It is not alleged that any misrepresentation was contained in any part of the prospectus other than that above extracted; but it is averred that this part was false in three particulars, and these enumerated particulars will now be separately dealt with, but not in the order in which they are set out in the bill.

1. It is alleged that the prospectus was false in that "the company failed to secure bona fide subscriptions for all the preferred stock"; and this allegation appears to be based upon the preceding one, "that the plan outlined by the said prospectus required that the whole contemplated issue of preferred stock, viz. \$300,000, should, in good faith, be subscribed and paid for before any of it could be issued to purchasers thereof." It is not, and could not be, alleged that the prospectus expressly stated anything of this sort, and all that is asserted, it will be observed, is that the plan which it outlined required

that the whole issue should be subscribed, etc. This is not an allegation of a representation of existing fact, but, at the utmost, of a promise merely; and therefore, though, possibly, a claim of contractual liability might have been founded upon it, it certainly cannot support the charge of fraud, which is the gist of the present complaint. But it is not true that the prospectus outlined any plan from which even an agreement could be inferred that none of the preferred stock would be issued until all of it had been subscribed and paid for. It may be that such was the complainant's anticipation (he has testified that he so "understood" or "assumed"), but anticipation is one thing, and contract is another, and a very different, thing. The prospectus contains nothing whatever to indicate any mutual understanding to that effect, but, on the contrary, it refers to "all shares issued," and to "outstanding preferred shares," in a way which would be insensible if it had been intended that, until all the shares had been subscribed and paid for, no shares whatever could be issued.

In connection with the allegation that the prospectus was false, because the company failed to secure bona fide subscriptions for all the preferred stock, it is further alleged that, "in order to organize under the prospectus of March 24, 1892, and fraudulently obtain from your orator and others their subscriptions to said preferred stock, the officers of the said Walton & Whann Company issued 1,000 shares thereof, of the par value of \$100,000, to themselves, although they paid nothing therefor to the company." The complainant's position is not strengthened by this supplementary allegation, or by the evidence adduced with relation to it. The averment that the transactions referred to were made in order to organize under the prospectus, and to fraudulently obtain subscriptions, is absolutely negatived by the proofs. This stock was not issued for these purposes, or for either of them, but as collateral security to enable the company to raise money upon the individual notes of its officers, and it was in fact so used, and the money thus obtained was immediately received by it. It appears that there were a number of such transactions, and that they began a few days before the complainant's subscriptions were made, and covered a period comprising several months thereafter. The prospectus says nothing about them, and, in the absence of any requirement that the stock should be all issued and paid for before any of the subscriptions thereto would be binding, the relevancy of this matter is not apparent. Whether this mode of raising money was or was not a legitimate one need not be decided. It is clear that it was not adopted with any wrongful intent or for any fraudulent object; but, even if it had been, the complainant could not be granted relief with respect thereto upon a bill charging false representations in the prospectus, and praying rescission upon that ground alone. It is true that a plaintiff may, in a proper case, be afforded relief under his general prayer, but this can be done only where the relief asked is agreeable to the case made by the bill. The court will grant such relief only as the case stated will justify, and a bill framed for one purpose cannot be made to answer another. Story, Eq. Pl. §§ 40, 42. If, therefore, the plaintiff has any separate and distinct ground of complaint respecting the issuance of these 1,000

shares, that ground cannot be considered here, because it has not been presented, and the fact that they were issued as they were has, of course, no tendency to support the unfounded allegation that the prospectus outlined a plan which required all the preferred stock to be subscribed and paid for before any of it could be issued.

Another averment, which may be appropriately considered at this point, is, in substance, that, at about the time the complainant made his subscription, it was announced by the officers of the company that the entire issue had been subscribed, and shortly thereafter it was all allotted, and thereupon a new board of directors was elected, in accordance with the plan set forth in the prospectus. There is certainly nothing in this statement, or in the accompanying allegation that "all of said preferred stock was voted at said election, and your orator supposed that all of said preferred stock had been in good faith subscribed," to entitle the complainant to the relief which he now asks. All that is here set forth seems to have occurred after he had become a stockholder, and consequently cannot be said to have induced him to do so, any more than could an occurrence arising after a sale had been completed create an implied warranty. *Morris v. Fertilizer Co.*, 28 U. S. App. 87-92, 12 C. C. A. 34, and 64 Fed. 55. The bill states that he purchased his stock on the 27th day of June, 1892, and that the announcement of which he complains was made at "about" that time; but the proofs show that it must have been subsequently made, and the corporation's minutes disclose that the meeting and election to which the bill seems to refer, and at which the plaintiff appears to have been present by proxy, was held upon November 9, 1892, more than four months after his subscription. The "announcement" was not made or referred to in the prospectus, which is alleged to have solely influenced him, and, no matter how it may have been made, it is simply impossible that it, or any of the proceedings which ensued, could have had anything to do with his prior purchase of the stock.

2. It is alleged that the prospectus was false, in that "the profits alleged to have been made by the company for the three years ending October 1, 1891, had not been earned as alleged in said prospectus of March 24, 1892, and as to the last year, viz. that ending October 1, 1891, * * * instead of the company earning \$75,466.63 of profits, the business for that year was conducted at a loss." There is nothing in the prospectus upon which this specification can be based, other than the "Certificate of Earnings" which it contains, and the statement respecting the persons by whom that certificate was made, as follows:

"At the instance of Messrs. Elliot, Johnson & Co., Messrs. Heins & Whelen, public accountants and auditors, of No. 508 Walnut street, Philadelphia, have thoroughly examined the books and accounts of the Walton & Whann Company and its associate companies. Their detailed statements can be seen at the office of Elliot, Johnson & Co., Wilmington, Delaware. Letters from most prominent banks and bankers, recommending Heins & Whelen for this purpose, can also be seen there."

The prospectus contained no independent estimate of profits. It represented that Heins & Whelen had made a certain certificate with respect to them, and this representation was true. It, impliedly,

also asserted that this certificate was made, accepted, and presented in good faith, and there is nothing whatever in the proofs to warrant the imputation that it was not, but, on the contrary, my examination of the evidence has satisfied me, not only that the matter certified was believed to be true, but that in point of fact it was true.

3. It is alleged that the prospectus was false, in that "the alleged excess of assets over liabilities of \$412,000 was the result of a fraudulent overvaluation of the assets for the purpose of selling the preferred stock." The terms of the prospectus to which this specification relates are:

"These statements [made by Heins & Whelen from the books and accounts] show an excess of assets over liabilities of \$412,000. Valuations of assets were tested and borne out * * * by bids received for the shares of the Etiwan Phosphate Co. and Keystone Chemical Co., all of which can be examined upon application."

That this representation was literally true is not questioned; that statements made by Heins & Whelen did show an excess of assets over liabilities of \$412,000, and bids had been received for the shares of the Etiwan Phosphate Company and Keystone Chemical Company to test and bear out their valuations. Yet, if that valuation was, as is alleged, "the result of a fraudulent overvaluation of the assets for the purpose of selling the preferred stock," the prospectus, though true in terms, was false in effect, and therefore quite as potent an instrument of deception as if it had distinctly embodied a positive misstatement, and its suggestion that the papers to which it referred could be examined upon application would not make it any less covinous. Subscribers to the stock might have examined those papers to obtain information of details, but they were not bound to look beyond the prospectus for the purpose of assuring themselves that its representations were honestly made. They had a right to believe, without inquiry, that the bids it mentioned had not been made (as the complainant charges they were) as part of a fraudulent scheme, known to the officers of the company, to overvalue its assets. But this charge has not been sustained. There is no evidence to impeach the statements made by Heins & Whelen. I am convinced that it was intended that their investigations should be made uprightly, and that the results which they reached were in fact conscientiously arrived at. Their conclusions, as the prospectus stated, were founded upon their examination of the books and accounts, and the bids which were made (as was also stated in the prospectus) were regarded as tests merely of the correctness of their deductions. Their business reputation, as well as that of the officers and of the bankers of the company, was at stake, and of this they appear to have been duly mindful. The value of the assets was a matter of judgment and opinion, and they estimated it in what was probably the only way in which it was possible to do so. They truly and plainly disclosed the method they had followed, and it has not been shown that this method was either adopted or pursued with intent to deceive, or for any fraudulent purpose whatever. Though suspicion may be aroused as to the sincerity of the offers of purchase, the evidence, as a whole, would not sustain a finding that they were,

as is averred, made and received as part of a scheme of overvaluation. Indeed, although, in the light of the present situation of affairs, the appraisement which was made of the real estate, as well as the value which was put upon the Etiwan and Keystone shares, may seem to have been excessive, yet, at that time, they might well have been supposed to be conservative and reasonable. I see no reason to doubt that they were so regarded by all of those who are now charged with complicity in a plot to cheat by means of willful and deliberate falsehood.

It is easy, in view of the subsequent failure of the Walton & Whann Company and of the large losses suffered by its creditors, to volunteer the opinion that it was insolvent when the prospectus was prepared. But the status of the corporation at that time, with the surrounding conditions, is the better test of whether there was fraud in the minds of those who issued it. An examination of the company's books, as they then were, shows, by the testimony of a disinterested accountant, that it was then financially sound, and was making large profits; and in view of these facts, and of all the evidence, it is not possible, in reason and common fairness, to say that the company or its officers had a fraudulent purpose in promulgating the valuation which the accountants placed upon its assets. I do not believe that they then supposed it to be insolvent, or in danger of insolvency; but, on the contrary, I believe that the accountants' statement was accepted in good faith, and that the insolvency which afterwards occurred was caused by a depreciation of values and other circumstances which had not been foreseen. *Bank v. Rogers*, 3 U. S. App. 406-413, 3 C. C. A. 666, and 53 Fed. 776. With reference to the entire case, the language adopted by the court of appeals from the opinion of the court below in *Richardson v. Walton*, 17 U. S. App. 525-527, 9 C. C. A. 605, and 61 Fed. 536, may be aptly quoted:

"The burden of proof is upon the plaintiff. The bill charges fraud. * * * To entitle the plaintiff to relief, the proofs should be free from all doubts and convincing. But they do not appear to be so. Taking the proofs as a whole, this much can be safely said: that the evidence is not so clear and satisfactory as to justify a decree sustaining the charge."

The subscriptions in question were made in June, 1892, and upon January 29, 1895, the plaintiff, for the first time, asserted a right and purpose to rescind. In the bill no particulars are stated to account for this procrastination. It states merely that the complainant had "since discovered" that the representations complained of were false; that, since the appointment of the receivers of the Walton & Whann Company, he had "discovered that fictitious subscriptions for \$100,000 of said preferred stock were taken"; and that after discovering this fact he elected to rescind. In my opinion, it was incumbent upon him to state with more exactness the times at which he made these discoveries, and to detail the circumstances, if any, which occasioned his failure to make them sooner. But, waiving this question of pleading, I have examined the proofs, and from them I find that the complainant received a dividend upon his stock in June, 1892, and again in April, 1893; and that upon June 13, 1893, he was

present at, and actively participated in the proceedings of, a special meeting of the stockholders, at which provision was made to borrow \$40,000 upon mortgage, and a committee, consisting of the plaintiff and others, was "appointed to take into consideration the advisability of selling the interest of this company in the capital stock of the Etiwan Phosphate Company," with authority to direct the officers to make said sale; and that the plaintiff, as a witness on his own behalf, upon being asked by his counsel, "Did you afterwards discover that any statement contained in the prospectus was untrue, and, if so, in what respect, and when did you discover it?" in substance testified, in response to this question and to several which followed, that he was told that the company was in urgent need of money; that he went to a meeting of which he could not fix the date, but which plainly appears to have been that of June 13, 1893; that this meeting was held "to consider ways and means"; that it was then and there suggested that the Etiwan property should be sold at a much lower figure than it had been taken at in valuation; that he then asked Messrs. Walton & Buck how it came that this asset, which had been represented as such a very valuable one, had suddenly become worth so much less money, and then it was that he discovered that a large amount of the preferred stock of the company had never been sold, and that the valuation of the Keystone Chemical Companies was based on a bid of Capt. Lemaister; that these were the principal matters as to which the statements contained in the prospectus were untrue and misleading; and that he purchased on the faith of the truth of the statements contained in the prospectus, which he afterwards found to be untrue by his examination of the affairs of the company within a short time after his purchase. In June, 1894, the company being then insolvent, Messrs. Winchester and Buck became its receivers, and to them the demand for rescission was made, but not until seven months after their appointment, and about one year and seven months after the stockholders' meeting of June 13, 1893.

In a case of this sort, even when clearly made out, it is the diligent only, and not the supine, that equity will relieve; and diligent this complainant certainly was not. He sought to repudiate a contract which he had made with the expectation of profit, but not until after it had become manifest that it had entailed a loss. He alleges that he was led into it by fraud, but he should have made it clear that it was the discovery of the fraud, and not the failure of the enterprise, which impelled him to retreat from it, and this he has not done. It cannot be pretended that he was prevented from examining for himself into the affairs of the company. Indeed, he has said that he did so a short time after his purchase, and then found that the statements on the faith of which he had purchased were untrue; and I am fully convinced that all that he now complains of was as well understood by him at least 18 months before as at the time he filed his bill, and certain it is that at least as far back as June, 1893, he had knowledge of facts which not only should have put him upon inquiry, but which did actually lead him to inquire; for this he has practically admitted in his testimony. It is needless to multiply citations (as might readily be done) to show that, under these circumstances, any right

of rescission, which he might otherwise have had, was lost by failure to assert that right in due season. Ogilvie v. Insurance Co., 22 How. 380-390; Wallace v. Hood, 89 Fed. 11. The learned counsel for the complainant has pressed upon my attention the case of Bank v. Newbegin, 20 C. C. A. 339, 74 Fed. 135; but the judgment in that case does not go far enough to avail the plaintiff in this one. It was there decided that recovery could be had notwithstanding the insolvency of the defendant bank; but here the obstacle to the right of the complainant to maintain his bill is not merely that the Walton & Whann Company had become insolvent before he claimed to avoid his contract, although that fact is, in my opinion, properly for consideration, in connection with the other facts, upon the question of the motive which actuated him in making that claim. Much that was said by the court in the Newbegin Case is pertinent to the present one, as tending, not to uphold, but to defeat, the complainant's contention. It was an action at law. That the plaintiff's purchase had been induced by false and fraudulent representations was conceded. The questions whether the plaintiff exercised reasonable diligence in discovering the fraud, and in electing to cancel his subscription after he had become aware that he had been defrauded, had been submitted to the jury; and this the appellate court held to have been properly done, and that the verdict on those issues was conclusive. It was said that it was "clear that the jury were entitled to determine whether the plaintiff was guilty of any want of diligence, either in discovering the fraud, or in notifying the defendant bank of his intention to rescind, or in bringing a suit for that purpose after the fraud was discovered"; and these are precisely the questions which the court has considered in the present case, and with respect to which the conclusion has been reached that the plaintiff was plainly not diligent.

The bill is defective in that it contains no offer to return the amount of the dividends which the plaintiff admittedly received upon this stock, or to submit himself to have that amount deducted from the sum for which he prays to be declared a creditor of the Walton & Whann Company. I think, however, that, as matter of form and pleading, this point need not at this stage be insisted upon; but, as matter of substance, it seems to me to be perfectly clear that a decree which, without requiring the complainant to refund the money which was paid to him upon this stock, should annul the contract under which it was acquired, would (even if otherwise proper) be manifestly inequitable and unjust. The bill will be dismissed, with costs.

In re EARLE.

(Circuit Court, E. D. Pennsylvania. February 27, 1899.)

NATIONAL BANKS—SALE OF COLLATERALS BY RECEIVER—POWER OF COURT TO ORDER.

The courts are not vested with any general supervisory or directing power over the liquidation of insolvent national banks, and cannot order or authorize a receiver to sell at private sale securities held by the bank as pledgee, which do not come within the authority given by Rev. St. § 5234, to order the sale or compounding of bad or doubtful debts, or the sale of real or personal property of the association.

This was a petition by George H. Earle, as receiver of the Chestnut Street National Bank, for an order authorizing him to sell certain collaterals.

Asa W. Waters and W. H. Addicks, for petitioner.

DALLAS, Circuit Judge. The prayer of the annexed petition is for a decree authorizing the petitioner, as the receiver of a national bank, to sell certain certificates of stock, which were held by the bank as pledgee, and not as owner, at private sale, "the proceeds thereof to be applied by him to the part payment of said notes," etc. The authority to make such a decree is supposed to be conferred by section 5234 of the Revised Statutes. But it is not. That section provides that a court of record of competent jurisdiction may make an order to sell or compound bad or doubtful debts, or for sale of real or personal property of the association. The order now asked is for neither of these. It is obviously not for the sale or compounding of a debt, and the property which it is contemplated to sell is not the property of the association. No general advisory or directing power is vested in the court. It is for the receiver, under the direction of the comptroller, to collect all debts, dues, and claims belonging to the bank, in accordance with the provisions of law. It is only when debts are bad or doubtful, and it is deemed expedient to sell or compound them, that the court can be called upon to make any order respecting them.

The learned counsel of the petitioner have referred me to the cases of Ellis v. Little, 27 Kan., 707, and In re Third Nat. Bank, 4 Fed. 775. I find nothing in either of them to lead me to doubt the correctness of the views I have hastily expressed. The petition is dismissed, without prejudice.

CHICAGO, R. I. & P. RY. CO. v. ST. JOSEPH UNION DEPOT CO.

(Circuit Court, W. D. Missouri, St. Joseph Division. January 31, 1898.)

I. JUDGMENT—EFFECT AS ADJUDICATION—SUIT ON DIFFERENT CAUSE OF ACTION.

While a judgment is an absolute bar to a second suit between the parties on the same cause of action as to all matters which were, or which might have been, litigated in the suit, where the second suit is on a different cause of action, a different rule applies, and the effect of the former judgment as an estoppel is limited to matters which were actually litigated and determined.

2. JURISDICTION OF FEDERAL COURTS—ENJOINING SUITS IN THE STATE COURTS.

Under Rev. St. § 720, a federal court has no power to enjoin the maintenance of an action in a state court on the ground that it has in a former action between the same parties adjudicated the questions involved, where the state suit is on a different cause of action; the effect of the federal judgment as an estoppel in such case being a matter of evidence which the state court has the right to determine, its judgment, if it fails to give due faith and credit to the federal judgment, being reviewable by the supreme court of the United States.¹

On Motion for Temporary Injunction.

Karnes, Holmes & Krauthoff, for plaintiff.

Spencer & Mossman, Frank Hagerman, and Willard P. Hall, for defendant.

ADAMS, District Judge. This is a motion for a temporary injunction to restrain the defendant from prosecuting certain suits already instituted by it in the state court, and to restrain it from instituting other suits alleged to be threatened by it. The facts, as shown by the bill, exhibits, and affidavits filed, are substantially as follows: The defendant claiming to have a cause of action against the complainant for certain installments of rent due defendant for use of its depot in St. Joseph for the months of May, June, July, August, and September, 1897, amounting in the aggregate to \$1,997.89 on the 18th day of December, 1897, instituted a suit in the circuit court of Buchanan county to recover the same. At a later date the defendant, claiming to have another cause of action against complainant for like installments of rent due it for the use of its depot by complainant for the months of October, November, and December, 1897, aggregating the sum of \$1,599.54 on the —— day of January, 1898, instituted another suit in said circuit court of Buchanan county for this last-named amount. The rent thus sued for in each of said actions was, under the contract claimed by defendant to create its right thereto, due and payable in monthly installments. It further appears from the bill and affidavit filed by the defendant that the defendant has given out and now threatens to continue to institute suits against the complainant for such rent whenever the amount due reaches a sum near to, but not exceeding, \$2,000 (which would be every three or four months). Complainant claims that, according to the true interpretation of divers contracts and conveyances through which it claims a right to such rent, it is not indebted to the defendant therefor at all; in other words, that it has a sufficient defense to the suits so instituted and to such as are so threatened. Among other defenses which it claims to have is this: That in April, 1897, defendant instituted a suit against it in the circuit court of Buchanan county for several installments of said rent then alleged to be due and unpaid, predicating its right to recover upon the same grounds as are alleged in the two suits instituted as first herein stated (which, for brevity's sake, will hereafter be called "state suits"); that said suit, which will hereafter be called the "federal suit" was duly removed to this court, and upon a

¹ As to enjoining suits in state courts, see note to *Garner v. Bank*, 16 C. C. A. 90.

trial upon its merits was, prior to the institution of the state suits, adjudged in favor of complainant. This judgment, complainant claims, is a conclusive estoppel, upon the principle of res adjudicata, of defendant's right to rent as sued for in the state suits, and as threatened to be sued for in the future.

Complainant contends that the judgment of this court so rendered is res adjudicata of the questions involved in the state suits, and that for this reason this court ought to enjoin the further prosecution of the state suits. The defendant, on the other hand, claims that by the exhibits and affidavits presented on this motion it appears that the state suits now sought to be enjoined are different in their causes of action, and raise different issues, from those involved in the federal suit so decided in this court, and that, therefore, such suit is not res adjudicata of the state suits. It is not claimed by complainant's counsel that the causes of action attempted to be litigated in the state suits are either of them for the same cause of action as that litigated and determined in the federal suit. The most that is claimed is that the right of the parties was so fixed in the federal suit that any other cause of action depending upon a consideration of the same facts is barred thereby. Such being the facts, it is clear that the judgment in the federal suit is not an absolute bar to recovery in the two state suits. It operates as an estoppel only concerning those matters in issue, or points controverted, upon the determination of which the judgment was rendered. Mr. Justice Field, speaking for the supreme court of the United States in *Cromwell v. Sac Co.*, 94 U. S. 353, says:

"In all cases where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be made as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The federal suit was for the rent of the depot for certain months. If an action were subsequently brought by the same party for the rent of the depot for the same months, the former judgment would constitute an absolute bar to such prosecution. It would be a "finality upon that cause of action concluding parties, and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." 2 Black, Judgm. § 506. If, on the other hand, an action be subsequently brought, like the state suits now in question, seeking recovery of rent for different months, a different effect is given to the former judgment. Its effect and extent as an estoppel must depend upon a consideration and determination of the similarity of the issues actually tried, and this involves a consideration of the record on which the judgment in the first case was rendered, and a comparison thereof with the issues presented in the subsequent cases. For these reasons, a judgment pleaded as res adjudicata in a suit upon a different cause of action, involving a contest as to its force and effect, must be brought to the attention of the court in the form

of evidence. 2 Black, Judgm. § 506; 1 Herm. Estop. Res. Jud. § 106; Cromwell v. Sac. Co., 94 U. S. 351. Its force and effect are essentially evidential.

Such being the case, is complainant entitled to an injunction staying the prosecution of these state suits? Section 720, Rev. St. U. S., is as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in the cases where an injunction may be authorized by any law relating to proceedings in bankruptcy."

It is settled by repeated adjudications of the supreme court that this section does not apply to such proceedings in state courts as are instituted for the purpose of hindering or obstructing the federal court in the proper exercise of jurisdiction already acquired by it. French v. Hay, 22 Wall. 250; Dietzsch v. Huidekoper, 103 U. S. 494. In these cases, and in others to which my attention has been called, the court treats the bill as ancillary to the suit of which it first acquired jurisdiction, and in which it rendered a judgment, or pronounced a decree, and awards an injunction to make effectual such judgment or decree; otherwise, the state courts might attack and entirely annul the judgment of the federal court, and take away from suitors the substantial fruits of a victory achieved. In order, therefore, to enforce its own jurisdiction, and afford the full relief adjudged by it to suitors, the federal courts may award an injunction against proceedings in a state court, notwithstanding the prohibition of section 720. In other words, section 720, when properly construed in the light of other acts of congress conferring jurisdiction upon federal courts, has no application to such proceeding. Accordingly, I believe that an injunction could and should be granted to complainant, if the defendant were attempting, by the use of state courts, to prevent the enforcement of the judgment rendered in the federal suit. The federal court had full jurisdiction over the parties in that cause, and adjudged the controversy between them. Its process should go accordingly, and any interference with it should be rigorously stayed by the strong arm of its chancellors.

But does the principle which warrants injunctive relief in such case apply to suits of the character of the state suits now under consideration? As already stated, the causes of action sued on in the state suits are each for installments of rent for the use of the depot, accrued since those which were the subject of the federal suit. Not only so, but a comparison of the pleadings in these cases discloses that the defendant plants itself on a different contract, at least one alleged to have been made at a different time than that relied upon in the federal suit. Manifestly, then, the judgment in the federal suit is not, and cannot be, an absolute bar. It is an estoppel only in so far as the points or questions actually litigated and determined in it are the same as those which arise in the state suits. The existence and extent of the estoppel, if any, must, therefore, be determined by evidence; that is, by the record and proceedings in the former suit. The limitation upon the operation of section 720, supra, created by judicial interpretation and construction,

as already seen, solely for the purpose of protecting and conserving the jurisdiction of the federal courts in appropriate cases, cannot, in my opinion, be extended so as to vest in the federal judiciary the power to grant an injunction in violation of the express language of the section, for the purpose of placing its own interpretation upon the force and effect of evidence which may be offered as a defense to another suit on a cause of action different from that in which it rendered the judgment. *Dial v. Reynolds*, 96 U. S. 340; *Sargent v. Helton*, 115 U. S. 348, 6 Sup. Ct. 78.

Again, it is not necessary to exercise the jurisdiction now invoked in order to secure to the complainant the full benefit of the constitutional provision requiring full faith and credit to be given in each state to the public acts, records, and judicial proceedings of every other state. It is familiar doctrine that this constitutional provision requires full faith and credit to be given in each state to the judicial proceedings of federal courts, as well as courts of the state. Therefore, when the state suits now under consideration shall be brought on for trial, it will be the duty of the state court to give full faith and credit to the judgment of this court rendered in the federal suit; and whether such due effect be given to the judgment of this court will be a federal question, and, if decided against the complainant in this case, may be taken to the supreme court of the United States on a writ of error. *Crescent City Live-Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 7 Sup. Ct. 472.

For the foregoing reasons, I am of the opinion that the complainant is not entitled to a temporary injunction to restrain the prosecution of the two cases already instituted against it in the circuit court of Buchanan county, as prayed for in its bill.

By agreement of the parties the other question presented by the pending motion will be disposed of on final hearing.

FRENCH et al. v. UNION PAC. RY. CO. et al.

(Circuit Court, S. D. New York. February 22, 1899.)

RECEIVERS — SUIT AGAINST IN ANOTHER JURISDICTION — POWER OF COURT TO CONTROL ACTION.

A court has no jurisdiction in a suit by a creditor of an insolvent corporation against receivers appointed by another court, though the suit is brought by leave of such court, to compel the receivers to pursue any particular course for the recovery of property or assets of the corporation, nor to control them in the management of the property, as such matters belong exclusively to the court, and in the cause in which they were appointed.¹

This was a suit in equity by Josiah B. French and others against the Union Pacific Railway Company, its receivers, and others. Heard on demurrer of the receivers to the bill.

George H. Yeaman, for plaintiffs.

Artemas H. Holmes, for defendants.

¹ As to suits by and against receivers of federal courts, see note to *Plow Works v. Finks*, 26 C. C. A. 49.

WHEELER, District Judge. The orators are alleged to be, respectively, holders of mortgage bonds of the Leavenworth, Topeka & Southwestern Railway Company, guarantied by the defendant the Union Pacific Railway Company, upon which they are compelled to rely for security, and against which two of them have obtained judgments upon their respective guaranties, in the city court of the city of New York, that remain unsatisfied. Several of the defendants are receivers of the Union Pacific Railway Company; and several others are a reorganization committee in the formation of the Union Pacific Railroad Company, as the successor of the Union Pacific Railway Company. The bill further alleges that but 16 per cent. of the subscriptions to the capital stock of the Union Pacific Railway Company was paid in; that many millions of stocks and bonds owned by the Union Pacific Railway Company were deposited as collateral security with J. Pierpont Morgan & Co.; that 15 per cent. of the subscriptions to the capital stock has been paid to the reorganization committee; that the receivers have been requested to recover this property and money, and the balance of the subscriptions, for the satisfaction of the guaranties of the orators, all which has been refused; and that leave to bring this suit against the receivers has been granted by the court that appointed them. The receivers have demurred to the bill, and the demurrer has now been heard.

The granting of leave to bring this suit does not confer upon this court any jurisdiction to grant in this suit any relief which does not belong to such a suit, nor give to the court in this cause any part of the merely administrative power of the court over its receivers in that cause. The orators are, according to the bill, merely unsecured creditors of the Union Pacific Railway Company, with the right to reach the unencumbered assets of that company, and the excess of encumbered property over the incumbrances, for the satisfaction of their claims. The receivers are complained of here for nonfeasance in their duties merely. They are not alleged, as the bill is understood, to have interfered with any of the property or rights of the orators, but are charged only with failure to take measures to secure assets of the corporation, of the property of which they are receivers, for the payment of the claims of the orators from such assets, when recovered. This court cannot in this cause compel the receivers of any court in another cause to pursue any particular course for the recovery of property or assets for any class of creditors, or control them in their management of any such proceedings when taken. All that necessarily belongs to the court whose receivers they are, and it cannot with propriety and safety be assumed by any other court. The receivers, as such, in that right, have no interest in the subjects of their receivership, except through the power of the court appointing them; and all right of recovery by them, as such, comes from the power of that court in that cause, and no court in any other cause can set that power in motion. In this view, the question of misjoinder of plaintiffs, that of the sufficiency of the judgments for reaching equitable assets by those recovering them, and that whether judgments for some would answer for all, are immaterial. Demurrer sustained.

FRENCH et al. v. UNION PAC. RY. CO. et al.

(Circuit Court, S. D. New York. February 22, 1899.)

EQUITABLE JURISDICTION—ENJOINING ACTIONS AT LAW.

An insolvent corporation cannot maintain a bill to restrain creditors from prosecuting actions on their respective claims, on the ground of preventing a multiplicity of suits, when such creditors are seeking to reach equitable assets of the corporation, to do which it is necessary that they should obtain judgments on their claims.

In Equity.

Rush Taggart, for plaintiffs.

George H. Yeaman, for defendants.

WHEELER, District Judge. This is a cross bill filed by the defendant the Union Pacific Railway Company in the original cause, decided upon the demurrer of the receivers to restrain a multiplicity of suits upon the guaranties, which has been heard on demurrer. 92 Fed. 26. The defendant does not admit that the two suits already brought are sufficient, so far as proceedings at law may be required, for reaching equitable assets; nor that valid judgments by some would be sufficient for all. The plaintiffs cannot properly be restrained from taking such steps as may be necessary to reach equitable assets, if any such should come within reach. No equitable ground for maintaining this bill is, in any view, made to appear. Demurrer sustained.

REYMANN BREWING CO. v. BRISTOR, County Treasurer.

(Circuit Court, S. D. Ohio, E. D. February 24, 1899.)

No. 852.

INTOXICATING LIQUORS—TAXATION OF BUSINESS—DOW LAW OF OHIO.

Under the Dow law (83 Ohio Laws, p. 157, and amendments), which imposes a tax upon each place where the business of trafficking in liquors is carried on, and defines such business as the buying or procuring and selling of liquors, not including the manufacture of liquors from the raw material, and the sale thereof at the manufactory by the manufacturer in quantities of one gallon or more at a time, a storage house or room maintained by a brewing company at a place other than its brewery, where beer is stored, and from which it is sold and delivered to retail dealers in the same packages in which it is received from the brewery, is subject to the tax; and in that respect the law does not discriminate in favor of manufacturers who are residents within the state.

This was a suit in equity by the Reymann Brewing Company against Harry Bristor, treasurer of Jefferson county, Ohio, to restrain the collection of certain taxes.

John A. Howard, for complainant.

A. C. Lewis, for defendant.

THOMPSON, District Judge. This cause is submitted upon the bill and a written statement of facts agreed upon by the parties. The statement of facts is as follows:

"Statement of Facts Agreed.

"The Reymann Brewing Company, the complainant, is a corporation resident in, and a citizen of, the state of West Virginia, and owns and operates a brewery at Wheeling, West Virginia, where it manufactures a beverage, of malt and intoxicating liquor, commonly known as 'beer.' It packs said beer in wooden barrels of various sizes, and also in glass bottles, which bottles are packed in wooden boxes, called 'cases'; twenty-four quart bottles or thirty-six pint bottles being packed in each case. These barrels and cases are packed at the brewery of the Reymann Brewing Company, at Wheeling, in the state of West Virginia, there delivered to the common carrier, the railroad company, and shipped to Steubenville, in the county of Jefferson, in the state of Ohio, where they are received by Bert Meyers, who is employed by the Reymann Brewing Company in the capacity of soliciting agent, salesman, and driver, and who calls on retail dealers in intoxicating liquors at their places of business in and about said city of Steubenville, and as such agent then and there solicits orders for and sells any number of the above-described packages desired. He then loads on the wagon owned by the Reymann Brewing Company the barrels or cases above described, and delivers them to the purchasers in the original and unbroken packages, in the same shape and condition as delivered to the common carrier at the brewery at Wheeling. Said agent also makes sales of said packages at, and delivers the same from, the place where stored at Steubenville. In no instance are any of the barrels or cases opened until after sold and delivered to the purchaser, and no change is made in any of the packages from the time they are packed at the brewery, at Wheeling, until delivered to the persons purchasing the same. Packages received by the said Bert Meyers at the railway station at Steubenville for which he has not received orders, or which he has not already sold, are stored in a room on the ground floor of a cold-storage house in said city of Steubenville, for which the Reymann Brewing Company pays a regular monthly rental, and of which room the said brewing company has the exclusive use and possession. The packages not delivered directly from the railway station to purchasers are delivered from the said storage house or room, upon orders solicited as aforesaid, and upon sales then and there at said storage room made. The price of the beer thus delivered is collected in some instances, from time to time, by a collector from the brewery, at Wheeling, who calls on the purchasers and collects; and in other instances such collections are made by said agent, Bert Meyers, at the time of sale and delivery at said storage room. During the period for which the assessments hereinafter mentioned were made, the said Reymann Brewing Company carried on its beer business in said city of Steubenville in the same manner as herein described. The horses, harness, and wagon described in the bill, on which the defendant, Harry Bristor, has levied, and which he has taken into his possession, are used by the Reymann Brewing Company solely in the matter of delivering to purchasers the packages above described. The barrels and cases of beer described in the bill were packed at the brewery, at Wheeling, and shipped in the manner above described to Steubenville, Ohio, placed in the storeroom above mentioned, and were to be there sold and delivered in the manner above described, when they were levied on, and taken possession of, by the defendant, Harry Bristor. The defendant, Harry Bristor, is treasurer of Jefferson county, in the state of Ohio, and as such treasurer did so levy upon and take into his possession, and has advertised for sale, the following personal property of the Reymann Brewing Company: Two horses (bay geldings); two horse covers; one set of double harness; one beer wagon; thirty-seven of said original and unbroken cases of beer, containing quarts; four of said original and unbroken cases of beer, containing pints; sixty-five original and unbroken barrels of beer, of one-eighth size; one hundred and fourteen original and unbroken wooden barrels of beer, of one-quarter size; twenty-nine original and unbroken wooden barrels of beer, of one-half size,—all of which he has done as said treasurer of Jefferson county, Ohio, for the purpose of collecting from the said Reymann Brewing Company certain taxes or assessments and penalties, amounting to \$873.60, and charged against said company on the tax duplicate in the office of said treasurer, under and by virtue of a law of the state of Ohio entitled 'An act

providing against the evils resulting from the traffic in intoxicating liquors, passed May 14, 1886 (see 83 Ohio Laws, p. 157), as amended by acts March 21, 1887 (see 84 Ohio Laws, p. 224); March 26, 1888 (see 85 Ohio Laws, p. 117), and February 20, 1896 (see 92 Ohio Laws, p. 34), known as the 'Dow Law,' which said levy and seizure were duly made, and which amount (\$873.60) the said Reymann Brewing Company lawfully owes, if, under the circumstances in this statement set forth, and the law herein referred to, said company, or its business in said city of Steubenville, as herein described, should and may lawfully be assessed as aforesaid. The defendant will, unless restrained by the court, insist on collecting future assessments of the complainant under said Dow law, in the manner prescribed by said law; that is to say, by further seizures. It is agreed by both parties to the above-styled cause that the foregoing statement is a true statement of the facts, and that the said cause may be submitted to the court on said statement of facts agreed.

Reymann Brewing Company,

"By Howard & Handlan, Its Attys.

"Harry Bristor,

Treasurer of the County of Jefferson, State of Ohio,

"By A. C. Lewis, His Attorney."

Upon these facts, is the complainant entitled to the relief prayed in the bill? The Ohio statute referred to in the agreed statement of facts, known as the "Dow Law," and entitled "An act providing against the evils resulting from the traffic in intoxicating liquors," provides:

"Section 1. That upon the business of trafficking in spirituous, vinous, malt, or any intoxicating liquors, there shall be assessed, yearly, and shall be paid into the county treasury, as hereinafter provided, by every person, corporation or co-partnership engaged therein, and for each place where such business is carried on by or for such person, corporation, or co-partnership, the sum of three hundred and fifty dollars.

"Sec. 2. That said assessment, together with any increase thereof, as penalty thereon, shall attach and operate as a lien upon the real property on and in which such business is conducted, as of the fourth Monday of May each year, and shall be paid at the times provided for by law for the payment of taxes on real or personal property within this state, to-wit: one-half on or before the twentieth day of June, and one-half on or before the twentieth day of December, of each year."

"Sec. 4. That if any person, corporation or co-partnership shall refuse or neglect to pay the amount due from them under the provisions of this act within the time therein specified, the county treasurer shall thereupon forthwith make said amount due with all penalties thereon, and four per cent. collection fees and costs, by distress and sale, as on execution, of any goods and chattels of such person, corporation or co-partnership; he shall call at once at the place of business of each person, corporation or co-partnership; and in case of the refusal to pay the amount due, he shall levy on the goods and chattels of such person, corporation or co-partnership, wherever found in said county, or on the bar, fixtures or furniture, liquors, leasehold and other goods and chattels used in carrying on such business, which levy shall take precedence of any and all liens, mortgages, conveyances or incumbrances hereafter taken or had on such goods and chattels, so used in carrying on such business; nor shall any claim of property by any third person to such goods and chattels, so used in carrying on such business, avail against such levy so made by the treasurer, and no property, of any kind, of any person, corporation or co-partnership liable to pay the amount, penalty, interest and costs due under the provisions of this act, shall be exempt from said levy. The treasurer shall give notice of the time and sale of the personal property to be sold under this act, the same as in cases of the sale of personal property on execution; and all provisions of law applicable to sales of personal estate on execution shall be applicable to sales under this act, except as herein otherwise provided; and all moneys collected by him under this act shall be paid, after deducting his fees and costs, into the county treasury. In the

event of the treasurer, under the levy provided for under this act, being unable to make the amount due thereunder, or any part thereof, the county auditor shall place the amount due and unpaid on the tax duplicate against the real estate in which said traffic is carried on, and the same shall be collected as other taxes and assessments on said premises."

"Sec. 8. The phrase 'trafficking in intoxicating liquors,' as used in this act means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical, or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time."

The contention of complainant is that this law, properly construed, imposes no tax upon manufacturers of beer, whether residents or nonresidents of Ohio, but that under the construction placed upon it by the taxing officers of Jefferson county, Ohio, it is sought to subject the complainant to the tax prescribed by the law, and at the same time to exempt the domestic manufacturers therefrom. I agree that this law does not impose a tax upon the manufacturers, as such. It is directed against those who traffic in intoxicating liquors, and have a place or places where the traffic is carried on. The manufacturerers within and without the state may sell at the manufactory, and ship to any part of the state of Ohio, and, I think, may solicit orders for their goods in any part of the state, to be shipped from the manufactory. But if they establish places within the state, distinct from the manufactory, where their goods are to be stored, for the purposes of sale and delivery, and such goods are there sold and delivered, then they become traffickers, within the meaning of the law, and are liable to pay the tax. *Feitz v. State*, 68 Wis. 538, 32 N. W. 763.

The only question to be determined is whether the facts agreed upon show that the complainant has established a place in the city of Steubenville, in the county of Jefferson, state of Ohio, where beer is sold and delivered. The agreed statement shows that:

"Packages received by the said Bert Meyers at the railway station at Steubenville, for which he has not received orders, or which he has not already sold, are stored in a room on the ground floor of a cold-storage house in said city of Steubenville, for which the Reymann Brewing Company pays a regular monthly rental, and of which room the said brewing company has the exclusive use and possession. The packages not delivered directly from the railway station to purchasers are delivered from the said storage house or room, upon orders solicited as aforesaid, and upon sales then and there at said storage room made; * * * and in other instances such collections are made by said agent, Bert Meyers, at the time of sale and delivery at said storage room. * * * The barrels and cases of beer described in the bill were * * * placed in the storeroom above mentioned, and were to be there sold and delivered."

And again:

"Said agent also makes sales of said packages at, and delivers the same from, the place where stored at Steubenville."

It is clear that complainant is a trafficker in intoxicating liquors, having a place in the city of Steubenville, Jefferson county, Ohio, where the traffic is carried on, within the meaning of the Dow law,

and is liable to the tax prescribed by that law; and there is no discrimination against the complainant, in favor of traffickers resident within the state. The bill will be dismissed, at the costs of the complainant.

HALL v. GAMBRILL et al.

(Circuit Court of Appeals, Fourth Circuit. February 8, 1899.)

No. 287.

1. APPEAL—NECESSARY PARTIES—SEVERABLE INTERESTS.

Where an agent who made a contract for the sale of land on behalf of the owner, on which sale, if valid, he was entitled to a commission, joined with the purchaser in a suit to compel specific performance by the vendor, their interests in the decree rendered are separate and distinct, and either may appeal without joining the other.

2. POWER TO SELL LAND—WHEN COUPLED WITH AN INTEREST—AGREEMENT FOR COMMISSIONS.

The fact that a power to sell land authorizes the agent to retain a percentage of the purchase money in payment for his services does not make it a power coupled with an interest, as the interest of the agent is only in the proceeds of the land arising from the execution of the power.

3. PRINCIPAL AND AGENT—FRAUDULENT CONTRACT BY AGENT—SPECIFIC PERFORMANCE.

A court of equity will not enforce against an owner of land a contract of sale made by his agent under authority given six years before, where the land has greatly appreciated in value meantime, and the agent, without advising his principal of such fact, made the sale for a price grossly inadequate at the time, though within the terms of his original authority.

4. SAME—COMPENSATION OF AGENT.

Nor can the agent in such case enforce the agreement for compensation, the consideration for which was his undertaking to faithfully perform his duty to his principal.

5. JURISDICTION OF FEDERAL COURT OF EQUITY—STATUTORY ATTACHMENT.

A federal court of equity has not jurisdiction of a proceeding for an equitable attachment under a state statute.¹

Appeal from the Circuit Court of the United States for the District of West Virginia.

This was a suit in equity by Cyrus Hall and Ray C. Coulter against J. H. Gambrill and another for the specific enforcement of a contract to convey land. From a decree dismissing the bill (88 Fed. 709), the complainant Hall appeals.

W. W. Arnett (D. C. Casto and V. B. Archer, on brief), for appellant.
Wm. G. Peterkin (Van Winkle & Ambler, on brief), for appellees.

Before GOFF, Circuit Judge, and PAUL and WADDILL, District Judges.

PAUL, District Judge. This cause is here on appeal from a decree of the United States circuit court for the district of West Virginia.

¹ For jurisdiction of federal courts of equity, see note to Barling v. Bank of British North America, 1 C. C. A. 514.

The appellant was one of the plaintiffs in the court below, and the appellees were the defendants. On the 6th day of September, 1889, the appellee J. H. Gambrill, a citizen of the state of Maryland, and the appellant, Cyrus Hall, a citizen of the state of West Virginia, entered into an agreement whereby said Hall undertook to sell for said Gambrill certain tracts of land lying in Ritchie county, W. Va. The material part of said agreement is as follows:

"The said sales to be made for not less than five dollars (\$5) per acre; the payments to be not less than one-third cash, and the deferred payments to be secured by good and sufficient liens, with notes as collateral security; the same to bear interest from the day of said sale. The said party of the second part hereby agreeing to perform all necessary work in the sale of said lands, draw all deeds of conveyance, mortgages, and notes in legal and proper form, and for which to receive, as compensation for said services, twenty per cent. (20 per cent.) of the net receipts of said sales, but that the 20 per cent. to be received only as the purchase money is collected, unless the party of the second part shall sell said lands for one-half cash; then, and in that event, he is to receive his 20 per cent. commissions,—that is, the whole amount out of the one-half cash received,—but does bind himself to collect all deferred payments if the party of the first part desires it. It is hereby agreed and understood that all mortgages, notes, and securities are to be made payable to the said James H. Gambrill, or his order, who will, when the same have been paid and the said purchase money has all been fully paid, execute with himself and wife good and sufficient deeds conveying the said lands to the purchaser or purchasers. The said 20 per cent. to be for all legal services heretofore rendered in defense of title to said lands, or may be rendered."

On the 12th of March, 1897, the appellant, Hall, entered into a contract with one Ray C. Coulter for the sale of a tract of land of 563½ acres, the land in controversy, at \$9 per acre. On the 15th day of March, 1897, the said J. H. Gambrill made a deed of assignment to Robert Gambrill, as trustee, of the tract of land in question, for the benefit of the creditors of said J. H. Gambrill. This deed was recorded in Ritchie county, W. Va., on the 18th day of March, 1897. The contract between Hall and Coulter bears date the 12th day of March, 1897. The evidence shows it was not signed for several days after that date. It was acknowledged April 5, 1897, and recorded on that day. On the 26th day of March, 1897, Hall wrote to Gambrill that he had made a sale of the land, and inclosed a deed dated March 30, 1897, conveying the same, to be executed by Gambrill and his wife to Coulter. On the 31st day of March, 1897, Gambrill wrote to Hall notifying him that he had made an assignment, and that he had no power to execute the deed to Coulter. On the 3d day of April, 1897, said Cyrus Hall and Ray C. Coulter instituted in the circuit court of Ritchie county a suit in equity against said J. H. Gambrill and Robert G. Gambrill. The said Hall sued out in this suit, under the provisions of a statute of West Virginia, process of attachment against the property of said J. H. Gambrill, had the same levied on the 563½ acres of land in controversy, and also had the attachment served on himself, as attorney in fact of J. H. Gambrill, requiring him, as garnishee, being indebted to and having in his possession the effects of the defendant J. H. Gambrill, to appear before the circuit court of Ritchie county on the first day of its next term, to answer as to such indebtedness and effects.

Hall, in his affidavit, on which the attachment issued, states his claim as follows:

"That, so far as this plaintiff is concerned, this action is brought to recover for a debt arising out of contract for legal services and commissions for the sale of a certain tract of land in Ritchie county, W. Va., under a written agreement between this affiant and James H. Gambrill, which said agreement is here made part of this affidavit, as Exhibit C. H."

This affidavit further states that the amount which he believes he is, at the least, justly entitled to recover in said suit, is \$1,014.30, with the interest until paid, and that the following grounds of attachment exist, to wit: That all of said debt is due, and that the defendants, and both of them, are not residents of the state of West Virginia.

The bill filed by Hall and Coulter, after reciting the transactions between Hall and Gambrill, and between Hall and Coulter, and a statement of the execution of the deed of assignment by J. H. Gambrill to Robert G. Gambrill, alleges that the said pretended deed of assignment from J. H. Gambrill to his son, Robert G. Gambrill, is fraudulent, null, and void, and constitutes a cloud upon the title of the purchaser, Ray C. Coulter, which ought to be canceled and removed. Therefore, quoting from the bill—

"It was intended wholly and solely for the purpose of cheating and defrauding Cyrus Hall, one of the plaintiffs, out of the sum of \$1,014.30, due to him for legal services and commissions for making said sale, and also to cheat, defraud, and deprive the plaintiff Ray C. Coulter from obtaining a title to the tract of land so purchased by him, as aforesaid. They further show to your honor that they had vested rights which had become complete and irrevocable, and could not in any way be taken away from them by any act on the part of the defendant Gambrill."

The prayer of the bill, omitting the formal parts, is:

"That the pretended deed of assignment, heretofore referred to, from the defendant J. H. Gambrill, to his son, Robert G. Gambrill, may be canceled, set aside, and removed as a cloud upon the title of the purchaser, Ray C. Coulter; that said contract of sale entered into between J. H. Gambrill, by Cyrus Hall, his attorney in fact, and Ray C. Coulter, may be specifically enforced; that your honor will require the defendants to execute, acknowledge, and deliver for record a good and sufficient deed, with covenants of general warranty; that, in case they fail within the time required by your honor to execute said conveyance, a commissioner may be appointed to execute the same in their behalf; that the plaintiff Cyrus Hall may have enforced his attachment lien for \$1,014.30, and be allowed to retain in his hands said sum out of the first payment made on said land, as per contract with J. H. Gambrill, filed as Exhibit No. 2, as part of this bill."

At the May term, 1897, of the circuit court of Ritchie county, the cause, on petition of the defendants, was removed into the circuit court of the United States for the district of West Virginia. To this bill the defendants, J. H. Gambrill and Robert G. Gambrill, filed their joint and separate answer, and also filed a cross bill. In the cross bill they prayed for and obtained an injunction restraining Coulter from taking possession of the land sold to him by Hall. The answer and the cross bill contain substantially the same allegations. They deny the construction of the contract between Hall and Gambrill, as claimed by Hall and Coulter. They charge Hall with endeavoring to sell the land to subserve his own interest, or that of some member of his family, of entering into a conspiracy with his co-

plaintiff, Coulter, to dispose of the land at less than its value; that Hall, as the agent of Gambrill, failed to keep his principal notified of the greatly increased value of the land by reason of the discovery of oil and the development of the oil industry on neighboring lands; and ask that the contract of March 12, 1897, between Hall and Coulter, be canceled and annulled. A great deal of testimony was taken in connection with the conduct of Hall in dealing with the land, and as to the conduct of Coulter in making his purchase; also as to the greatly increased value of the land from what it was, in 1889, in a wilderness state, when Hall became Gambrill's agent, to what it was at the time Hall sold the land to Coulter.

On the hearing, the circuit court decreed that the plaintiffs, Hall and Coulter, were not entitled to any relief, and dismissed the bill. It declared the contract of March 12, 1897, between Hall and Coulter, for the sale of the 563½ acres of land, null and void and canceled, and set aside the same as a cloud upon the title of said J. H. Gambrill and R. G. Gambrill, trustee, and perpetuated the injunction granted on the 8th day of June, 1897. The decree further provided:

"This decree is without prejudice to any rights which may hereafter accrue to said Cyrus Hall, under the certain contract in evidence between him and J. H. Gambrill, bearing date on the 6th day of September, 1889."

From this decree, the plaintiff Hall alone appealed. Omitting the argumentative statements in the assignments of error, the errors complained of are:

- (1) "In that the court decreed that the plaintiffs, Cyrus Hall and Ray C. Coulter, are not entitled to relief in said cause or either of them."
- (2) "In decreeing that J. H. Gambrill and Robert Gambrill, plaintiffs in the cross bill, were entitled to relief prayed for in said cross bill."
- (3) "That the court erred to the prejudice of the plaintiffs in the original bill, Hall and Coulter, in declaring and decreeing to be null and void the writing dated March 12, 1897, and decreeing the same to be a cloud upon the title of J. H. Gambrill and R. G. Gambrill, trustee."
- (4) "That the court erred in making the injunction granted on the cross bill on the 8th day of June, 1897, against the plaintiffs in the original bill, perpetual."
- (5) "That the court erred to the prejudice of the plaintiffs in the original bill, Hall and Coulter, and to the prejudice of petitioner, in refusing to grant the prayer of the original bill; and in refusing to cancel and set aside the assignment made by the defendant in the original bill, J. H. Gambrill, to his son, R. G. Gambrill, on the 15th day of March, 1897, so far as the same affected the title to the 563½ acres of land in the bill and proceedings mentioned; and in not decreeing that the contract for sale entered into by J. H. Gambrill, by Cyrus Hall, his attorney in fact, and Ray C. Coulter, on the 12th day of March, 1897, be specifically enforced; and in refusing the decree that the defendants, J. H. Gambrill and R. G. Gambrill, be required to make, acknowledge, and deliver for record a deed for the said 563½ acres of land, to Ray C. Coulter."

Coulter having failed to take an appeal, it is not necessary to consider the decree of the circuit court so far as that decree affects his interest, nor to pass upon the questions so elaborately discussed by counsel as to his right to have the contract of March 12, 1897, specifically enforced in his favor. He is not jointly affected with Hall, by the decree of the court below, in such way as to make him a necessary party to the appeal. The interest of Hall is so far separate and

distinct from that of Coulter that Hall can appeal without Coulter. 2 Fost. Fed. Prac. § 482; Forgay v. Conrad, 6 How. 201.

The chief contention here, as in the court below, on the part of counsel for Hall, is that Hall, by virtue of the writing made between himself and J. H. Gambrill on the 6th of September, 1889, acquired such an interest in the proceeds of the sale of the land as made the power of attorney irrevocable by said Gambrill during his lifetime. We concur with the circuit court in its construction of that contract. We also concur in its views as to the failure of Hall to perform his duty as the agent of Gambrill, in neglecting to inform Gambrill, his principal, of the greatly increased value of the land at the time he sold it, in March, 1897, over what it was when it went into his hands for sale, in September, 1889. The evidence in the record fully sustains the court below in holding that he utterly disregarded his duty in this particular.

The learned judge who decided the cause in the circuit court has so clearly and forcibly stated the reasons controlling his decision that we adopt the material part of his opinion as expressing the views of this court. He says:

"It is claimed by the plaintiffs in this action that this power of attorney, executed by Gambrill to Hall, conferred a power upon Hall, coupled with an interest. An inspection of the power of attorney shows that Hall was authorized to sell the land at a sum not less than five dollars per acre, one-third in cash, and deferred payments to be secured by good and sufficient liens. Hall was to perform all necessary work in the sale of the land, draw deeds of conveyances and mortgages, and to receive as a compensation twenty per cent. of the net receipts of said sales, which was to be paid him as the purchase money was collected. The notes to secure the deferred payments were to be made payable to Gambrill, and, in the event a mortgage was taken upon the land, it also was to be made payable to him.

"I do not concur in the position of Hall that, by the terms of this agreement, he acquired an interest, coupled with a power, which authorized him to sell this land, and to compel Gambrill, the owner, to execute the contract made by him. It is very clear to my mind that, at the time the contract was entered into, the object and purpose of the parties was to sell the land at any fair consideration that could be obtained for it, but under no circumstances was it to be sold for less than five dollars per acre. The fact that Hall was to be paid a commission of twenty per cent. out of the proceeds arising from the sale of the land did not vest in him an interest in it. It was simply a contingent compensation, which he was entitled to whenever a sale was made by him under the power of attorney; but the power of attorney, upon its face, expressly declares that the notes and securities taken in payment of the deferred installments were to be made payable to the said Gambrill, or his order, stipulating that, when all the purchase money had been paid, the said Gambrill and his wife were to execute good and sufficient deeds of conveyance of said land to purchasers. This clause in the power of attorney clearly shows that Gambrill never intended to part with his title to the land, except upon the terms satisfactory to himself. He did not, by the terms and conditions of the power of attorney, place the property in the hands of Hall to sell upon any terms that he (Hall) should contract for; but the whole scope of the power of attorney shows that the contract must be made with Gambrill's approval before he would execute a deed. Hall could not make a deed for the land, or any portion of it, for the reason that he had nothing in the land to convey, having no interest of any kind in it. * * * The words employed in the contract do not seem to be susceptible of any other meaning. The contract confers upon Hall a power to sell, but it does not grant an interest in the land to be sold by him. To create an interest of this character, the power must be irrevocable. By the terms of this contract,

there was no actual transfer of any interest in the land. If, instead of agreeing to pay a commission in the event of a sale of the land, Gambrill had conveyed an undivided interest in the land to Hall, he would then have had an interest in it, not contingent, but actual; but he did not convey any interest in it.

"It was said by Judge Marshall in the case of *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174, that 'the power must be ingrafted on an estate in the thing. "A power coupled with an interest" is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But, if we are to understand by the word "interest" an interest in that which is to be produced by the exercise of the power, then they are never united. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be coupled with it.' Such is undoubtedly the law. Applying the principle as stated by Chief Justice Marshall,—'The power ceases when the interest commences, and therefore cannot be coupled with it,'—can it be said that Hall had any interest in the contract until he exercised the power to sell? Clearly, he had no interest that would accrue to him until after the sale was made. His commissions were 'the only interest he had, under the contract, and the same were contingent upon a sale. There was, under the power of attorney, no actual transfer of any interest in the land by Gambrill to Hall. He was a mere agent of Gambrill to negotiate the sale, subject to the approval of Gambrill; and, when the sale was negotiated and approved, then he was entitled to his commission for making the sale, and not before. A failure to sell before a revocation of the power would terminate all interest he had in the contract, which clearly shows that his interest was contingent on being able to sell the land, and was in no sense an interest running with the land.

"Other questions which arise under this contract might be referred to, more particularly as to whether or not the power of attorney from Gambrill, during the six years subsequent to September, 1889, had not been revoked before the pretended contract made by Hall and Coulter was executed. As to that question it is unnecessary to express an opinion. It, however, appears to me that the equities of the case are clearly with Gambrill. Hall had this property under the power of attorney from 1889 to 1897, before he succeeded in making any negotiations for the sale of it. He was paid from time to time sums of money amounting to nearly two hundred dollars for his attention to the property. In the early part of the winter of 1897, it became apparent, by the development of oil fields, that this land was likely to be valuable oil property. It was then for the first time, during the eight years that he had authority to sell the land, that he ever succeeded in entering into any negotiations for the sale of it. He never informed his principal as to the condition of the country, and the enhancement of the value of the land, and the proximity of it to the oil fields; and he negotiated a sale of the land, as appears from the evidence, at a price far below its value. His agency commenced about six (seven and a half) years before the land was sold; and, after the land had greatly increased in value, Hall undertook to sell it, without ever informing his principal of the increased value of it. A court of equity will not lend its aid to enforce the execution of a contract which is unjust, or deprive either party of his just rights. At the time Gambrill authorized Hall to sell this land, and fixed the minimum price at five dollars per acre, it was in a forest condition; but six years afterwards the land had increased in value to nearly a hundred dollars per acre, and it then became the plain duty of Hall to notify his principal of the increase in value of the land before he attempted to sell it, and, if he failed to do this, it would be an utter disregard of his duty. In the case of *Proudfoot v. Wightman*, 78 Ill. 553, it was held, upon a bill to enforce the specific performance of an alleged contract for the sale of some lots in Cook county, Ill., that where a party had been authorized, in 1865, to sell the premises at one hundred and fifty dollars per acre, and in 1868 the land had increased to the value of five hundred dollars per acre, it was the plain duty of the agent to notify his principal of the increased value of the land before attempting to sell it; and if this duty was disregarded, and an attempt made to sacrifice the property, it would be a fraud upon the rights of the principal, which a court of equity would not tolerate."

In *Wadsworth v. Adams*, 138 U. S. 380, 11 Sup. Ct. 303, it is stated in the syllabus, which is a summary of the doctrine as to the right of an agent to the compensation agreed to be paid him, as defined in the opinion of the court by Justice Harlan:

"It is a condition precedent to the right of an agent to the compensation agreed to be paid to him that he shall faithfully perform the services he undertook to render; and if he abuses the confidence reposed in him, and withholds from his principals facts which ought, in good faith, to be communicated to the latter, he will lose his right to any compensation under the agreement; being no more entitled to it than a broker would be entitled to commissions who, having undertaken to sell a particular property for the best price that could be fairly obtained for it, becomes, without the knowledge of the principal, the agent for another, to get it for him at the lowest possible price."

There is one other question presented to the court for its consideration by counsel for the appellant. It is contended that, although the court below considered the sale by Hall to Coulter fraudulent, yet that court should have decreed in favor of Hall the money value of his services to Gambrill, as attorney, in preserving Gambrill's title to the land. It is a sufficient answer to this question to say that the only standing that Hall had in the court of equity below was by reason of his assertion that he had an equitable interest in the proceeds of the sale of the land to Coulter, by reason of what he claimed to be an irrevocable contract with Gambrill. On his money demand he sued out an attachment in equity, under a statute of the state of West Virginia, and attacked the deed of assignment from J. H. Gambrill to R. G. Gambrill, trustee, as fraudulent and void, because made with intent to defraud him (Hall) of his interest in the proceeds of the sale of the land to Coulter.

A federal court of equity has no jurisdiction of such a proceeding by attachment in equity, as provided by the statute of West Virginia. *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977; *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127. Numerous authorities might be cited to the same effect. The decree of the court below is without prejudice to Hall's just demands, if any he has, under the said contract. The decree of the circuit court must be affirmed, and it is so ordered. Affirmed.

OAKFORD v. HACKLEY.

(Circuit Court, W. D. Pennsylvania. February 9, 1899.)

No. 1, September Term, 1895.

1. COAL LEASE—VALIDITY OF AGREEMENT TO EXECUTE.

Evidence considered, and *held* insufficient to justify the refusal of an owner of land to perform an agreement to execute a coal lease thereon, on the ground of fraud and misrepresentation.

2. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—AGREEMENT FOR MINING LEASE.

A valid agreement, definite, and fair and reasonable in its terms, was made for the lease of a tract of coal land, to be mined by the lessee. The lease would necessarily extend through a number of years. The quantity to be mined each year was uncertain, and payment of a royalty was to be made to the owner according to a sliding scale, varying from year to year. Owing to a known fault in the vein, but the extent of

which was unknown, the total quantity of coal to be mined was very largely a matter of uncertainty. *Held*, that specific performance of the agreement would be decreed at suit of the lessee, on the ground of the inadequacy of his remedy at law for nonperformance, arising from the impossibility of determining the amount of his damages with any reasonable degree of certainty.

This was a suit in equity, by James W. Oakford against Mrs. Frances A. Hackley, to enforce the specific performance of an agreement to enter into a lease of certain coal lands owned by defendant.

Samuel B. Price, for complainant.

James E. Burr, H. W. Palmer, and Robert G. Ingwersoll, for defendant.

BUFFINGTON, District Judge. This is a bill to enforce specific performance of an agreement for a lease of coal land in Lackawanna county. The bill was filed in the court of common pleas of that county, and by the respondent, a citizen of the state of New York, removed to the circuit court. The proofs show that Frances A. Hackley, the respondent, by the will of her husband, who died in the summer of 1894, became the owner in fee of 150 acres of land situate in Lackawanna county, known as the "Thomas Bell Tract," and underlaid with anthracite coal. By letter of attorney, dated August 1, 1894, Mrs. Hackley constituted Judge William H. Jessup, of the city of Scranton, her attorney. On August 30th, Judge Jessup wrote Mrs. Hackley in reference to the Bell tract as follows:

"I have had applications for the leasing of the 150-acre tract of Thomas Bell. * * * It occurs to me that it would be a very good time to get the 150 acres leased now. There are not many tracts that are not under lease, and, of course, the sooner you get your tract under lease, the sooner you will be realizing from it. The borings that were made, of which I found among the papers the reports, would seem to show that quite an extensive fault exists in the tract, and under a portion of it there was no coal. As to whether any recent developments in the vicinity have changed this, it would be well for us to find out before making any definite arrangements; and, above all, it is worth more to you to have thoroughly reliable men to deal with, as it may run as long as you live, perhaps, than even to get a little better price from unreliable men, and being continually annoyed. That is my experience, and I know it was the experience of your husband, Col. Hackley; and I know, for that reason, he declined to negotiate with certain parties with reference to the property."

The reference to the report in this letter is to maps of borings which were found among the papers of Col. Hackley at the time of his death, by Judge Jessup, concerning which he testified as follows:

"The two maps of borings I told Mrs. Hackley I would bring home with me, because, in future leasing of the Thomas Bell tract, they would be important to show the parties who might desire to lease the land and the coal there was on it."

Additional letters were written by Judge Jessup to Mrs. Hackley, which were not put in evidence by either party; but on October 23d she wrote the judge as follows:

"Dear Sir: Your letter of the 16th instant, and also your telegram of yesterday, came duly to hand. * * * Note what you say in regard to the Thomas Bell tract, and will be glad to receive proposals for lease, which will have my immediate attention."

It should also be noted that Judge Jessup testified as follows:

"I had several talks with Mrs. Hackley, but I told her my advice would be, if she was anxious to be freed from annoyances and trouble of business, and as her property consisted of the Archbald property, which was then under lease, and this Thomas Bell tract in Pennsylvania,—that my advice would be to get both of them under long-term leases at the earliest date, so that she would know to a certainty what would be her regular income; and, as she had some matters in view in the way of charities, which she then talked about, she would thus know how much she could give to charity, or any object she pleased; and that was my advice to her. She seemed to consent to that."

The Archbald property was then under lease, but a renewal of the lease was arranged for by Judge Jessup, and executed by Mrs. Hackley. On the 27th of October, Oakford, the plaintiff, made an offer to lease the coal by the following letter:

"Scranton, Pa., Oct. 27th, 1894.

"To Hon. Wm. H. Jessup, Att'y for Mrs. Frances A. Hackley:

"I hereby offer to lease from you all the merchantable and minable coal in, under, and upon the Thomas Bell tract of land, in Lackawanna county, Pennsylvania, at the following rents, or royalties, viz.: For the first two (2) years, forty-two (42) cents for prepared sizes, one-half ($\frac{1}{2}$) of the price of prepared sizes for pea, and one-fourth ($\frac{1}{4}$) of the price of prepared sizes for buckwheat, and one-eighth ($\frac{1}{8}$) of the price of prepared sizes for birdseye and culm, if sold and removed from the demised premises. After two years from date of leases, the royalty on prepared coal to increase at the rate of one (1) cent per annum up to a maximum of fifty (50) cents, and the smaller sizes proportionately. Lease to contain usual mining privileges and a reasonable minimum.

"[Signed]

J. W. Oakford."

On November 8th, Judge Jessup took this offer to New York City, and submitted it to Mrs. Hackley, and, after consultation, the following acceptance was appended to the offer:

"I accept the above offer, and direct W. H. Jessup to draw up the proper lease for the coal mentioned.

"Nov. 8, 1897.

Frances A. Hackley."

On the same day Judge Jessup wrote Mr. Oakford as follows:

"Dear Sir: I write to inform you that your proposal to lease the coal on a part of the Thomas Bell tract owned by Mrs. Hackley is accepted by her, and I am directed to prepare a proper lease for the same. The acceptance is predicated upon the signing of such lease as I shall advise her to prepare.

"Very truly yours,

"W. H. Jessup, Attorney for Mrs. F. A. Hackley."

Subsequently Judge Jessup prepared a lease, which is printed as Exhibit C to plaintiff's bill, and on the 26th of November, 1894, the same was executed by Mr. Oakford. Without now going into detail, it is sufficient to state that respondent refused to execute the lease. Her position with reference thereto, for present purposes, is summarized by her answer to the request of Mr. Oakford for its execution, embodied in a letter, dated December 24, 1894, in which he says:

"(1) Have you any modifications of the present lease to suggest, which would make you willing to execute it? (2) If not, on what do you base your refusal to sign the lease with me?"

And her answer thereto, dated December 27th, as follows:

"In answer to your first question, I will say that, if I were going to sign the lease with you, there are many alterations which I should wish made; but, under all the circumstances, I am unwilling to sign the lease, however modified or amended. In answer to the second question, I will say that, on account of the painful misunderstanding and unpleasant feeling associated with the matter, I cannot conscientiously sign the lease according to the agreement, which I signed under a great misunderstanding of the facts."

An examination of the proofs in this case shows a specific offer to lease a body of ascertained coal upon definite terms, the acceptance of that offer in writing by the defendant, an authorization by her to her counsel to prepare a proper lease, notification to the plaintiff of the acceptance of the offer, preparation of the lease by the respondent's counsel, execution thereof by the plaintiff, and refusal on the part of the respondent to execute the lease. No specific objections are made to the form of the lease, but the refusal to execute is on the ground that the agreement was made under "a great misunderstanding of the facts." The conditions and essentials prerequisite to jurisdiction and the entry of a decree for specific performance are all here found, unless the allegation of misunderstanding of facts is established. Such misunderstanding must, if it existed, have arisen in the case by reason of the acts of Oakford, the lessee, Mrs. Hackley, the lessor, or Judge Jessup, her attorney.

Misconduct on the part of Oakford, the purchaser, is urged in three particulars: (1) That he secured the lease by undue influence exercised, and misconduct on the part of Judge Jessup, by association with himself in the lease, or offering to associate, Judge Jessup's son, W. H. Jessup, and thereby procured a lease less favorable to Mrs. Hackley than other bidders would have entered into if they had been fairly treated; (2) that he concealed from Mrs. Hackley the fact that one J. N. Rice, a person objectionable to Mrs. Hackley, was associated with him in the lease; (3) that he represented to Mrs. Hackley that her relative, Joseph B. Dickson, was associated in the lease, and thereby procured her consent.

The first contention is not sustained by the proofs. While it is true that Mr. Oakford, who was a personal friend of young Mr. Jessup, did, during the preliminary stages of the negotiations, suggest to him that there might be an opportunity for him to take an interest in the lease, yet this offer or suggestion was, as it properly should have been, declined by Jessup.

As to the second contention, the fact that Mr. Oakford did not disclose Dr. Rice's connection with or interest in the proposed lease cannot fairly be attributed to any motive on his part to deceive Mrs. Hackley. There is no evidence whatever that he knew Dr. Rice was distasteful to Mrs. Hackley. Dr. Rice testifies that he had no knowledge of the fact that he was objectionable to Mrs. Hackley, or her deceased husband. His testimony shows that he and Judge Jessup had had some controversy or trouble, and that he feared, if he made the application for the lease to Judge Jessup, he would not receive as fair treatment as other bidders; and, knowing that Mr. Oakford was friendly with Judge Jessup, he procured him to negotiate the lease. We are therefore convinced that the facts proven in ref-

erence to this second contention show no impropriety or misconduct on the part of Mr. Oakford.

As to the third contention, of Dickson's alleged interest in the lease, the proofs fail to show that any allegations in regard to such interest induced any action by Mrs. Hackley. They show that no alleged or supposed interest of his in the lease was known to Mrs. Hackley on November 8th, when, by indorsement on Oakford's offer, she agreed to the giving of the lease. It therefore could have been, and was, of no effect in leading her to an agreement to give the lease. The first intimation to her of any such fact was conveyed in a letter of Judge Jessup to her, dated the 21st of November, which, after citing the preparation of the lease, and that Mr. Oakford would be in New York the next day to execute it, says:

"I understand he expects Mr. Dickson, of the firm of Dickson & Eddy, whom I believe you know very well, to be interested with him in this enterprise. Mr. Dickson will call upon you with Mr. Oakford, when the lease will be all ready to execute, and I think they are as near like the lease which was executed last week as the nature of the property will admit of."

It will therefore be seen that the fact of Mr. Dickson's connection with the lease could not have been an element in inducing Mrs. Hackley to sign the agreement of November 8th.

The proofs satisfy us, also, that no misrepresentation was made to Mrs. Hackley in that respect by either Mr. Oakford or Judge Jessup. The fact was that the Ontario & Western Railroad Company was interested in securing this lease, and in transporting the Bell coal to market. To that end it had agreed to furnish a substantial part of the funds necessary to its development. See letter of J. E. Childs, dated October 22, 1894, which is as follows:

"New York, Oct. 22, 1894.

"Dr. J. N. Rice, Scranton, Pa.—Dear Sir: Referring to our conversation at this office last Saturday, I have conferred with President Fowler, and he approves of the proposed arrangement. The company will loan two-thirds of the money necessary to start the operation,—this loan not to exceed fifty thousand, and subject to the usual conditions in relation to security and repayment.

"Yours very truly, [Signed] J. E. Childs, General Manager."

Mr. Dickson was the sales agent of that company's coal, and was interested in the way of commissions in the sale thereof. Under the circumstances, we see no impropriety whatever, under the proofs of this case, in Mr. Oakford, who was not personally acquainted with Mrs. Hackley, requesting Mr. Dickson to accompany him to see her when he went to have the lease executed in duplicate; nor was the fact that he should accompany one calculated to mislead Mrs. Hackley. Indeed, the fact that Oakford requested Dickson to go to Mrs. Hackley, and that Judge Jessup informed her before either came of the fact that Dickson was interested in the lease, shows that no impropriety was intended or undue influence to be exerted thereby on Mrs. Hackley. If the fact of Mr. Dickson's alleged interest was to be used as a lever to procure Mrs. Hackley's assent, and in point of fact he had no interest whatever in the lease, then assuredly Judge Jessup and Mr. Oakford, by placing Mr. Dickson face to face with Mrs. Hackley, were affording her means of obtaining the best possible

proof of misconduct on their part. We are therefore of opinion that, so far as Mr. Oakford is concerned, no act or omission has been shown on his part which would affect his right to a specific performance of this contract.

Turning, now, to the conduct of Judge Jessup, the allegation is made that in the making of the lease he was unfaithful to the interest of his client, and that he misrepresented the facts to her, and either wilfully or carelessly failed to secure for her a higher royalty for her coal than Mr. Oakford's offer. This charge is a serious one, affecting, as it does, the integrity of a member of the bar, of long standing, who has enjoyed the confidence of his fellow men. It is a charge that should not be lightly or unadvisedly made, and which should not be found by a court to be true, except upon clear and convincing proof.

After a careful consideration of these proofs, we have reached the conclusion that there is nothing which in any way impugns the integrity of Judge Jessup in the leasing of this land, and we are of opinion he acted throughout in perfect good faith. That a mistake may have occurred may be conceded, and that it may be possible that, if other bidders had known what Oakford had offered, they would have bid more; but, if such is the case, these facts were not occasioned by any lack of good faith or improper conduct on the part of Judge Jessup. In the first place, he made an effort to secure all possible lessees. He testifies that, among others, he interviewed Mr. Jermyn, Mr. Connell, Mr. Hand, and M. S. Kemmerer of Mauch Chunk. None of these men are called to contradict him. The last named examined the borings, and Judge Jessup says:

"I explained to him that Mrs. Hackley had accepted a bid of forty cents a ton for the re-leasing of the Archbald property, but that her ideas were very high in reference to the value of this property, and whoever would bid for it would have to bid very high."

He says he told the same thing to Mr. Oakford and to Mr. Sturges, who contemplated putting in a bid for the Dolph Coal Company. The alleged trouble or misconduct is said to have arisen in what Judge Jessup said to Mr. Sturges. The allegation is that Judge Jessup conveyed the idea to him that a 40-cent royalty was all Mrs. Hackley wanted, and that, if the Dolph Coal Company would bid that amount, they would get it. Mr. Sturges' version of the negotiations is as follows:

"When I came back, I went into Judge Jessup's office, and told him that I understood that he was attorney for Mrs. Hackley, and that the Dolph Coal Company wanted to lease the Thomas Bell tract whenever she was inclined to do it, and asked him whether she was ready to lease. He said he thought she was; that she wanted to get her properties paying royalties. * * * Then I asked him what royalties she would want for it. His answer was that she had just closed a contract with Messrs. Jones and Williams for renewal of their lease of their tract at 40 cents, the amount to be increased after two or three years, I think; and he thought she would want the same for the Bell tract. I told him that I thought it was too much, that this tract was nothing like as valuable as the Jones and Williams tract, that the acreage was very much smaller, that probably there was only one good vein, and that there was an extensive fault supposed to run across it. He said he knew that. They had had an examination made, and in their judgment there was something like one hundred acres only, and he gave me figures. He thought

there would be between six and seven hundred thousand tons, which agreed with what we had estimated. I told him that the Dolph Coal Company wanted it; that our headings ran almost alongside it for nearly half a mile, as I understood; that we could get into it within a week, or some short time (I think within a week), and commence paying royalties at once, but that the royalty for the land was high, and whether the Dolph Coal Company would pay it, or not, I didn't know, but they would soon have a meeting, and I would bring the matter before them, and see whether they would pay it. He said, 'Very well,' and I left him. I should say, in this conversation, he didn't state, in any way, shape, or manner, that they were taking propositions for mining this property, or that there was any competition, except he said there were two or three people inquiring about it. I knew there were dozens of people inquiring about every undeveloped coal tract in the valley. I left the office with the understanding, whether rightly or wrongfully, that it was simply a question whether the Dolph Coal Company was willing to pay forty cents a ton. I didn't understand anyone else was to bid, or that we were to offer any competitive bids. I didn't know there was any great haste about it, and didn't call any meeting, but waited for the regular meeting, which, I think, had been delayed that month. Some time afterwards, I think two or three weeks, I received this letter, which Judge Jessup has offered in evidence. I have the original here. You can compare it, if you want to:

"Oct. 25, 1894.

"E. B. Sturges, Esq.—Dear Sir: If the Dolph Coal Company desire to make a proposition for a lease of the coal on the Thomas Bell tract belonging to Mrs. C. B. Hackley, I would like to have them make the best proposition they are willing to make for the coal, and also a statement as to what arrangement they will make in reference to the culm, and where the same will be deposited, as in any lease to be executed for this she will undoubtedly require that the culm shall be separated from other land, or such an arrangement made in reference to the same as she shall have the benefit of it.

"[Signed]

Jessup & Hand.'

"* * * There was nothing final about the thing at all. He gave me the impression that Mrs. Hackley would want forty cents a ton for that property, and, if the Dolph Coal Company would pay it, that they would get it. When I received this communication from Judge Jessup, I supposed that, having been slow about the thing, he simply was hurrying me up. I still didn't understand that there was any competition, or that others were bidding, or that I was to make any bid; but I at once got a meeting of the Dolph Coal Company. He said he wanted answer that week. I find a record on my diary, that we held a meeting on the afternoon of the next day, and that Mr. Dolph and I were appointed a committee. I presented this matter to the Dolph Coal Company, and stated to them what Judge Jessup had said,—that, if we wanted that land, we had to pay forty cents for it, and a sliding scale. They thought it was too much. After a good deal of discussion, we decided to pay it, and Mr. Dolph and myself were appointed a committee to make the proposal to Judge Jessup. As I remember, the only change that we tried to get was that the price should not commence to raise until five years, instead of two. We thought that, at the rate named, the raise in two years was too quick. Immediately after the meeting (the same day), in accordance with their action, Mr. Dolph and I sent this communication, dated October 26, 1894:

"Hon. W. H. Jessup, Attorney for Mrs. C. B. Hackley—Dear Sir: The Dolph Coal Company have authorized Mr. Edward Dolph and myself to make the following offer for the coal under the Hackley tract, adjoining the Dolph workings: Forty cents per ton for sizes above pea, the price to raise one cent per year after five years. For pea and smaller sizes, the price to be proportioned, on the ratio of the selling price, to that of larger sizes. Lease to contain the usual clauses as to returns, examination, weights, etc., and provide a fair annual minimum. An account will be kept of all culm dumped, the same to be accounted for when sold, or to be subject to Mrs. Hackley's order in any reasonable way.

"Yours, respectfully,

[Signed] E. B. Sturges,
"For D. C. Co."

Witness, continuing:

"This communication was handed to Judge Jessup, or left in his office, and I heard nothing from it for at least two weeks,—more than two weeks. I had no doubt that the offer had been accepted, and that the lease had been made, or, at least, that if there was anything wrong about it, or unacceptable, I would hear from Mrs. Hackley or Judge Jessup at once; but I refrained still from communicating with Mrs. Hackley in any way. And I want to say right here,—I don't want to be misunderstood,—Judge Jessup didn't say that her price would be forty cents a ton, but that she had made a lease to Jones and Williams at forty cents, and he presumed she would want the same for this land. He didn't say that forty cents would be her price, but I understood that was her figure, and that, if we offered that, we would get it."

Judge Jessup's version is this:

"Shortly after this Mr. Sturges called upon me, and said he was interested in the Dolph Coal Company; that he understood that Mrs. Hackley desired to lease this property; that their property adjoined the Thomas Bell tract on one side. I showed him the report of the borings upon the Thomas Bell tract, and told him the same thing which I had told Mr. Kemmerer and Mr. Oakford. He said that, as they adjoined this property, it was more to them than it was to anybody else, for they could mine the coal from this property without making any additional improvements; and he said that, if they could get a lease, they could be delivering coal within six weeks from the time they got their lease. He showed me, upon the map, which side their property adjoined this property,—I don't now remember which side it was,—and, after talking with him, I told him that Mrs. Hackley had accepted a proposition to lease to Jones and Williams for forty cents; that I considered the Archbald lease a more valuable property than I did this, because it was a larger property; but I told him Mrs. Hackley's views were very high in reference to this matter, and whoever got it would have to bid very high. I told him that there were two other gentlemen that I knew who proposed to bid upon the property, and, after talking with him some little time, he said, 'We can afford to give more for that property; I will make my best bid first,' and said, 'Whenever you are ready to receive bids, why, we will make a bid.' Shortly after I received this letter from Mrs. Hackley, which is dated October 24th and is marked 'Plaintiff's Exhibit A,' in which she said, 'Note what you say in regard to the Thomas Bell tract, and will be glad to receive proposals for lease, which will have my immediate attention.' Immediately after the receipt of that letter I notified Mr. Kemmerer, Mr. Oakford, and Mr. Sturges that Mrs. Hackley was ready to receive their proposals. I communicated with Mr. Kemmerer by telephone, and he asked who were expecting to bid for it. I told him Mr. Sturges and Oakford, so far as I knew; and he then said he had some business arrangements with the Dolph Coal Company, whom I knew Mr. Sturges represented, and he did not like to come into competition with them, for he wanted some favors from the Dolph Coal Company, and he was afraid he would not get them if he put in a bid against them, and was fortunate enough to get this property, and therefore he would withdraw, and not put in a bid at all. I also informed Mr. Oakford,—I think, personally,—and I wrote a letter to Mr. Sturges, and sent to his office, of which I have a carbon copy. * * * After receiving these offers, on the 8th day of November, I went to New York, taking with me the offer of Mr. Sturges and Mr. Oakford. I met Mrs. Hackley. I read to her the offer of Mr. Sturges, as I have read it here. I also read to her the offer of Mr. Oakford,—a better offer than that of Mr. Sturges, in that he was to give forty-two cents for the first two years, whereas Mr. Sturges was to give only forty cents a ton for the five years; that, as the Dolph Coal Company could immediately mine out the coal without any preparation, they would have the opportunity of mining the greater part of the coal, which was estimated at 650,000 tons, within five years, and could get it all for forty cents a ton, whereas the bid of Mr. Oakford was forty-two cents to start with, and, as he would be obliged to put on improvements to mine the coal, he would not be expected to get out any coal within a year, so that his price would increase at once

beyond the forty-two cents within a year after he had started to mine; and that I considered she would get a good deal more money out of it by leasing to Mr. Oakford than to Mr. Sturges, for the reason that it would be to their interest to mine all the coal they could at forty cents within the five years, instead of allowing it to remain in the ground and mining it out at the increased rates. She agreed with me that it was better. She asked me if Mr. Sturges would not give any more. I told her what Mr. Sturges had said to me in the office—that they could afford to give more than anybody else, and he would make his best bid first, and that I had requested Mr. Sturges to make his best bid first, and I supposed that was his best bid. From what I knew of Mr. Sturges I did not believe he would give any more. Upon this she accepted Mr. Oakford's bid, and I wrote upon the paper the following:

"I accept the above offer and direct W. H. Jessup to draw up a proper lease for the coal mentioned." Frances A. Hackley.

"Nov. 8, 1894."

In the first place there is an utter absence of motive shown on Judge Jessup's part to part with his client's interest at an undervaluation. What possible motive could he have in so doing? The contention that his son was, or was to be, interested in Oakford's lease, is without foundation. If the respondent's contention is correct, Judge Jessup, without any proven motive or inducement, deliberately sacrificed the interests of a client whose business he would naturally value, and that, too, in a way in which he would be almost sure to be detected. An analysis of the testimony shows, to our mind, that Judge Jessup's version of his statement to Mr. Sturges is correct. In the first place, he says he made the same statement, namely, that, while Mrs. Hackley had re-released the Archbald coal for 40 cents, she wanted more for this, to Kemmerer and others. Mr. Oakford testifies that Judge Jessup did so tell him. Mr. Kemmerer is not called to contradict Judge Jessup, and, in the absence of such contradiction, we are safe in assuming Judge Jessup stated to him as he testified. Now, if he had told these facts to both these gentlemen, and invited them both to put in bids, for what plausible or possible reason, or upon what theory, would he induce Mr. Sturges to put in a 40-cent bid. If he wanted to give the property to Oakford, why should he try to have Mr. Kemmerer put in a larger bid, and thus defeat his purpose? Judge Jessup testifies, and he is confirmed by the absence of any contradiction on the part of Mr. Kemmerer, that, after receiving word from Mrs. Hackley, as noted in her quoted letter, that she was willing to lease the Bell tract, he notified Kemmerer, and requested a bid, and, in answer to his inquiry as to who the bidders were, was told they would be Sturges and Oakford. It then developed that Kemmerer did not want to antagonize the Dolph Coal Company, and so declined to bid. It will thus be seen that the effort of Judge Jessup to get a third bid for the property was defeated, not by any lack of desire on his part, but by reason of the Dolph Coal Company. The letter of Judge Jessup to Mr. Sturges of October 25th, which is given in full above, is consistent with Judge Jessup's version of the previous conversation. It will be noted that he asks them to make "the best proposition they are willing to make for the coal." This is quite consistent with Judge Jessup's testimony that:

"I told him that there were two other gentlemen that I knew who proposed to bid upon the property, and, after talking with him some little time, he said,

'We can afford to give more for that property; I will make my best bid first,' and said, 'Whenever you are ready to receive bids, why, we will make a bid.'

The proof also shows that, however much they may have subsequently changed their minds, the bid put in was the most the Dolph Coal Company was at that time willing to pay. Mr. Sturges says that in his first talk with Judge Jessup he told him that:

"The royalty for the land was high, and whether the Dolph Coal Company would pay it, or not, I didn't know, but they would soon have a meeting, and I would bring it before them, and see whether they would pay it."

At the meeting where the matter was considered, he says:

"I presented this matter to the Dolph Coal Company, and stated to them what Judge Jessup had said,—that, if we wanted that land, we had to pay forty cents for it, and a sliding scale. They thought it was too much. After a good deal of discussion, we decided to pay it, and Mr. Dolph and myself were appointed a committee to make the proposal to Judge Jessup."

It would therefore seem that, as things then stood, the bid then made was the best the Dolph Coal Company was willing to do, and that they were not even willing to pay what Mr. Sturges says he understood would be necessary to secure the property, to wit, pay 40 cents, with a sliding scale after two years. They postponed the rise till five years. The substantial difference between their bid and Mr. Oakford's may be thus illustrated: Assuming there were 600,000 tons in the tract, and it would be taken out in equal proportions through the 10 years, the average royalty paid by Oakford would be 46 cents, and by the Dolph Coal Company 41½ cents, which would make Oakford's lease net \$27,000 in royalties more than Dolph's. Tested by the views of the members of the Dolph Coal Company,—and Mr. Sturges has testified to their views, freely expressed at the meeting, that a royalty of 40 cents, with a sliding scale after two years, was too high, and that they were only willing to pay a sliding scale rising after five years,—bearing in mind that, with its improvements ready for beginning operations at once, the price remained stationary for five years, and therefore, if the Dolph Coal Company got the lease, the bulk of the coal would be mined at 40 cents, it would seem that Judge Jessup had obtained an exceptionally fine price for his client's coal.

A careful scrutiny of the proofs satisfies us that Mr. Sturges not unnaturally fell into the mistake of supposing that he would get the coal cheaper than any one else. The Dolph headings ran alongside it for nearly half a mile, an entrance could be made within a few days, and their breaker, trackage, and other improvements used to mine this coal. It would therefore seem quite natural that in time the Dolph Company should get this coal,—a feeling which was evidenced by Mr. Sturges' remark to Dr. Rice, "I asked him if he wasn't a little gally in using my ammunition to shoot my ducks." That some one else would slip in and bid a considerable advance over them seemed never to have occurred to their minds. When informed she had signed the option, Mr. Sturges says, "Of course, I was utterly dumbfounded; I never had thought of such a thing." But that there was any misrepresentation on Judge Jessup's part, or that he told Mr. Sturges that 40 cents was Mrs. Hackley's price, Mr. Sturges himself does not say. He testifies:

"And I want to say right here,—I don't want to be misunderstood,—Judge Jessup did not say her price would be forty cents per ton, but that she had made a lease to Jones and Williams at forty cents, and he presumed she would want the same for this land. He did not say that forty cents would be her price, but I understood that was her figure, and that, if we offered that, we would get it."

Feeling sure, as we have noted, from their abutting against the property, that the coal would naturally drop to them, it is not surprising that Mr. Sturges and his company should receive the impression they did; but the fact remains that such an impression was a mistake on their part, and was not caused by Judge Jessup.

An agreement to lease, fair and reasonable in terms, certain in its subject, and procured without fraud or mistake, being shown, will equity afford relief in the way of specific performance? We think, in this particular case, it should, because otherwise the complainant would be without an adequate remedy at law. The general doctrine is that in contracts for the sale and purchase of lands, as a class, damages are inadequate. Pom. Spec. Perf. Cont. p. 38. In discussing the question as to where equity will give relief, it is laid down by the same author (page 9) that where the legal remedy is impracticable, where from special, practical features of a contract, inherent in its subject-matter or its terms, it is impossible to arrive at a legal measure of damages with any sufficient degree of certainty, so that no real compensation can be obtained in an action at law, then equity will specifically enforce the contract. By this means alone can the injured party have the substantial effect of his agreement. "To this head," the author says (page 46), "must be referred a variety of different agreements,—among others, contracts in which acts are to be done or articles delivered by one party, and payments are to be made by the other, in installments, at stated times, through a number of years, and where, to compel the plaintiff to accept a present sum, by way of damages, for a nonperformance, would be forcing him to sell his expected profits for a price wholly conjectural." In summing up his conclusions from an examination of the cases, the author states, and his reasoning to our mind is sound, as follows:

"The foregoing instances are sufficient to illustrate and establish the doctrine that equity may interpose, and specifically enforce a large variety of agreements, where the measure of legal damages is purely conjectural, and the legal remedy of compensation is, therefore, wholly impracticable. These cases have also been, and generally are, cited to show that equity has jurisdiction where damages are inadequate; but the inadequacy here consists in the impossibility of arriving at any definite amount of damages, by means of the certain and fixed rules which govern the common-law methods of administering justice."

Applying this principle to the case in hand, we think it pre-eminently one where the remedy at law would be comparatively inadequate, when contrasted with the adequacy of the equitable remedy of specific performance. The lease must necessarily extend through a number of years, the amount of coal mined each year is uncertain, and the royalty payable depends, owing to the sliding scale, running from 42 to 50 cents, on the year in which it is mined. In addition to this, the faults in the coal, and the extent of such faults, all of which are problematical, and now necessarily uncertain, render the

value of the lease uncertain. The foregoing facts show the wide possible variation in the values set upon this coal, and the conjectural value of the lease as a working interest. In the matter of royalties alone, to say nothing of the possible financial results of working the coal, we have seen a net difference of \$27,000 in estimated value; and these show the wide range of possibilities and probabilities to which a jury could alone resort in estimating the value of the undeveloped lease. It is, therefore, clear to us that, in the uncertainty surrounding the subject-matter, and the necessarily conjectural character of the evidence that alone could be submitted, the fixation of any amount by a jury would be conjectural in character. By decreeing specific performance, we have the assurance that the agreement which the parties made would be carried out; while, in remitting the parties to an action at law for damages, from the problematical character of the testimony to be submitted to the jury, we could have no assurance that substantial justice between the parties was reached. "When a contract concerning real estate is valid, unobjectionable in its nature and in the circumstances connected with it, and capable of being enforced, and it is just and proper that it should be fulfilled, it is as much a matter of course for a court of equity to decree a specific performance as for a court of law to give damages for the breach of it." *Wat. Spec. Perf. Cont.* p. 7, § 6.

We are therefore of opinion, after careful consideration, that the case is one for a decree of specific performance.

BOYD et al. v. HANKINSON et al.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1899.)

No. 274.

1. EXECUTION—LEVY ON REALTY OF CORPORATION—EFFECT OF SUBSEQUENT DISSOLUTION OF CORPORATION.

Under the laws of South Carolina, after an execution has been levied on real estate of a corporation defendant, neither the lien created thereby, nor the validity of a sale thereunder to convey title, is affected by the dissolution of the corporation.

2. CORPORATIONS—EFFECT OF DISSOLUTION—RIGHT TO SUE.

The dissolution of a corporation by the forfeiture of its charter or otherwise does not deprive it of the power to convey its property, or to maintain or defend suits relating to the settlement and winding up of its business.

3. TRUST—PURCHASE OF PROPERTY AT JUDICIAL SALE—FIDUCIARY RELATIONS OF PARTIES.

Defendant made an offer for the purchase of real estate owned by a corporation, which was accepted by its officers; but, before a conveyance was made, it was learned that the charter of the corporation had been declared forfeited by the authorities of the state in which it was chartered, and, in the belief that the company could not then convey a good title, it was agreed that the property should be sold under a judgment against the company held by one of its officers, bought in by him, and conveyed to defendant under the agreement for sale, and meantime defendant was placed in possession. At the sale, the officer being present only by an agent, defendant bid in the property for a sum much less than the agreed price, and received a deed therefor from the sheriff. *Held*, that his relation to the property and the corporation was such that

he held the title so acquired in trust, and would not be permitted to retain the property without paying the remainder of the purchase money due under his agreement.

4. CORPORATIONS—SUITS BY STOCKHOLDERS AFTER DISSOLUTION.

Stockholders and creditors of a corporation may maintain a suit in equity, after its dissolution, to recover assets wrongfully appropriated or withheld, and to have them applied for their benefit.

Appeal from the Circuit Court of the United States for the District of South Carolina.

This was a suit in equity by James Boyd, Martin Lane, and William H. Castle against Luther H. Hankinson and Owen Alderman. From a decree dismissing the bill (83 Fed. 876), complainants appeal.

William H. Fleming, for appellants.

D. S. Henderson, for appellees.

Before GOFF, Circuit Judge, and PAUL and WADDILL, District Judges.

GOFF, Circuit Judge. The complainants below, citizens of the states of Pennsylvania and Delaware, filed their bill in equity in the circuit court of the United States for the district of South Carolina against the defendants below, who were citizens of that state. The complainants sued as stockholders and creditors of the Southern Pine Fiber Company, a corporation chartered by the state of New Jersey, and doing business in the state of South Carolina. It was alleged in the bill of complaint: That the Southern Pine Fiber Company was the owner of three acres of land situated in North Augusta, Aiken county, S. C., with the buildings thereon, and certain machinery and other personal property placed therein. That the charter of said company had on May 4, 1897, been declared forfeited and void by the governor of New Jersey, as provided by the laws of that state. That on March 5, 1897, said company, acting through William H. Castle, its treasurer, had offered, in writing, to sell the said property, real and personal, to the Hankinson Lumber Company, for the sum of \$5,000, of which \$1,000 was to be paid in cash, and the residue in four annual payments of \$1,000 each, with interest; the title to said property to remain in said company until paid for, and a bond for title to be made to the purchaser; the offer to be subject to the approval of the stockholders, and to be accepted or rejected within 10 days from March 5, 1897. That on May 20, 1897, one J. L. Hankinson wrote to said treasurer, saying, among other things:

"We have persuaded my father, Luther H. Hankinson, who is interested with us, to buy the Pine Fiber property; and he authorizes me to make you an offer of \$4,500, of which \$1,000 will be cash, and the bal. in four equal installments, with interest; terms same as option. Kindly give this your prompt attention."

That on May 24th such offer was declined by said company. That on June 7, 1897, Luther H. Hankinson, through his agent, J. L. Hankinson, accepted said offer of sale, in writing, in the following words:

"My father has decided to purchase the Pine Fiber property at \$5,000, on the terms and conditions named in your letters to me, viz. \$1,000 cash; balance, equal payments, in one, two, three, and four years, with interest. This

purchase to cover everything except the machinery used in the manufacture of pine fiber, such machinery being now stored subject to your order. Have papers prepared in the name of L. H. Hankinson, and send same to Mr. Jackson, or any one in Augusta, and the notes will be signed, and check given, upon delivery of your bond for titles."

That thereafter, in July, 1897, it was ascertained that the charter of said company had been forfeited, and that it was then agreed by those representing said company and said Luther H. Hankinson that a proper and better title could be secured to said property by having the same sold under certain judgments held by and in the name of said William H. Castle, which had been rendered some years prior thereto, by the court of common pleas of Aiken county, S. C., and that in accordance with such understanding, and for the purpose of perfecting the title so as to carry out the said contract, executions were levied upon the property, and it was advertised to be sold on the 4th of October, 1897, at which sale it was intended that Castle should purchase the property, and then convey it to Hankinson for the sum of \$5,000, the sole object of such public sale being to perfect the title. That, in an effort to carry out in good faith the contract of sale, Castle on September 13, 1887, wrote the son and agent of Luther H. Hankinson as follows:

"Messrs. Fleming & Alexander notify me that the sheriff will sell the mill property on the first Monday in October next. I have instructed them to bid up, if necessary, to the amount we agreed to sell to you. Will you also look after the matter? I am in hopes that it will be knocked down at a less figure, so as to save sheriff's costs. As soon as the property stands in my name, I will transfer it to your father,—as soon as proper papers are prepared."

That Castle instructed said firm (Fleming & Alexander) to bid for him to the amount of \$5,000, if necessary, but that the member of the same who had given the matter attention was absent, and the instructions were overlooked by the partner who was then in charge, he thinking that he was only to bid to cover the amount of the executions levied on the property; and, as he believed that there would be no opposition bids (it being generally known that the sale was being made simply to perfect the title), he instructed his representative to attend the sale, and bid to the amount due on said executions,—a sum between \$1,800 and \$1,900. That there were but two bidders at the sale, the said Luther H. Hankinson and the representative of Fleming & Alexander, who in fact was representing said Castle, and that, as such representative only bid to the amount of said executions, the property was sold by the sheriff (the defendant Alderman) to said Hankinson for \$2,000, which was paid by him to the sheriff, who made such purchaser a deed for the property, and that he is now in the possession of the same. That, on the afternoon of the day of the sale, Fleming & Alexander communicated with the purchaser, advising him of the written instructions which had been sent them by Castle, and expressing the hope that the purchase had been made by him (Hankinson) for the purpose of carrying out the contract with Castle, but that said purchaser refused to carry it out, and stated that he had bought the property in his own name, and would continue to hold it for his own use. That said Castle has never accepted the

proceeds of such sale, which are still in the hands of the sheriff. Complainants prayed that a receiver be appointed to take charge of the assets of the Southern Pine Fiber Company, and sell the same, under the directions of the court, the proceeds to be distributed, as should be found proper, among the complainants and other creditors and the stockholders of such defunct corporation; that the deed from the sheriff to Luther H. Hankinson be declared void, and be canceled; that, should such deed not be canceled, then Hankinson be required to carry out his contract, and pay over to the proper parties the further sum of \$3,000, which he had so agreed to pay,—and for such other and further relief as would be proper under the circumstances.

When the bill, which was duly verified, was presented to the court, an order was passed, on the 29th day of October, 1897, appointing a receiver as prayed for, directing him to take charge of the property, and investing him with the powers usual under such proceedings. Such order also directed said defendant Luther H. Hankinson to show cause why a perpetual injunction should not issue against him, restraining him from setting up any title to the property under and by virtue of the deed made to him by such sheriff.

The defendant Luther H. Hankinson filed his answer, in which, after certain formal statements, denials, and admissions, he sets up that there were certain negotiations between the Hankinson Lumber Company and himself, with some of the officers of the Southern Pine Fiber Company, relating to the purchase of said property, but that the same had not been carried into a permanent contract or agreement before he was informed that the charter of such company had been forfeited; that he had no information that such negotiations ever had the sanction of the directors or stockholders of said last-named company; that, after the alleged forfeiture of the charter of the company, he distinctly informed those who were so negotiating with him that they must, before he would agree to purchase the property, give him a bond of indemnity, if the property was sold at public outcry, that a warranty title would be made to him of the property, no matter at what price the same was purchased; and that said parties and their attorneys distinctly declined and refused to give such guaranty, hence he concluded that all such negotiations were at an end, and that he was not, in equity, bound to carry out any such agreement. Said defendant claimed further that he was the owner in fee simple, and in possession, of the land and other property so purchased at public sale from the sheriff, that his title was valid, and that he should not be disturbed in his possession.

The defendant Alderman, sheriff of Aiken county, also filed his separate answer, in which, after alleging that he was a stranger to, all and singular, the matters set out in the bill, except so much thereof as alleged that he did sell the land described therein; and, as to that, he admitted that the same was sold by him at public outcry, under directions from Fleming & Alexander, attorneys at law, who represented certain judgment creditors of the Southern Pine Fiber Company. He set out that, at such sale, Luther H. Hankinson, being the highest and last bidder, became the purchaser of said property at the price of \$2,000, which sum was paid in cash, and that he holds the same

subject to the order of court, and that it is true that he has made and delivered to such purchaser a deed for the property, conveying to him all the right, title, and interest of the Southern Pine Fiber Company in and to the property so described.

To these answers replications were filed, testimony was duly taken, and the cause submitted, when the court below entered a decree dismissing the bill. From the decree so entered the complainants sued out this appeal, alleging a number of errors in the proceedings below, a few of which, only, we find it necessary to discuss.

We will first consider the questions raised relating to the sale of the property of the Southern Pine Fiber Company. Was that sale a valid one, and did it pass the title to the property to the purchaser, Luther H. Hankinson? Due notice was given of the sale, and the proceedings were in accordance with the South Carolina statute relating thereto. The judgments had been regularly obtained against the Southern Pine Fiber Company, the executions had been properly levied in 1893, and the active energy of the same was in force for 10 years from the date of the levy. The rights of all the parties had been fully determined, and it was conceded that the complainant Castle then held and controlled said judgments. It was by his direction that the sheriff proceeded with the sale, and he evidently ordered it, that he might be able to comply with his agreement with Hankinson. No new or additional proceedings were required in the court of Aiken county, as the power to sell already existed, under the vested rights given by the levy of the executions. Even if the charter of said company had become forfeited, still the sale could have been made, for the death of a party against whom execution has been issued does not prevent the sale of the property which had been duly levied on. *Taylor v. Doe*, 13 How. 287; *Fishburne's Case*, 1 Spear, 347. The same rule is applicable to corporations as to natural persons, and so, if the charter was in fact forfeited,—a question that it is not necessary for us to decide,—still the right to sell was not affected thereby. But, even if the charter was forfeited, the company, while it would not be able to continue the transaction of business, would still be authorized to close out its affairs and dispose of its property, in the interest of its creditors and stockholders. And this is true, independent of the New Jersey statute on that subject, which is as follows:

"Sec. 53. All corporations whether they expire by their own limitation or be annulled by the legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established." Sess. Acts N. J. 1896, p. 295.

The sale was therefore regular, and no effort was made to set it aside because of inadequacy of price, except as this suit may be considered such. The title to said property passed to Luther H. Hankinson by the sheriff's deed, and is vested in him to-day.

We now have to determine whether or not, under all the circumstances of this case, equity and good conscience will permit said defendant to retain that title without accounting for the value of the

property, to the sum, at least, that he had agreed to pay for it. It is true that the offer of March 5, 1897, made by the Southern Pine Fiber Company, to sell its property to the Hankinson Lumber Company, was not accepted by the latter. It is also true that the proposition of Luther H. Hankinson, made under date of May 20, 1897, was declined by the Southern Pine Fiber Company. Thereafter, on June 7, 1897, Hankinson renewed his offer, increasing the amount, and changing the detail connected with it; and it was this proposition that was under consideration when, in July, 1897, the parties in interest concluded that, as the charter of the company had been declared void, a sale under the executions then in force would be the preferable plan of procedure. From this time on, the only open question was as to the best way to convey the title to Hankinson. The property was regarded as sold to Hankinson, who on August 2, 1897, wrote to Castle, saying, "We are now making improvements on said property upon faith of your promise to make us necessary papers;" and on August 10, 1897, Castle replied, saying he regarded the property sold to Hankinson, and that he would refuse any other offer for it. The manner of securing the title to Hankinson, and of making the sale and the deed, was still under consideration. Without referring specially to the testimony, we find that it shows that J. L. Hankinson was the agent of the defendant Luther H. Hankinson, and that the latter was bound by the acts and negotiations of the former looking to the purchase of the property of the Southern Pine Fiber Company, and that said defendant had agreed to purchase the property of that company, as set forth in the bill, for the sum of \$5,000; that he further agreed to a public sale of said property under the executions then in the hands of the sheriff, for the purpose of perfecting the title, the understanding being that the property would be purchased by or for Castle, individually, at as low a figure as possible, and by him then be conveyed to said defendant for the sum of \$5,000, the purchase money to be for the benefit of the creditors and stockholders of said company; that, previous to the sale by the sheriff, the defendant Luther H. Hankinson had, on the faith of his agreement with Castle to purchase the property, entered into the possession of the same, and made certain improvements thereon; that after such agreement, such taking possession of the property, and such improvements made thereon, the defendant Luther H. Hankinson attended the sale and purchased the property, without having advised Castle, or any one representing him, that he did not consider the agreement to purchase binding on him, and that he intended to bid in his own behalf; that both Castle and the defendant Hankinson believed at the time they agreed to a public sale of said property that the charter of the Southern Pine Fiber Company had been legally annulled, and that such sale was the safer course to pursue in order to vest a perfect title to the property in said defendant, and at the same time best protect the interests of the creditors and stockholders of that company.

The facts being as we have found them, what, in good conscience, should be required of the parties? If Castle had purchased the property at the public sale, could Hankinson have compelled him to convey it under the previous agreement? Answering this in the affirma-

tive, as we do, it follows that if Hankinson had not bid for the property, and Castle had purchased it, the latter, had he sued the former for specific performance, would have been entitled to a decree in his favor. The equities of the case are now plainly apparent. The relations existing between Hankinson, Castle, and the Southern Pine Fiber Company were such that it would be unconscionable to allow said defendant to hold the property at the price of \$2,000, when he was under contract to give \$5,000 for it, and the only object of the sale at sheriff's outcry was to enable him to have a good title to the same. The contention of counsel for appellees, that the original offer of sale was rendered inoperative because it contained the clause, "subject to the approval of the stockholders of said Southern Pine Fiber Company," and that as a matter of fact such stockholders did not approve of the terms of sale, is without merit, for the reason that thereafter both Castle and Hankinson concluded that, as the charter of the company had been forfeited, the stockholders were therefore without authority to act, and consequently the plan to sell at public sale was proposed and agreed to. A court of conscience will not permit a party to profit by his own wrong, and in this case we cannot allow the defendant Hankinson to claim for himself individually the property conveyed to him by the sheriff, unless he first accounts to Castle, who represents the creditors and stockholders of the Southern Pine Fiber Company, for the difference between his bid at the public sale and the price he had agreed to give for the property. He holds the title in trust for them, and, unless he pays said difference, the court should either direct a sale of the property, and apply the proceeds for that purpose, or set aside the sale as made by the sheriff and direct a resale of the same, returning to Hankinson the purchase money so paid by him.

Complainants sue as creditors of the Southern Pine Fiber Company, also as its stockholders; and equity will entertain such a suit, even if the charter of the company had been forfeited before process issued, and will decree that the assets of such company be applied for the benefit of all its creditors and stockholders. It will be better to bring the said company before the court,—a course not resorted to heretofore because of the mistaken idea that it would have been improper, on account of the alleged forfeiture of the charter of that company. But, as we have seen, the company could have prosecuted and defended suits, could have closed its business and have disposed of its property, even though its charter had been undoubtedly forfeited, and due announcement of the same had been made under the law. The decree appealed from will be reversed, and this cause will be remanded to the court below, with instructions to proceed therein in the manner indicated in this opinion. Reversed.

CENTRAL OF GEORGIA RY. CO. v. KAVANAUGH et al.

(Circuit Court of Appeals, Fifth Circuit. January 24, 1899.)

No. 765.

CARRIERS OF GOODS—LIMITATION OF LIABILITY—STATE STATUTES.

A contract made by a railroad company in Georgia for the through carriage of freight from Savannah to Chattanooga, Tenn., is governed by the statutes of Georgia; and under Civ. Code 1895, § 2276, providing that a carrier can only limit its legal liability by express contract, as construed by the courts of the state, a provision of the bill of lading that the railroad should only be liable for the safe delivery of the goods to its connecting carrier is without effect to relieve it from liability for damage to the goods while in the possession of the connecting carrier, unless such bill of lading is signed by the shipper.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

Kavanaugh & Brennan shipped a car load of bananas from Savannah to Chattanooga. The car was delayed in transit, and the bananas deteriorated, whereupon Kavanaugh & Brennan intervened in the main suit (the Central Railroad & Banking Company of Georgia against the Farmers' Loan & Trust Company), against the receivers of the Central Railroad & Banking Company of Georgia, for damages for the delay to the shipment of bananas. The shipment was made via the Central Railroad, from Savannah to Atlanta, and thence to Chattanooga, via the Western & Atlantic Railroad. It is conceded that the shipment was delayed in transit on that portion of the route beyond Atlanta. The carriage between Savannah and Atlanta was confessedly prompt and expeditious. The line of the Central Railroad terminates at Atlanta, and the defendant showed delivery to the Western & Atlantic Railroad, its connection. The appellant, the Central of Georgia Railway Company, was duly substituted defendant in the place of the said receivers. The master found in favor of the plaintiffs. Exceptions were filed as follows: "And now, within thirty days from date of the master's report, comes the Central of Georgia Railway Company, substituted defendant in said cause in place of H. M. Comer and R. Somers Hayes, receivers of the Central Railroad & Banking Company of Georgia, and excepts to the master's finding, and specifically to the master's conclusion of law, as follows: The only defense sought to be set up in this case is that the negligence through which the loss was occasioned was that of a connecting line, to which the fruit had been delivered with proper diligence. By the terms of the bill of lading, the goods were to be transported by the Central Railroad and connecting lines, via the W. & A. R. R., until they reach the station nearest to the ultimate destination. Against this liability, relief is sought by the stipulation in the bill of lading to the effect that the liability of the Central Railroad ceases with proper delivery to its connecting and succeeding carrier. This agreement or stipulation would have been a good defense had the bill of lading been signed by the consignor; but it was not, and its insertion in the bill of lading does not limit the liability of the carrier. To limit its liability, an express contract must be made by the common carrier with the consignor. The errors in the master's conclusion of law being: First. That the master held, in effect, that the defendant had made a contract to carry the goods through to destination, and to be liable for them beyond the terminus of its own line, whereas the bill of lading under which the bananas were shipped specifically provided against this in the following paragraphs, taken from the bill of lading, which is attached to the evidence, and to which reference is hereby made: 'It is mutually agreed, in consideration of the rates herein guaranteed, that the liability of each carrier as to goods destined beyond its own route shall be terminated by proper delivery of them to the next succeeding carrier.' 'This bill of lading is signed for the different carriers who may be engaged in the transportation, severally, not jointly, and each of them is to be bound by and have

the benefit of all the provisions thereof as if signed by it, the shipper, owner, and consignee. The acceptance of this bill of lading is an agreement on the part of the shipper, owner, and consignee of the goods to be bound by all of its stipulations, exceptions, and conditions, as fully as if they were all signed by such shipper, owner, and consignee. This contract is executed and accomplished, and the liabilities of the company as common carrier thereunder terminate, on the arrival of the goods or property at the wharf, station, or depot to which this bill of lading contracts to deliver, and the carrier will be responsible thereafter only as warehouseman. The bill of lading shall have the effect of a special contract, not liable to be modified by a receipt from or act of an intermediate carrier.' Second. The master treated the terms of the bill of lading as though there were an effort on the part of the defendant to limit its liability, and therefore were not good because not signed by the consignor; whereas, under the general commercial law which prevails in the United States courts, before the carrier is held liable beyond the terminus of its own route, it must appear that the carrier has made an express contract to be so liable." On the hearing, the exceptions to the master's report were overruled, and a decree was rendered in favor of the interveners, from which decree the Central of Georgia Railway Company appealed to this court.

T. M. Cunningham, Jr., for appellant.

M. A. O'Byrne, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). The contract of transportation in this case stipulates for a through carriage of goods. It is styled at its head "Through Bill of Lading." It contracts for the delivery of the goods at Chattanooga, their destination, and stipulates for a through rate of freight, and, in terms, attempts to limit the carrier's liability, except on its own lines, as follows:

"Each carrier shall be bound (subject to the limitations and exceptions contained in this contract) to deliver said goods in the same order and condition as that in which it received them; and the ultimate carrier to deliver them at its station or wharf, to the consignee or his assigns, if called for by him or them, as in this contract provided, he or they paying freight and charges thereon, and average, if any. It is mutually agreed, in consideration of rates herein guaranteed, that the liability of each carrier as to goods destined beyond its own route, shall be terminated by proper delivery of them to the next succeeding carrier."

The bill is a through bill of lading, aside from the fact that the attempt at limiting liability is wholly inconsistent with any other view of the contract than that it is, and was intended to be, a through bill. As the contract was a Georgia contract, it is pertinent to cite, as to the character of the same, Central R. Co. v. Dwight Mfg. Co., 75 Ga. 609; Railway Co. v. Pritchard, 77 Ga. 412, 1 S. E. 261; Atlanta & W. P. R. Co. v. Texas Grate Co., 81 Ga. 610, 9 S. E. 600; and Railroad Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838.

Civ. Code Ga. 1895, § 2276, reads as follows:

"A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract and will then be governed thereby."

The construction of this section by the supreme court of Georgia is to the effect that a common carrier receiving goods for through

shipment over its own and other lines cannot confine its liability to damages on its own line, and relieve itself from negligence and damage on the lines of connecting carriers, except by an express contract assented to by the shipper, and that the mere acceptance by the shipper of a bill of lading containing a provision confining the general responsibility of the contracting carrier to liability for negligence and damages on its own line is not sufficient under the statute. Express Co. v. Purcell, 37 Ga. 103; Railroad Co. v. Spears, 66 Ga. 490; Railroad Co. v. Gann, 68 Ga. 350; Central R. Co. v. Dwight Mfg. Co., 75 Ga. 609; Railroad Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838.

If the Georgia law, as construed by the supreme court, should prevail as to the contract in this case, the finding of the master and the decree of the court affirming the same are conceded to be correct. Counsel for appellant, however, contends that the Georgia law should not prevail, and that this court should not be controlled by the judicial decisions of the state where the contract of carriage was made, but should follow the common-law rule, as declared by the courts of the United States. His main reliance is upon Myrick v. Railroad Co., 107 U. S. 102-107, 1 Sup. Ct. 425, 429, which decides:

"The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: That each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route, and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."

The supreme court have had frequent occasion to cite the Myrick Case with approval, but have found it proper to declare that it is only applicable in the absence of a controlling statute. Railway Co. v. Prentice, 147 U. S. 101, 106, 13 Sup. Ct. 261; Railroad Co. v. Baugh, 149 U. S. 368, 375, 13 Sup. Ct. 914; and Railway Co. v. Solan, 169 U. S. 133, 136, 18 Sup. Ct. 289.

In this last-mentioned case the proposition is stated as follows:

"The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions, not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the state in which the cause of action arises. But the law to be applied is none the less the law of the state, and may be changed by its legislature, except so far as restrained by the constitution of the state or by the constitution or laws of the United States."

From this it is clear that the common-law rule declared in the Myrick Case is not to be applied when there is an express statute of the state where the transportation contract is entered into, regulating the matter. And see Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397-447, 9 Sup. Ct. 469 et seq. Section 2276 of the Georgia Civil Code is an express statute providing how the carrier may relieve himself of liability by contract. The true construction of this statute has been settled by an unbroken line of decisions

by the supreme court of Georgia. In general, the construction given to a state statute by the highest court of the state will be followed by the courts of the United States. It is therefore clear to this court that the master, in applying section 2276 of the Georgia Civil Code, as construed by the supreme court of Georgia, to the facts of this case, did not err, and that the decree of the court based on the master's report was correct, and should be affirmed; and it is so ordered.

SPRAGUE et ux. v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1899.)

No. 284.

1. CARRIERS OF PASSENGERS—ACTION FOR PERSONAL INJURY—QUESTIONS FOR JURY.

Plaintiff, with her husband, purchased first-class tickets for transportation between two stations on defendant's railroad, and made the journey in the caboose of a freight train. When the train arrived at their destination, it stopped, with the engine opposite the station and the caboose some distance back. While so standing, the plaintiff rose from her seat to look from the window, and was thrown down and injured by a violent jerk given the caboose by the starting of the train. It further appeared that the movement of the train was the same as was usual at that station. *Held*, that it could not be said, as a matter of law, that defendant's servants were not guilty of negligence causing the injury, but that the question was one of fact for the jury.

2. SAME—LIABILITY FOR SAFE CARRIAGE—PASSENGERS ON FREIGHT TRAINS.

Where a railroad company sells tickets to passengers to be used on a freight train which is provided for the accommodation of passengers generally, it is held to the same degree of care for the safety of such passengers as though they were carried on a regular passenger train.

3. SAME—PRESUMPTION OF NEGLIGENCE FROM FACT OF INJURY.

An injury to a passenger while in the exercise of that degree of care which may reasonably be expected from a person in his situation is *prima facie* evidence of the carrier's liability.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

James H. Merrimon (M. Silver, on the brief), for plaintiffs in error.
Charles Price, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and PAUL, District Judge.

GOFF, Circuit Judge. The plaintiffs in error, who are husband and wife, instituted this action at law to recover damages from the defendant in error on account of personal injuries sustained by the wife, claimed by them to have been caused by the negligence of the employés of the Southern Railway Company. It is set forth in the complaint that on the 7th day of July, 1897, the feme plaintiff purchased of the defendant company a first-class ticket over its railroad, from the station at Hickory to the station at Morganton, and that she entered and took a seat in the caboose car attached to a freight train on said road (as she was directed to do by the agent of said company), for the purpose of making said trip, and that while doing so, and when she was

still in said car, she was injured by the negligence of the defendant's employés. The answer of the Southern Railway Company denies the charge of negligence, and sets up contributory negligence on the part of the said feme plaintiff, in substance as follows: That she contributed to her injury by her own negligence, in standing up in the car while the same was in motion, when the defendant had provided a seat for her, in which she might have remained in perfect safety; that she knew she was on a freight train, and that it was not as safe as a regular passenger train, and that it required greater care on the part of passengers, which she failed to exercise, but that she assumed the risk of injury by standing up in the caboose car during the time the same was in motion; that she did not wait in her seat until the train stopped at Morganton, but she arose and stood up while said car was being moved, and before it had reached the station, thereby contributing to her injury.

The case came on to a trial before a jury, on the following issues: First. Was the feme plaintiff injured by the negligence of the defendant company? Second. Did the feme plaintiff contribute to her injury by her negligence? Third. What damages, if any, is the feme plaintiff entitled to recover?

After the plaintiffs had offered their evidence, the defendant moved the court to dismiss the complaint and enter judgment of nonsuit. The court below ruled that the plaintiffs were not entitled to recover, and entered a judgment of nonsuit. To such judgment this writ of error was sued out.

It is claimed by the plaintiffs in error that it was error in the court below to dismiss their complaint and enter said judgment of nonsuit. The supreme court of North Carolina, in construing the statute of that state relating to nonsuits, has held that such a motion is, in effect, the same as a demurrer to the plaintiffs' evidence. *Purnell v. Railroad Co.*, 29 S. E. 953, 122 N. C. 832. Therefore, under said statute, when the motion for nonsuit is submitted, the court should dispose of the same in the light of the rule that admits everything which a jury could reasonably infer from the evidence.

The plaintiffs' testimony tended to prove that they had purchased first-class tickets over the defendant's road from the station at Hickory to the station at Morganton; that they entered the caboose car, and traveled in it, the same being attached to a freight train composed of 12 or 13 cars; that they were both aware of the fact that they were to go on a freight train, being so advised when their tickets were purchased; that they traveled safely to Morganton, where the engine stopped in front of the depot building, thereby leaving the plaintiffs, who were still in the caboose on the end of the train, some little distance from the station; that in the said car was a sofa or settee, some chairs, a table, and a stove; that after the car reached Morganton, and when it was not in motion, and was at a point where it had been for some minutes, the feme plaintiff arose from her seat, and walked across the car, for the purpose of looking out of the window, and, while she was standing near it and by a table, the engine suddenly moved up, and thereby the slack of the train was taken out, and the car given a sudden lurch or jerk, by which the said feme plaintiff was

thrown to the floor, causing her great bodily injury and pain, the result being a fractured thigh bone and permanent injury; that she was in her 67th year at the time of such injury; that, when the train stopped for the first time at Morganton, it remained still for a few minutes, then moved up, and then stopped again, and that when it so moved up it made a heavy jerk, when the engine again stopped suddenly, and that considerable jar was caused thereby; that, by the time the slack is taken out of a train as long as that was, the end of the train has a pretty heavy jerk; that the movements of said train at Morganton were the same as they usually were at that place, it stopping and starting as it had often done before; that during the trip, and before the train reached Morganton, the husband plaintiff, who had gone out on the platform of the car, was admonished by the brakeman that it was dangerous for him to be there, as the sudden jerk of the car might throw him off, and that he returned to his seat inside the car, at the same time advising his wife of the warning he had received; that they were not warned by any of the train officials, at Morganton or elsewhere, that the car would be suddenly or violently moved, and that it would be best for them to be careful during the time it was being so moved.

Negligence is in some cases a question of law to be determined by the court, and in others a matter of fact to be found by the jury. In this case the court below held it to be a question of law, and directed a nonsuit. We think this was error, as we are of the opinion that the jury should have been directed to find from the evidence whether or not the defendant so managed its engine and so moved its car at the time that Mrs. Sprague was injured as to make it liable for injuries caused thereby to those who were passengers in said car; or, in other words, if the defendant's conduct at that time constituted "negligence," in the sense such word was used in in the issues submitted to the jury.

We are unable to conclude, after carefully considering the testimony offered by the plaintiffs, that the facts shown by it are such that all reasonable men must draw the same conclusion from them, and hence we hold that, if such facts constitute negligence, the same must be found by the jury from the testimony, and not by the court as a matter of law. *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679; *Railway Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104. If from the evidence there is uncertainty as to the existence of negligence, then the question is one of fact, and must be settled by a jury, and such is the case even if there be no testimony save that offered by the plaintiff, and in which there is no conflict, if fair-minded men, in an honest effort to do right, would reach different conclusions from it. This is a case peculiarly for the jury, for the reason that it is from all the circumstances incident to the injury to the feme plaintiff—such as the movement of the train, the stopping and starting of the same, whether the car was properly and safely handled, or carelessly and dangerously pushed and jerked about—that the question of negligence and the matter of responsibility can be intelligently found and fairly determined. It is now so well settled that if, in any case, the facts are such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of that matter is for

the jury, that we deem a further discussion of the question unnecessary, and, as the case is again to go to a jury, we think it best not to further consider the testimony.

The court below seems to have founded its conclusion on the fact that the plaintiffs were traveling in a caboose car, and not on a regular passenger train. But we are of the opinion that as the defendant sold tickets to the plaintiffs to be used in said car, which was provided for the accommodation of passengers in general, the plaintiffs were entitled to demand and have of and from the defendant the highest possible degree of care and diligence, regardless of the kind of train they were on. A railroad company is liable for the negligence of its servants, resulting injuriously to its passengers, whether they are traveling in the luxurious cars of the modern train, or in the uncomfortable caboose of the local freight; for in all such cases the law requires that the highest degree of care that is practicable be exercised. The reasons for this rule are well known, and are based upon wise public policy and the plainest principles of justice. The supreme court of the United States, in alluding to this matter (*Railroad Co. v. Horst*, 93 U. S. 291, 296), said:

"Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger trains. The same considerations apply to freight trains. The same dangers are common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise. There is no reason, in the nature of things, why the passenger should not be as safe upon one as the other. With proper vigilance on the part of the carrier, he is so. The passenger has no authority upon either, except as to the personal care of himself. The conductor is the animating and controlling spirit of the mechanism employed. The public have no choice but to use it. * * * The rule is beneficial to both parties. It tends to give protection to the traveler, and warns the carrier against the consequences of delinquency. A lower degree of vigilance than that required would have averted the catastrophe from which this litigation has arisen. *Dunn v. Railway Co.*, 58 Me. 187; *Tuller v. Talbot*, 23 Ill. 357; *Railway Co. v. Thompson*, 56 Ill. 138."

It was held in *Railroad Co. v. Pollard*, 22 Wall. 341, a suit for an injury to the person against a railroad company, that "if the passenger is in the exercise of that degree of care which may reasonably be expected from a person in his situation, and injury occur to him, this is *prima facie* evidence of the carrier's liability." Such is also the doctrine of *Stokes v. Saltonstall*, 13 Pet. 181, a leading case on this question. See, also, to like effect, the cases of *Boasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653; *Gleeson v. Railroad Co.*, 140 U. S. 435, 11 Sup. Ct. 859. Applying this principle to the case we are now considering, and it will follow that the jury should have been permitted, in the absence of explanation by the defendant of the circumstances under which the injury occurred, to ascertain the plaintiffs' damages, provided they did not also find that the female plaintiff contributed to the accident by her own negligence.

The contention of counsel for defendant in error that the supreme court in *Transportation Co. v. Downer*, 11 Wall. 129, held that a presumption of negligence does not arise from the simple occurrence of

an accident, will not be sustained by a careful examination of the opinion in that case. It will be well to remember that the plaintiff in that case was suing to recover for the loss of personal property, and not for damages occurring to him while a passenger; and yet the court said that if the accident was caused by the mismanagement of a thing over which the defendant had immediate control, and for the management of which he was responsible, that the presumption of negligence did arise. We agree with counsel for the defendant in error that if, looking at all the evidence, and drawing such inferences therefrom as are just and reasonable, the court below could have said, as matter of law, that the plaintiffs were not entitled to recover, then the order of nonsuit was properly entered. Pleasants v. Fant, 22 Wall. 116; Montclair v. Dana, 107 U. S. 162, 2 Sup. Ct. 403. But, as we have already shown, the court below, under the circumstances of the case as developed by the plaintiffs' testimony, could not have properly so said as matter of law, and the issues should have been submitted to the jury, under appropriate instructions as to the law by which they were to be guided in reaching a conclusion.

The judgment complained of will be reversed, and this case will be remanded, with instructions to proceed with a new trial under the principles of law as herein announced. Reversed.

FIDELITY MUT. LIFE ASS'N OF PHILADELPHIA, PA., v. MILLER et al.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1899.)

No. 288.

1. LIFE INSURANCE—ACTION OF POLICY—EVIDENCE.

Where, in an action on a life insurance policy, defendant set up as a defense that the deceased obtained the policy, and deliberately committed suicide, for the purpose of defrauding the defendant, and in support of such defense introduced evidence of acts, conduct, and statements of deceased, including a letter written to a third person shortly before his death, not as acts or declarations against interest, but as showing his condition or state of mind, and the motives with which he acted, a letter written by the deceased to his wife on the day before his death was properly admitted on the part of plaintiff in rebuttal.

2. TRIAL—INSTRUCTIONS—EXPRESSING OPINION ON FACTS.

It is not error for a judge of a federal court, in submitting a question to a jury, to express an opinion as to the weight of certain evidence bearing thereon, where the jury are expressly told at the same time that the decision of the question rests entirely with them.

3. LIFE INSURANCE—MISREPRESENTATIONS IN APPLICATIONS—MATERIALITY.

Under a statute providing that a misrepresentation or an untrue statement made by an applicant for life insurance in good faith shall not work a forfeiture, or be ground of defense in a suit on the policy, unless the misrepresentation or untrue statement relates to a matter material to the risk, the insurer and insured cannot contract as to what statements shall be material, but that question is one to be judicially determined in each case,—by the court if the materiality is obvious, or by the jury if it depends on disputed facts.

4. SAME—CONSTRUCTION OF APPLICATION.

An application for life insurance required the applicant to state whether or not he had ever made application for insurance to any "company, association, or society," on which no policy had been issued, and to "give

name of each company, date of application, kind of policy, and amount applied for." Held, that an application for membership in a secret social and beneficial order, membership in which was attended with some benefit payable in case of death, was not within the language of such requirement.

5. SAME—MATERIALITY OF REPRESENTATIONS.

An applicant for life insurance stated, in answer to a question in the application, that he had never made application for insurance to any company, association, or society, on which a policy had not been issued. In an action on the policy after his death, it appeared that nine years before the issuance of the policy he had applied for membership in the Royal Arcanum, which was a secret social and beneficial order, in which some kind of benefit was paid on the death of a member, the nature and amount of which were not shown; that his application was reported on favorably by the examining physician, but rejected by the chief medical examiner on account of a fact shown by the examination, which in itself did not constitute good ground for rejection, which never affected the health of the applicant, and did not exist at the time of the issuance of the policy in suit. It further appeared that the deceased was never informed that he had been rejected on account of his health. Held, that the answer to the question in the application was made in good faith, and, if regarded as a misrepresentation, was immaterial to the risk.

6. SAME—STATEMENTS AS TO SICKNESS AND DISEASES.

Statements in an application for life insurance as to the diseases and sickness of the applicant are material, and he is bound in good faith to correctly state the facts so far as he knows them; but he is not bound to remember and state all of his ailments, and the temporary derangement of the functions of his organs, from which he recovered without impairment of his general health.

In Error to the Circuit Court of the United States for the District of Maryland.

This was an action by David P. Miller and Ann E. Percy, executors of William R. Percy, deceased, against the Fidelity Mutual Life Association of Philadelphia, Pa., on a policy of life insurance. There was judgment for plaintiffs on the verdict of a jury, and defendant brings error.

The defendants in error on the 27th day of December, 1897, brought their suit against the plaintiff in error on a policy of insurance insuring the life of William R. Percy for \$25,000, payable to his legal representatives within 90 days after satisfactory proof of death, and of the just and lawful claim, both as to the rights and interest of the beneficiary thereunder, as well as to the justness of the claim. The application was attached to and made part of the policy. The policy was issued on the 5th of August, 1896. The death of the insured, W. R. Percy, occurred on the night of the 26th of May, 1897, by drowning in the Chesapeake & Ohio Canal, about 12 miles below Cumberland, Md., the horse upon which he was riding along the towpath suddenly plunging into the canal with him. The defendants in error were duly appointed executors of his last will and testament.

The suit was originally instituted in the circuit court of Allegany county, in the state of Maryland, but subsequently, on the 23d of March, 1898, on petition of the plaintiff in error, was removed into the circuit court of the United States for the district of Maryland. Ten pleas were filed by the plaintiff in error, and replication and issues followed in regular course of pleading. The defenses set up were: (1) False answers by insured as to his previous condition of health. (2) False answers as to the physicians whom he had consulted. (3) Concealment that he had been previously rejected by the Royal Arcanum. (4) That the policy was obtained by fraud, and that the application had been made with fraudulent intent at a time when he was hopelessly insolvent, indebted to trust estates, and unable to meet his indebtedness, and made for the purpose of protecting his benefi-

ciaries; when he had a deliberate purpose of taking his life, with the intent to liquidate his debts with money derived from the policies of insurance. (5) That the company, in any event, could only be liable for moneys paid to it as premiums, as he had died by his own hand within three years from the issue of the policy.

The clauses of the application for insurance, so far as material to the questions at issue, are as follows:

"(5) That I have never had or been afflicted with any sickness, disease, ailment, injury, or complaint, except as here stated. Nothing serious. A. B. Price, M. D.

"Give full particulars as to the nature thereof, date and duration, whether trivial or otherwise. If rheumatism, state whether muscular, sciatic, or inflammatory.

"Dyspepsia about twenty years ago. Ankle broken in 1847.

"(6) That the last physician I consulted, or who prescribed for me, was Dr. A. B. Price, of Frostburg, about Oct., '95, for the sickness here stated: Hurt from riding horseback; irritation of bladder; slight colic several times.

"Give nature and duration of illness, and, if complete recovery, say so.

"(7) That I have not consulted or been prescribed for by any other physician or medical man during the last ten years, except as here stated.

"Give date, nature of illness, and name of every physician for last ten years.

"None but John Porter, dead; after that, family doctor, A. B. Price.

"(8) That I have never made application for insurance on my life to any company, association, or society, upon which application no policy was or has yet been issued to or received by me for the full amount and kind, and at the rate applied for, and that no physician has ever given an unfavorable opinion upon my life with reference to life insurance, except as here stated. No.

"Give name of each company, date of application, kind of policy, and amount applied for.

* * * * *

"I hereby agree and bind myself as follows: That the truthfulness of the statements above made or contained, by whomsoever written, are material to the risk, and are the sole basis of the contract with the said association.

* * * And all provisions of law in conflict with or varying the terms of this agreement and policy applied for are hereby expressly waived. * * * And that, if any concealment or untrue statement or answer be made or contained therein, then the policy of insurance issued thereon, and this contract, shall be, ipso facto, null and void, and all moneys paid hereon shall be forfeited to said association: provided, always, that, if the necessary payments be made to keep said policy in force, it shall, in the event of my death, be incontestable for the sum payable thereunder after three years, except as therein set forth."

The defendants in error and the plaintiff in error respectively asked certain prayers or instructions of the court,—the defendants in error, six in number; and the plaintiff in error, five. The court granted the first, third, and sixth prayers of the defendants in error, amending, however, the first and sixth, and granted in lieu of the fourth a separate instruction of its own. It rejected the first, second, third, and fourth prayers of the plaintiff in error, and gave its fifth prayer, with an amendment by it, and treated the court's instruction granted in lieu of defendants in error's fourth instruction as one covering the second and third offered by plaintiff in error.

The instructions or prayers granted by the court are as follows:

"First [being the first prayer of defendant in error as amended]. If the jury find that the plaintiffs are the executors of the late William R. Percy, and that the defendant corporation executed the policy of insurance offered in evidence and delivered the same to said Percy in his lifetime, and that said Percy paid the defendant all premiums payable thereon at the time of said delivery, and paid all further premiums due thereon up to the time of his death, and complied with all the undertakings stipulated to be performed on his part in said policy, and that he died on the 26th day of May, 1897, and that the plaintiffs exhibited and delivered to the defendant the proofs of death

and justice of claim offered in evidence on or about the 21st day of June, 1897, and more than 90 days before this suit was brought, then the plaintiffs are entitled to recover in this suit, unless the jury shall find from the evidence that the application for the policy on the part of the said William R. Percy, deceased, contained some misrepresentation or untrue statement of fact made not in good faith by said applicant, or unless they shall find said application contained some misrepresentation or untrue statement or some material matter to the risk, or unless the jury find that said policy of insurance was obtained by said Percy from the defendant by fraud of him, said Percy, or that the said Percy destroyed himself. This prayer I grant, in connection with such other prayers as I shall grant, and such instructions as I shall give to the jury. The law of Maryland, passed in 1894, declares that a misrepresentation or untrue statement by an applicant for life insurance, made in good faith, shall not work a forfeiture, or be a ground of defense in a suit on a policy of life insurance, unless the misrepresentation or untrue statement relates to a matter material to the risk. This law renders it now impossible for the insurer and the insured any longer to agree that a statement shall be taken to be material to the risk, and to make it so, if in fact it is not really so, and prevents their contracting that a matter really irrelevant shall be taken to be material; and the plaintiffs' counsel contend that the court of appeals of Maryland, by its opinion in the case of this Same Defendant v. Ficklin, 74 Md. 172, 21 Atl. 680, and 23 Atl. 197, has decided that the question of materiality, as well as the question of good faith, is always to be left to the jury. However this may be, there are statements required in nearly all applications for life insurance which it would be the duty of the court, if requested, to instruct the jury are material to the risk, and as to which it would be the duty of the jury to act upon the instruction of the court. In my judgment, it amounts to this: that now, under the act of 1894, the untrue statement must relate to some matter material to the risk; and the materiality no longer depends upon the agreement of the parties that it shall be so considered, but upon the actual fact that it is so. If the materiality is obvious and legally indisputable, it is within the province of the court to instruct the jury that the statement is material; but if it is not obvious, or depends upon disputed facts, it is the duty of the court to have the jury decide whether it is material or not.

"Second [third prayer of defendants in error]. That the defendant has offered no legally sufficient evidence to sustain the seventh plea pleaded by it in this cause.

"Third [court's prayer in lieu of defendants in error's fourth]. The plaintiffs' fourth prayer has reference to the matter of the Royal Arcanum. All we know, from the evidence in this case, of the Royal Arcanum, is derived from the application made by Percy, and the witnesses who have spoken of it. It appears to be a secret order of a beneficial character, membership in which is attended with some benefit payable in case of death. I hold that, so far as the nature of this order appears, it is not within the terms of the eighth clause of the application to the defendant company. This ruling is supported by several decided cases. I refuse plaintiffs' fourth prayer, and give instead the following instruction: The jury are instructed that the evidence in this case does not justify them in finding that the statement made by Percy in the eighth clause of his application for the policy sued on had reference to the application by him dated August 12, 1897, for membership in the Frostburg Council of the Order of Royal Arcanum, given in evidence, and that in considering the truthfulness of the statement made by Percy in said eighth clause, so far as it relates to the applications for insurance on his life in any company, association, or society, the jury should disregard said application for membership in said order. There is another clause of that eighth section which has reference to an unfavorable opinion by a physician; and as to that I instruct the jury that the statement in said eighth clause, that no physician had ever given an unfavorable opinion on his life, with reference to life insurance, does not render the policy sued upon void, unless the jury find that said Percy knew of such unfavorable opinion, and, knowing it, concealed the fact by the said statement made by him in his said application to the defendant company.

"Fourth [sixth prayer of defendants in error as amended]. The plaintiffs pray the court to instruct the jury that mere temporary afflictions or ailments, not of a serious or dangerous character, which pass away, and are likely to be forgotten, because they leave no trace on the constitution, are not to be regarded as diseases, within the meaning of the application for the policy of insurance offered in evidence in this case. By the fifth clause of the application, Percy declared that he had never been afflicted with any disease, sickness, ailment, or complaint, except as stated, and, qualifying the statement in writing: 'Nothing serious; dyspepsia about 20 years ago; ankle broken in 1847,'—gave the name of his doctor, and also qualifying it by stating that (in the sixth clause) about 1895 Dr. Price prescribed for him for being hurt from riding horseback; irritation of the bladder; slight colic several times. I instruct the jury that the substantial correctness of his statements about his diseases and sickness was material to the risk, and he was obliged to state, in good faith, the facts, as far as he knew them, but that he was not obliged to remember and state all his slight illnesses, or temporary derangement of the functions of his organs, from which he had recovered without impairment of his general health. The statement was, in substance, that he had had no serious illness, and the burden is upon the defendant to satisfy you that the statement was false to a material extent. If, however, upon considering the whole evidence on the subject, you are satisfied that Percy, when he signed the application, knew that he had had a serious disease, of such character as to affect his general health, and by his statement concealed the fact from the defendant company, then the policy would be void.

"Fifth [plaintiff in error's fifth instruction as amended]. The jury are instructed that upon the policy of insurance, with copy of the application attached and made part of the contract as given in evidence, if the assured shall, within three years from the date of the policy, 'die by his own hand, sane or insane,' there can be no recovery by the estate of the dead man of the amount of insurance upon his life, except as to the money so paid into the company by the insured, which money in such event shall constitute the sum insured, and the defendant's liability under such policy; and the jury are further instructed that any form of self-destruction is covered by such description. The plaintiffs' second prayer asks me to say to the jury that upon the issue of suicide there is no legally sufficient evidence from which they can find that Percy committed suicide. I refuse this prayer, and leave the question of suicide to the jury. It is a matter with which a jury of twelve men is better able to deal than a single judge. Suicide is a matter generally incapable of direct proof, and as to which the jury are entitled to draw such reasonable inferences as the proven facts justify to the minds of men experienced in the affairs of life. I do say to the jury, however (leaving always entirely to them the decision of the question), that, so far as I remember the testimony, there is but little in the facts and circumstances of Percy's drowning which to my mind supports the theory of premeditated suicide by intentionally riding his horse into the canal. There is abundant testimony of his having recently taken an unusual amount of life insurance, and of the great disproportion between the annual premiums and the means of Percy to meet them; so that, if there is evidence to prove the suicide, there is abundance of testimony to suggest a motive. But the circumstances which tend to prove that Percy intentionally cast himself into the canal, or intentionally permitted himself to drown while in the canal, seem to me to be slight; but I leave this issue to the jury, with the following instructions for their guidance as to the amount of proof which they should have to justify them in finding that Percy destroyed his own life: The court instructs the jury that the presumption is that the death of the said insured, William R. Percy, was not voluntary, and the defendant, in order to sustain the issue of suicide on its part, must overcome this presumption by evidence sufficient to satisfy the jury that the death was voluntary. If the jury find that Percy drowned himself, or permitted himself to be drowned, then, by the terms of the policy, there can be no recovery of the amount insured; and on this issue I grant the defendant's fifth prayer."

On the 30th of June, 1898, after the evidence had all been adduced,—of which there was a great deal,—the instructions given by the court as above

set out, and the arguments of counsel, the case was submitted to the jury, and a verdict for \$26,125 rendered in favor of the plaintiffs; and upon the same day a judgment was rendered thereon, to reverse which judgment the writ of error in this case was sued out.

J. W. S. Cochran and William Pinkney Whyte, for plaintiff in error.
Julian J. Alexander and B. A. Richmond, for defendants in error.

Before GOFF, Circuit Judge, and PAUL and WADDILL, District Judges.

WADDILL, District Judge (after stating the facts). The assignments of error are 11 in number, but it will not be necessary to take them up in detail. They are substantially covered by the following statements: That the court erred—First, in permitting a letter written by deceased to his wife, dated May 25, 1897, the day before his death, to be given in evidence by the defendants in error and read to the jury; second, in amending and qualifying the fifth instruction of the plaintiff in error in reference to suicide, whereby it is claimed that the court expressed to the jury an opinion upon the weight of evidence that resulted prejudicially to the plaintiff in error; third, in holding that the act of the general assembly of Maryland of 1894 was applicable to the policy sued on, and that under the law the insurer and the insured could not contract as to the materiality of statements in the contract of insurance; fourth, in deciding that the clause in the application for insurance as to the insured not having been rejected by any "company, association, or society" did not refer to his proposed application for membership in the Frostburg Council of the Royal Arcanum; fifth, in determining that the ailments or diseases covered by or referred to in the application for insurance were not merely temporary in character, but of a serious and permanent nature. This case depended mainly upon questions of fact, which, when fairly submitted to the jury, and by them determined, are conclusive. The verdict having been found for the defendants in error, it will be presumed that the cardinal facts were all found in their favor; and unless some error of law, either in the admission or exclusion of evidence, or the giving or rejection of instructions, contributed to that result, the judgment of the lower court should not be disturbed.

1. The question of the admission in evidence of the letter written by deceased to his wife depends largely upon the facts and circumstances of the case, and what took place pending the trial. The defense set up by the plaintiff in error was that the insurance policy had been obtained with intent to defraud the insurance company, by the insured deliberately taking his life, and that he did commit suicide. Upon this defense, issue was joined, and the jury was called upon to determine whether the deceased had deliberately taken his own life in furtherance of a contemplated scheme to defraud the company. In support of this defense a long chain of facts and circumstances, showing the conduct, manner, habits, appearance, and state of mind of deceased for some weeks before his death, what he did and said during this time and up to the hour of his death, were submitted to the jury by the plaintiff in error, with a view of showing that he did contemplate suicide. The plaintiff in error further offered in evidence

the contents of a letter (the original being destroyed) written by deceased to one Walter F. Coymer two or three days before he died, in which deceased directed Coymer to pay certain rent due him to his (deceased's) wife, at Frostburg, and that deceased had never done so before. This was also introduced with a view of showing that deceased was deliberately arranging for the fraud set up by the defense. In rebuttal of this, the defendants in error offered, and the court admitted in evidence, the letter which forms the basis of this exception, written by deceased to his wife, dated the day before his death, and mailed in the early morning of that day, which letter was duly received by his wife at Frostburg. We think that this letter, which was entirely inconsistent with the theory of contemplated suicide, was properly submitted to the jury. If it was not a part of the res gestæ, it was in rebuttal of evidence offered by plaintiff in error as to the conduct and demeanor of the deceased covering the very period of time involved. It would seem that the defendants in error should have been allowed to introduce evidence of the statements and actions of deceased during the very time that his conduct, actions, and behavior were called into question by the insurance company; and we therefore think that the letter is clearly admissible, under the circumstances. The evidence of the plaintiff in error as to what the deceased said and did was not introduced upon the theory of admissions against interest on the part of deceased, as it did not, in the main, prove or tend to prove anything of that character. It was, on the contrary, introduced with a view of showing the condition or state of mind of deceased at the time, and the motives with which he acted. Just what constitutes the res gestæ is sometimes difficult to determine. 1 Greenl. Ev. § 108. In Thomas' Adm'r v. Lewis, 89 Va. 1, 57, 15 S. E. 389,—a celebrated and leading case on the subject of gifts *donatio mortis causa*,—the contestants offered evidence of the donee's conversations had two or three days after the death of the donor, tending to show that she did not then claim or have in her mind the existence of the gift. The court, on the distinct ground that it was a part of the res gestæ, and in rebuttal of the evidence for contestants, permitted the donee to prove that she and her companion spoke of the fact of the gift, and of the declarations of the donor in her favor, to third persons, on the day of, and before, the death of the donor. Curtis v. Moore, 20 Md. 93; Lund v. Inhabitants of Tyngsborough, 9 Cush. 36; Rawson v. Haigh, 2 Bing. 104; Aveson v. Kinnard, 6 East, 188; Bateman v. Bailey, 5 Term R. 512.

2. The action of the court in commenting upon the evidence as to suicide in its amendment to the fifth prayer of plaintiff in error is free from error of a material character. In federal courts considerable latitude is given to the trial judge in passing upon questions of evidence, and he has the right to express his opinion. Improvement Co. v. Munson, 14 Wall. 449. He may direct a verdict as to him seems proper from the evidence, and necessarily must, in giving instructions, where the case is submitted to the jury, make some statement bearing upon the evidence, though, as far as possible, he should avoid making any comment upon the weight of evidence that would tend to influence the jury in reaching a conclusion thereon. In Lovejoy

v. U. S., 128 U. S. 173, 9 Sup. Ct. 58, Mr. Justice Gray, delivering the opinion of the court, said:

"It is established by repeated decisions that a court of the United States, in submitting a case to the jury, may, in its discretion, express its opinion upon the facts, and that such opinion is not reviewable on error, so long as no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury." Haines v. McLaughlin, 135 U. S. 584, 10 Sup. Ct. 876; Simmons v. U. S., 142 U. S. 155, 12 Sup. Ct. 171; Meyer v. Cadwalader, 60 U. S. App. 547, 32 C. A. 456, 89 Fed. 963.

The language of Mr. Justice Strong in the case of *Evanston v. Gunn*, 99 U. S. 660, 668, seems peculiarly appropriate to this case. He said:

"Sentences may, it is true, be extracted from the charge, which, if read apart from the connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled."

The words of the court in this case, "there is but little in the facts and circumstances of Percy's drowning which to my mind supports the theory of premeditated suicide by intentionally riding his horse into the canal," if standing alone, might possibly be objectionable, as indicating a purpose on its part to take from the jury the consideration of the question of suicide; but, when read in connection with what preceded and what followed, we feel sure that the jury could not have understood that the court meant to take from them the full consideration of the question of suicide. After granting the prayer of plaintiff in error on the question of suicide, the court added:

"The plaintiffs' second prayer asked me to say to the jury that upon the issue of suicide there was no legally sufficient evidence from which they can find that Percy committed suicide. I refuse this prayer, and leave the question of suicide to the jury. It is a matter with which a jury of twelve men is better able to deal than a single judge. Suicide is a matter generally incapable of direct proof, and as to which the jury are entitled to draw such reasonable inferences as the proven facts justify to the minds of men experienced in the affairs of life."

Then follows the language excepted to, quoted above, still further qualified as follows:

"I do say to the jury, however (leaving always entirely to them the decision of the question), that, so far as I remember the testimony, there is but little in the facts and circumstances of Percy's drowning which to my mind supports the theory of premeditated suicide."

Further in the same instruction the court said:

"But the circumstances which tend to prove that Percy intentionally cast himself into the canal, or intentionally permitted himself to drown while in the canal, seem to me to be slight; but I leave this issue to the jury."

Taking this charge to the jury as a whole, it is free from the objection of which plaintiff in error complains; and, from our view of the case, plaintiff in error was not prejudiced by the language of the court on the subject of suicide.

3. Did the trial court err in giving instruction No. 1 of defendants in error, as amended by it, and in holding that the act of the Maryland legislature of 1894 was applicable to the policy sued on? In considering this question it should be borne in mind that the contract of insurance was made in the state of Maryland, by a citizen of that state, with the plaintiff in error, a corporation of the state of Pennsylvania, duly

chartered by, and doing business under the laws of, that state. The law of the state of Maryland passed in 1894, above referred to, declares that a misrepresentation or an untrue statement by an applicant for life insurance, made in good faith, shall not work a forfeiture, or be a ground of defense in a suit on a policy of life insurance, unless the misrepresentation or untrue statement relates to a matter material to the risk. The law of the state of Pennsylvania (Act June 23, 1885; P. L. 134) is to the same effect. Plaintiff in error insists that the trial court erred in giving effect to the Maryland statute, because it only covered policies containing warranties, and that, notwithstanding these plain provisions of the statute, the insurer and the insured could contract as to the materiality of any statement made a part of the contract. We think the statute is clearly applicable to the policy sued on; that, whether in the application the word "warrant" is actually used or not, the language is sufficiently broad to constitute a warranty. *May, Ins. § 156*; *White v. Society*, 163 Mass. 108, 39 N. E. 771; *Burlegh v. Insurance Co.*, 90 N. Y. 220. The supreme courts of the states of Maryland and Pennsylvania have each passed upon the effect of these statutes, and held that the "misrepresentation" or "untrue statement" contained in an application for insurance, and which is sought to be made a ground of defense, must be of some material matter, and that the parties cannot, in the face of the law, contract that immaterial matter shall be material, and that contracts of insurance must be made in subordination to the statutes, and can have the legal effect which the law attributes to them, and none other. We do not understand upon what principle of law insurance companies can claim a right to contract to disregard a plain provision of a statute made for their guidance. *Insurance Co. v. Ficklin*, 74 Md. 172, 185, 21 Atl. 680, and 23 Atl. 197; *Hermany v. Association*, 151 Pa. St. 17, 24, 24 Atl. 1064; *Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co.*, 19 C. C. A. 286, 72 Fed. 418; *Id.*, 43 U. S. App. 75, 19 C. C. A. 316, and 73 Fed. 653. The supreme court of the United States, in the case of *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87, recently had this general subject under review, and decided that under the law of the state of Iowa declaring that a solicitor for insurance should be considered the representative of the company, and not of the person taking the insurance, the parties could not contract to the contrary in order to make the solicitor the representative of the insured, regardless of anything contained in the policy. *White v. Society*, 163 Mass. 108, 39 N. E. 771; *Levie v. Insurance Co.*, 163 Mass. 117, 39 N. E. 792; *Hogan v. Insurance Co.*, 164 Mass. 448, 41 N. E. 663. It is manifest that these statutes were passed to prevent the defeat of the ends of justice by mere technicality. They are remedial in character, and should be given such liberal and reasonable interpretation as would insure a judicial investigation, in the ordinary way, of whether the particular statement alleged to be untrue or a misrepresentation was material to the risk. If the statement is found to be material, the penalty of forfeiture of the policy will follow, whether the answer be made in good faith or not. Should the question untruly answered relate to something found not to be material, and the answer be made in good faith, then the breach of warranty works no

prejudice to the insured or his representatives. We hold that there is no error in the first instruction of the lower court, and agree with the learned judge that the questions of materiality and good faith in the answers to questions propounded in the application for insurance are not always to be left to the consideration of the jury, but when such materiality is obvious, and the answers in the application are expressly made the basis of the contract, it is a matter for the court to pass upon. Otherwise, or when the materiality depends upon disputed facts, it should be determined by the jury. We have examined the two recent cases in the supreme court of Pennsylvania on this subject, to which our attention was called, of *Lutz v. Insurance Co.*, 40 Atl. 1104, and *March v. Insurance Co.*, Id. 1100, in which the act of the 23d of June, 1885 (P. L. 134), mentioned above, is further considered. We do not see anything in either of these decisions which changes or materially alters the doctrine laid down in the case of *Hermany v. Association*, 151 Pa. St. 17, 24 Atl. 1064, so far as affects this case. The views of that court coincide with those herein expressed upon the questions of materiality of representation or statement,—as to when determined by the court, and when by the jury.

4. We will now consider the question of whether the application for certificate of membership in the Frostburg Council of the Royal Arcanum was within the scope of the questions and answers made thereto by the deceased in his application for insurance, copied in full in the statement of facts of the case. This subject was very fully discussed in the case of *Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co.*, 19 C. C. A. 293, 72 Fed. 419. Judge Taft, speaking for the United States circuit court of appeals, Sixth circuit, said:

"The circuit court was right in holding that within the scope of the question: 'Have you your life insured in this or any other company? If so, give the name of each company, and the kind and amount of the policy,'—were not included Schardt's certificates of insurance in the Knights of Pythias and Royal Arcanum, mutual aid associations. It will be conceded that these associations, which are primarily for social and charitable purposes, and for securing efficient mutual aid among their members, are not usually described as insurance companies. That the certificate which they issue to a member, insuring, upon certain conditions, the payment of a sum certain to the member's representatives on his death, has much resemblance, in form, purpose, and effect, to an insurance policy, is true; and, if we were called upon to give the application a wide and liberal construction in favor of the insurance company, we might properly hold that the question embraced in its scope every association or individual contracting to pay money to one's representatives in the event of his death. Such a construction might be warranted by the probable purpose of the question to enable the company to judge how great a motive his life insurance would furnish the applicant for self-destruction or the fraudulent simulation of death. But we are here considering a contract and application drawn with great nicety by the insurance company, and framed with the sole purpose of eliciting from the insured full information of all the circumstances which the company's long experience has led it to believe to be valuable in calculating the risk. We cannot presume the company to have been ignorant of the fact that large numbers of persons have taken out life insurance in mutual benefit associations, which are not ordinarily described as insurance companies, and that doubt has often arisen whether the contracts they issue are properly or technically described as life insurance at all. *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87. Having in view the well-established rule that insurance contracts are to be construed against those who frame them (*Indemnity Co. v. Dorgan*, 16 U. S.

App. 290, 309, 7 C. C. A. 581, and 58 Fed. 945; *Insurance Co. v. Crandal*, 120 U. S. 527, 533, 7 Sup. Ct. 685), and that any doubt or ambiguity in them is to be resolved in favor of the insured, we conclude that a certificate in a mutual benefit and social society was not within the description, 'policy of life insurance in any other company.' We are fortified in the conclusion by the fact that this contract is a Pennsylvania contract, and the courts of that state have uniformly held that mutual aid associations and insurance companies are so clearly to be distinguished that statutes applying to insurance companies and their policies do not have application to mutual aid associations, and the certificates of life insurance which they issue to their members. In *Dickinson v. A. O. U. W.*, 159 Pa. St. 258, 28 Atl. 293, the defendant association sought to avoid its certificate on the ground of misrepresentation in the application. The plaintiff objected to the introduction of the application, because it had not been attached to the policy in accordance with the Pennsylvania statute which forbade the introduction by an insurance company, in defense of a suit on its contract of insurance, of an application not attached to the policy when issued. It was held that the statute did not apply, because the defendant association was not an insurance company, but belonged to the distinctly recognized class of organizations known as 'benevolent associations.' See, also, *Association v. Jones*, 154 Pa. St. 99, 26 Atl. 253; *Commonwealth v. Equitable Ben. Ass'n*, 137 Pa. St. 412, 18 Atl. 1112; *Commonwealth v. National Mut. Aid Ass'n*, 94 Pa. St. 481; *Lithgow v. Supreme Tent (Pa. Sup.)* 30 Atl. 830; *Theobald v. Supreme Lodge*, 59 Mo. App. 87; *Sparks v. Knight Templars*, 1 Mo. App. Rep'r, 334. It is true that in other states it has been held that such associations are within the description of 'insurance companies,' and that the contracts they make are properly termed 'policies,' as those terms are used in the statutes of such states. *State v. Nichols*, 78 Iowa, 747, 41 N. W. 4; *Insurance Order v. Lewis*, 12 Lea, 136; *Assurance Fund v. Allen*, 106 Ind. 594, 7 N. E. 317; *Com. v. Wetherbee*, 105 Mass. 159; *Sherman v. Com.*, 82 Ky. 102. In this conflict of authority, we must lean towards the decisions of the state courts of that state, according to the laws of which we must construe this contract, and, for the reasons already given, hold that certificates of membership in mutual benefit benevolent associations were not embraced in the question asked by the company in that state."

We have given this full extract from the opinion of Judge Taft because it treats this difficult and comparatively new question, in a case practically identical with the one under consideration, with much force, ability, and clearness; and we concur in his reasoning and conclusion as to what the law is, and adopt the same as applicable to this case.

It will be observed that the learned judge in the court below, in considering this question (court's instruction No. 4), was embarrassed by the lack of evidence as to the character of the Royal Arcanum Association. He said:

"It appears to be a secret order of a beneficial character, membership in which is attended with some benefit payable in case of death."

Can it be said from this description that the certificate of membership in this secret order came within the language used in the application for policy: "That I have never made application for insurance on my life to any company, association, or society"? "Give name of each company, date of application, kind of policy, and amount applied for." This last inquiry, read in connection with the first, shows clearly that it was a policy in some "company" about which information was sought, and that in the first inquiry the words "company, association, or society" all referred to one and the same thing, viz. to an insurance company; and, besides, while, in their broader sense and acceptation, the words "company, association, or society" may cover

a beneficial order, it will not be maintained that in ordinary life insurance parlance they mean any such thing. An "insurance company," an "insurance association," or "insurance society," all mean one and the same thing; that is, regular insurance. Hence, in the second inquiry, the name of each "company" was alone requested. The plaintiff in error itself is an insurance association, as distinguished from a company, and there are companies and societies in abundance; for instance, "The Equitable Life Assurance Society," "The New York Life Insurance Company," etc., all meaning the same thing. We do not feel that there can be any serious doubt as to the correctness of this conclusion,—particularly when, as we have shown, questions of doubt and ambiguity as to the meaning of the policy should be resolved against the company issuing the same. It was at least the duty of the plaintiff in error to show, in the court below, if it desired to bring the certificate of membership within the language used in the application for insurance in its company, what the insurance in the Royal Arcanum, if any, was. It does not appear in the record that the deceased ever applied for insurance therein, or for any policy therein, but merely for a "certificate of membership" in the order, which was a secret beneficial order; and in so far as there appears to have been any profits to be derived therefrom, as shown by the application for membership, it is in these words: "I direct that, in case of my decease, all benefit to which I may be entitled from the Royal Arcanum be paid Ann E. Percy." Nothing is shown as to what amount was to be received, or whether, as a matter of fact, the deceased would have been entitled at his death to any benefit arising from this secret social and beneficial order. The facts bearing upon the application for membership in the Royal Arcanum and the rejection of the applicant are meager in the record. The application for membership in the Royal Arcanum at Frostburg seems to have been made in July, 1887,—nearly nine years before the issuing of the policy sued on. The local medical examiner examined the deceased, and certified to his being a good risk, and that he would probably live out his estimated expectancy. Subsequently it seems that the application was rejected by the lodge, for what cause is not stated. At the trial of this case, however, the chief medical examiner of the order, from Boston, was examined as a witness for the plaintiff in error, who produced the original application for membership, taken from the archives of the order at Boston, with a pencil memorandum made thereon by the chief medical examiner at that time, as follows: "Rej. Aug. 20; Lt. Wt., High Sp. of U,"—which means, as interpreted by the present chief medical examiner: "Rejected Aug. 20th; Light weight, too high specific gravity of urine." It does not appear that there was good reason for the rejection, and it is quite clear that the present medical examiner would not have made such rejection. It seems that deceased was 5 feet 6 inches in height, and weighed 119 pounds, at the time his application was sent in. The order's standard weight for a person of that height was 140 pounds, though they accepted risks as low as 116 pounds, 3 pounds less than the weight of deceased at that time. And, so far as the albumen in the urine was concerned, while it was 1038, and 1020 was normal, it was proved

that it was liable to change at any time; and there was nothing to show that the specific gravity at that time might not have been due entirely to some temporary cause, rather than from organic trouble. The matter of specific gravity of urine may or may not be an important element. If the result of organic disease, and progressive in its operation and effect, the materiality of its existence at one time would clearly appear as to any subsequent period in the progress of its operations upon the human system; but in this case it appears that a full medical examination was had before the policy in controversy was issued by the plaintiff in error, and the absence of symptoms which are claimed to have caused a rejection upon the examination for membership in the Royal Arcanum would clearly indicate the immateriality of both the question and answer as showing that the trouble, if any, was not organic, and had ceased to exist. The reason for the action thus taken by the order was never communicated to any one, and it is perfectly certain that deceased was never informed as to it; nor does it appear from the evidence that he was ever advised of his rejection as a member of the order. As to his rejection on account of health, the physician by whom he was examined certified his risk as being a good one, and it does not appear in the evidence in this case that he ever had any intimation to the contrary. Hence, whatever misstatements he may have made as to a physician not having reported unfavorably upon his application for life insurance, it was innocently made, so far as his application for membership in the Royal Arcanum was concerned. *Moulor v. Insurance Co.*, 101 U. S. 708, 710. Further, it does not appear that any report was ever made adversely to him on an application for insurance of any kind. The fourth instruction therefore seems to us to be free from error. *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87; *Commonwealth v. Equitable Ben. Ass'n*, 137 Pa. St. 412, 18 Atl. 1112; *Association v. Jones*, 154 Pa. St. 99, 26 Atl. 253; *Theobald v. Lodge*, 59 Mo. App. 87.

5. The learned judge of the court below instructed the jury, in effect, that statements in the application of deceased as to his diseases and sickness were material, and that he was obliged, in good faith, to correctly state the facts so far as he knew them, but that he was not obliged to remember and state all of his slight ailments or temporary derangements of the functions of his organs, from which he had recovered without impairment of his general health, and that if, upon the whole evidence, they were satisfied that the insured, at the time he signed the application for insurance, had any disease serious in its character, likely to affect his general health, and failed to remember the same, then the policy would be avoided. We think this instruction correctly states the law. In the fifth clause of his application, the insured declared that he had never been afflicted with any disease, sickness, ailment, or complaint, except as stated, and qualified the statement by adding: "Nothing serious; dyspepsia about 20 years ago; ankle broken in 1847." He gave the name of his doctor, and also qualified it by stating in the sixth clause that about 1895 Dr. Price prescribed for him for being hurt while riding horseback; "irritation of the bladder; slight colic several times." This state-

ment by the insured of his health, and the temporary ailments and afflictions that he had, shows that the insurer and the insured each had in mind the inquiry after diseases serious in their character, and affecting the general health, and not merely temporary afflictions; and from the evidence it does not appear that the insured made any materially incorrect statement of any kind. These temporary ailments specified do not appear to have been serious in their character, and the insurance company was advised as to them before entering into the policy; and it nowhere appears from the evidence that the deceased was afflicted with a serious disease of any kind, or that he made misrepresentation or false statement as to his health in any respect. Authority in support of these views is abundant. Mr. Justice Harlan, in discussing the question of ailments in Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 258, 5 Sup. Ct. 119, 123, said:

"Unless he had an affection of the liver that amounted to disease (that is, of a character so well defined and marked as to materially derange for a time the functions of the organ), the answer, that he had never had a disease called 'affection of the liver,' was a 'fair and true' one; for such an answer involved neither fraud, misrepresentation, evasion, or concealment, and withheld no information as to his physical condition with which the company ought to have been made acquainted." Indemnity Co. v. Dorgan, 16 U. S. App. 290, 7 C. C. A. 581, and 58 Fed. 945; Insurance Co. v. Wise, 34 Md. 598; Insurance Co. v. Moore, 6 App. Cas. 648; Cushman v. Insurance Co., 70 N. Y. 76, 77; Society v. Winthrop, 85 Ill. 542; Brown v. Insurance Co., 65 Mich. 314, 315, 32 N. W. 610.

The assignments of error founded on the refusal of the court below to grant the instructions asked for by the plaintiff in error, referring to the questions we have discussed, and not covered by the instructions given, are without merit, for the reasons we have assigned in sustaining the instructions to the jury in the court below. The case seems to have been fully submitted, with a clear and comprehensive statement of the law, to which, as a whole, no just exception can be taken; and we find no error in the judgment of the lower court for which it should be reversed, and the same is affirmed.

WAGNER et al. v. J. & G. MEAKIN, Limited.¹

(Circuit Court of Appeals, Fifth Circuit. January 24, 1899.)

No. 670.

1. FOREIGN CORPORATIONS—REGULATION BY STATE—DOING BUSINESS IN STATE.

A petition by a foreign corporation, setting up as a cause of action certain foreign bills of exchange drawn on, and accepted by, defendants, residents of Texas, and also an account for goods sold and delivered by plaintiff to defendants, does not show that plaintiff was engaged in business in Texas, within the meaning of the statute of that state, so as to require, to enable plaintiff to maintain the action, an allegation that it had previously filed a copy of its charter with the secretary of state and obtained a permit to engage in business.²

¹ Rehearing denied February 21, 1899.

² As to status of foreign corporations, see note to *Silver Mines v. Brown*, 7 C. C. A. 419.

2. SAME—FOREIGN COMMERCE.

An answer in such action, alleging that defendants, as agents for plaintiff, solicited orders in Texas for merchandise to be shipped by plaintiff from England to the purchasers, would not show such facts as would render plaintiff subject to the state statute requiring foreign corporations to file a copy of their charter and obtain a permit before engaging in business in the state, as the business shown would constitute commerce between a foreign country and the United States, not subject to state regulation.

3. CONTRACT—CONSIDERATION.

An answer alleging that plaintiff agreed to fill orders for merchandise obtained by defendants, but afterwards, after defendants had obtained certain orders, notified them that it would not fulfill such agreement, there being no allegation of any agreement on the part of defendants to obtain orders, nor that they had presented any to be filled prior to such notification, does not show a contract resting on any consideration, for the breach of which damages are recoverable.

In Error to the Circuit Court of the United States for the Western District of Texas.

R. L. Summerlin, Oscar Bergstrom, S. G. Newton, and W. W. Walling, for plaintiffs in error.

Thos. Haynes, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

McCORMICK, Circuit Judge. The defendant in error brought this action against the plaintiffs in error in the circuit court for the Western district of Texas. On May 7, 1897, it presented its first amended original petition, which, by the practice in that state, takes the place of its former pleading. This amendment states the plaintiff's case as follows:

"Now comes the plaintiff, J. & G. Meakin, Limited, by its attorney, and by leave of court files this its first amended original petition in lieu of its original petition filed herein on March 16, 1897, and, complaining of Adolph Wagner, Charles J. Chabot, and George A. Chabot, defendants, says: The plaintiff is a corporation duly incorporated under the laws of the United Kingdom of Great Britain and Ireland, is a citizen of said United Kingdom, and has its principal office at Hanley, county of Stafford, England, in said United Kingdom. That the defendants are citizens of the state of Texas, and reside in the county of Bexar, city of San Antonio, in the Western district of said state, and that the defendants were, at the dates hereinafter mentioned, and still are, partners in the trade, doing business under the firm name of Wagner & Chabot. That heretofore, to wit, on the 14th day of February, 1896, the plaintiff, at said Hanley, England, made a certain foreign bill of exchange of that date, directed to the defendants in their firm name, and thereby requested said defendants to pay to the order of the plaintiff, six months after said date, the sum of five hundred and ninety-three pounds, eight shillings, and eight pence, for value received, and delivered the bill of exchange to the defendants, who afterwards accepted the same, payable at San Antonio; by reason whereof the defendants became liable and promised to pay the plaintiff the sum of money specified in said bill of exchange, according to the tenor and effect thereof and their said acceptance. That afterwards, to wit, on July 15, 1896, before said bill of exchange became due, the defendants requested of plaintiff an extension of four months, because they said collections were poorer than ever before in their experience, and their cash resources were therefore rather tight; the defendants promising, if granted said extension, to pay interest. That the plaintiff granted said extension, and duly presented said bill of exchange on the 17th day of De-

cember, 1896, for payment, but the defendants refused to pay the same; whereupon it became necessary to have the same protested for nonpayment, which the plaintiff caused to be done, and paid therefor, and for the notices of protest, four dollars, whereby the defendants became liable and promised to pay the plaintiff said sum of \$4. That, to wit, on the 30th day of May, 1896, the plaintiff, at said Hanley, England, made another foreign bill of exchange, of that date, directed to the defendants in their firm name, and thereby requested the defendants to pay to the order of the plaintiff, six months after said date, the sum of two hundred and forty pounds and four shillings, for value received, and delivered said bill of exchange to the defendants, who afterwards accepted the same, in San Antonio; by reason whereof the defendants became liable and promised to pay plaintiff the sum of money specified in said bill of exchange, according to the tenor and effect thereof and their said acceptance. That afterwards, to wit, on the 23d of November, 1896, the plaintiff presented said bill of exchange to the defendants for payment, but the defendants refused to pay the same; whereupon it became necessary to have the same protested for nonpayment, which the plaintiff caused to be done, and paid therefor, and for the notices of protest, four and one-half dollars, whereby the defendants became liable and promised to pay plaintiff said sum of \$4.50. That the plaintiff is still the owner and holder of the two said bills of exchange. That, to wit, on July 1, 1896, the plaintiff, at the special instance and request of the defendants, sold and delivered to them certain goods, wares, and merchandise, more particularly described in the account hereto annexed and made a part hereof, which account is verified under oath, and that the defendants promised to pay the plaintiff, six months after said date, the several prices charged for the several items in said account, as well as the inland carriage to Liverpool; the Liverpool charges, insurance, and interest, as specified in said account, amounting in all to two hundred and eighty-eight pounds, twelve shillings, and five pence. That each pound mentioned in said bills of exchange and in said verified account is equivalent to \$4.90 in lawful money of the United States; each shilling, to $24\frac{1}{2}$ cents; and each penny, to $2\frac{1}{24}$ cents. That, therefore, the amount due the plaintiff upon the bill of exchange first above set out, including protest fees, is two thousand nine hundred and eleven and $\frac{82}{100}$ dollars in lawful money of the United States, with legal interest; and the amount due the plaintiff upon the second bill of exchange above set out, including protest fees, is, in lawful money of the United States, eleven hundred and eighty-one and $\frac{48}{100}$ dollars, with legal interest; and the amount due the plaintiff upon said verified account is, in lawful money of the United States, fourteen hundred and fourteen and $\frac{24}{100}$ dollars. That the aggregate amount due the plaintiff from the defendants is \$5,507.54, with legal interest. The said bills of exchange and said account are long since due, and, though often requested, the defendants refuse to pay the same, or any part thereof, to plaintiff's damage ten thousand dollars."

And thereupon it prayed for judgment against each of the defendants, and against the firm of Wagner & Chabot, for its debt, with interest and for costs.

The defendants excepted to the pleadings of the plaintiff, on the ground that it appears from the plaintiff's petition that it is a foreign corporation, doing business in the state of Texas, and was doing business at the time the cause of action accrued; that it does not appear that the plaintiff corporation has filed its articles of incorporation, and obtained a permit to do business, in Texas, as provided by law; nor does it appear from the petition that the transaction set out and sued upon by the plaintiff constituted either interstate or foreign commerce.

Subject to the action of the court on the foregoing exception, the defendants answered, tendering the general issue, and, further specially answering, say:

"That in the matters and things set out in plaintiff's petition, and at the times thereof, the plaintiff was a foreign corporation, incorporated under and by virtue of the laws of the kingdom of Great Britain, and was doing business in the state of Texas, through the defendants herein as its agents, and that the business transacted and sued upon by plaintiff was business transacted in the state of Texas in violation of the laws thereof, and that the plaintiff had not then filed with the secretary of state of the said state of Texas its articles of incorporation, and had obtained no permit to do business in the state of Texas, and that, therefore, it cannot recover for the matters and things set out in said petition. Further answering, these defendants say that, during the years 1894, 1895, and 1896, they were wholesale dealers in, and manufacturers' agents of, china, crockeryware, and earthenware of all descriptions, located in the city of San Antonio, and carrying on such business through traveling representatives in the state of Texas and in the republic of Mexico. That during the years 1894 and 1895 the defendants purchased from the plaintiff its different classes of manufactured crockery, ironstone, china, and earthenware, upon the agreement and condition that the defendants would and should take orders from retailers of such goods in the state of Texas and the republic of Mexico, as well as goods desired by themselves for use in their retail business in the city of San Antonio. That the plaintiff should ship said goods, wares, and merchandise direct from its place of manufacture, from Hanley, in the county of Staffordshire, England, by way of New Orleans, to San Antonio, Texas. All goods intended for shipment on orders taken by the defendants to be crated separate, and marked as the defendants desired, so as to enable the defendants to break bulk at New Orleans, and ship them in car-load lots, at a common through rate, to all common points in Texas where such orders had been taken. All such shipments to be billed direct to the defendants, and to be paid for by the defendants at the prices set out in the schedule hereto attached, marked Exhibit No. 13. In addition to which prices to be paid to the plaintiff, the defendants were to pay all costs of transportation and delivery to the consignees. In accordance with which agreement these defendants, at their own cost and expense, employed traveling salesmen to solicit such orders in the state of Texas and the republic of Mexico, and that all such orders so taken were filled, the goods packed in crates, marked, and shipped as directed by the defendants. That in the latter part of the year 1895 the plaintiff desired to discontinue its contract and agreement to fill all orders taken by the defendants in the state of Texas, whereupon these defendants sent their agent, Mr. G. R. Spielhagen, to the plaintiff's place of business, at Hanley, England, to arrange with it for the continuation of its contract of 1894 and 1895. That the said G. R. Spielhagen did go to England, with a view of securing such extension of the contract between themselves and the plaintiff, and on or about the 1st of November the plaintiff entered into a contract with the defendants, through its agent and business manager, J. H. Meakin, to extend the contract for and during the year 1896,—that is to say, that these defendants should solicit such orders for goods in the state of Texas and the republic of Mexico, have the goods manufactured by plaintiff, the plaintiff agreeing to fill and ship all such orders, and to pack such goods in crates as might be provided in said orders, and to be marked for specification, so as to enable the defendants to break bulk at New Orleans, and then transport them in car-load lots to the purchasers at such points in Texas, and the defendants to pay therefor the prices set out in the schedule hereto attached, marked Exhibit No. 13, together with the freight and expense for shipping and delivering to the consignees, the defendants to have, as compensation therefor, the difference in such contract price and the expenses and the price at which the goods were sold to such customers; the plaintiff also agreeing to furnish, and did furnish, the defendants samples of its goods so manufactured, for the use of defendants' salesmen in taking such orders, and also agreed to furnish the defendants not less than thirty car loads of said goods to fill such orders as the defendants then had or would make during the season; of which contract these defendants were immediately notified by their said agent, and these defendants, by letter dated the 30th day of November, 1895, and other letters written to the plaintiff, acknowledged the making of such contract,

indicating their satisfaction therewith. Such contract entered into by and between the plaintiff and the defendants was a verbal contract, and recognized in their correspondence. That immediately thereafter—that is to say, about the 1st of January, 1896—the plaintiff did forward to the defendants such assortment of samples of goods to be sold by them, and, in pursuance of such agreement for the shipment and delivery of such samples, the defendants did immediately employ salesmen to go to different parts of the state of Texas, as well as to the republic of Mexico, to solicit such orders and canvass such goods; it being understood, by and between the parties, plaintiff and defendants, that the defendants would employ and should solicit orders in accordance with said agreement. That two salesmen were employed and canvassed for two months, and one salesman was employed and canvassed for one month. That the reasonable value of the services of such salesmen, and the amount paid by the defendants to them, was one hundred and twenty-five (\$125.00) dollars each, and seven and $\frac{5}{100}$ (\$7.50) dollars per day for expenses each. That notwithstanding the contracts as entered into by and between the plaintiff and the defendants, as heretofore set out, the plaintiff, at the instance of competing crockery dealers in the United States, withdrew from its said contract with the defendants, and on or about the 20th day of February, 1896, the defendants received written notice from the plaintiff that it would no longer fill orders for the direct shipment of goods to the defendants' customers in Texas. That, upon receipt of said notice, these defendants sent out notices to their traveling salesmen to discontinue taking such orders, which notices reached their salesmen in the different parts of Texas between the 10th and 20th of March, 1896, after which time the defendants' said salesmen took no further orders. That during such time,—that is to say, from the 1st day of January, 1896,—and up to the time such notices were received by the salesmen, they had, in accordance with said contract, taken large orders for the goods manufactured by the plaintiff, and which were to be shipped to the different parties ordering the same in the state of Texas. That during said time they had sold twelve car loads of such goods, and file herewith a complete statement of the goods so sold, the parties to whom sold, and the prices at which they were sold are hereto attached, marked Exhibits Nos. 1 to 12, which are hereby referred to and prayed to be taken as a part of this answer. That such orders were all forwarded to the plaintiff to be filled in accordance with said contract, but the plaintiff, after receiving such orders taken before the receipt of notice of its withdrawal from the contract, failed and refused to fill the same, to these defendants' great damage. That, if such orders had been shipped as required by said contract, these defendants would have been compelled to pay the freight and other expenses of delivery of said goods, which amounted to the following percentage on the different kinds of goods named in said orders, to wit: On white granite, 60 per cent. on English cost; plain print, $56\frac{1}{2}$ per cent. on English cost; enameled, traced, $56\frac{1}{2}$ per cent. on English cost; enameled, no gold, $56\frac{1}{2}$ per cent. on English cost; gold illuminated, $56\frac{1}{2}$ per cent. on English cost; enameled, full gold, $56\frac{1}{2}$ per cent. on English cost. That the difference between the prices which these defendants agreed to pay to plaintiff for such goods and the price for which they were sold, after deducting all expenses of freight and delivery, is three thousand seven hundred and eighty-six and $18\frac{1}{100}$ (\$3,786.18) dollars, which profit these defendants would have realized, and is the sum in which they have been damaged on account of the plaintiff's failure to comply with its said contract to ship said goods. That all of said purchasers and customers were solvent, ready, willing, and able to pay for said goods had they been delivered as per contract. That the bills of exchange set out in plaintiff's petition and sued upon, as well as the open account therein set out, were executed to the plaintiff, and the goods purchased from the plaintiff, in pursuance of, and in part carrying out, the contract set out between the plaintiff and the defendants requiring such sales and shipments of goods, and are therefore a part and parcel of the transaction between the plaintiff and the defendants as set out and involved in plaintiff's said petition, and for breach thereof as set out in this answer. That the defendants were unable to obtain the crockery and goods to be manufactured by the plaintiff, for the purpose of filling said orders, from any other

source, and same could not be obtained in the market, and therefore these defendants were damaged in the said sum so above set out. These defendants further aver and represent that if the plaintiff had not violated the contract, and withdrawn therefrom, these defendants, in pursuance thereof, could have sold in the state of Texas at least thirty car loads of the goods so to be manufactured by the plaintiff, and would have realized thereon a net profit of ten thousand dollars, and by reason thereof these defendants have been damaged in the further sum of ten thousand dollars. Further answering, these defendants say that the plaintiff is a foreign corporation, and has no property in the state of Texas, nor, so far as these defendants know, in the United States of America, subject to execution. And thereupon they pray for judgment over against the plaintiff for the amount of the damages alleged, together with interest, and for costs of suit."

To this pleading of the defendants, the plaintiff excepted, because it does not show any valid contract between the plaintiff and the defendants the breach of which would give the defendants cause of action for damages; that, plaintiff's suit being founded on a certain liquidated demand, the answer sets up a claim for unliquidated damages, and the allegations do not show that the claim arises out of, or is incident to or connected with, the plaintiff's cause of action; that so much of the answer as alleges that the appointment of the defendants as special agents of the plaintiff was through a correspondence by mail is bad, because the dates of the correspondence making such appointment, and the substance thereof, should be stated, or the letters should be attached, so as to apprise plaintiff of the proof necessary to be produced to rebut the same; that the allegation that the plaintiff has never filed a certified copy of its charter with the secretary of state of Texas, nor obtained a permit to do business in Texas, is bad, because it shows that, if the plaintiff had been doing business in Texas, all such business was done through the defendants, as its agents, and it further appears from the answer that the plaintiff is subject to the act of congress to regulate commerce, and, under such allegation, it was not necessary for the plaintiff to file a copy of its charter nor to obtain a permit to do business; that the claim on account of the employment, salary, and expenses of salesmen is not good, because if there had been a breach of contract, as the defendants allege, the plaintiff would not be liable for such salary and expenses, which are not averred to have been within the contemplation of the parties at the time of the alleged contracting; that the claims for loss of profits are not well made, because the answer shows that the profits claimed are too remote, uncertain, indefinite, and speculative, and such as are not shown to have been within the contemplation of the parties at the time of the alleged contracting. The plaintiff further excepts to that part of the answer which alleges that the defendants sold to parties in Texas certain goods, and to Exhibits A and B attached to the answer, because neither the allegations nor the exhibits show the kind or quantity of goods sold to each party, nor the dates when sold, so that the plaintiff cannot properly prepare to meet same with proof.

The case came on for trial, and, after full hearing on the respective exceptions of the parties to the pleadings of the adversary, the circuit court overruled the exceptions of the defendants to the pleadings of the plaintiff, and sustained all of the exceptions of the plain-

tiff to the answer of the defendants, and charged the jury to find their verdict in favor of the plaintiff. There was a verdict for the plaintiff, and judgment thereon.

The first error assigned is that the court erred in overruling the defendants' special exception to the plaintiff's petition. Under this assignment, counsel for the plaintiffs in error contend that, when a suit is brought by a foreign corporation against a defendant, the petition is fatally defective if it fails to allege a compliance with the laws of the state giving to corporations the right to maintain suits, when there is a law in force in the state providing that no suits shall be maintained without such compliance, and, in support of that contention, state that the petition of the plaintiff shows that it is a foreign corporation doing business in Texas, and does not allege that it had obtained a permit to do business in the state of Texas.

The provisions of the Revised Statutes of Texas of 1895 are relied on, as follows:

"Art. 745. Hereafter any corporation for pecuniary profit except as hereinafter provided, organized or created under the laws of any other state, or of any territory of the United States, or of any municipality of such state or territory, or of any foreign government, sovereignty, or municipality, desiring to transact business in this state or solicit business in this state, or establish a general or special office in this state, shall be and the same is hereby required to file with the secretary of state a duly-certified copy of its articles of incorporation, and thereupon the secretary of state shall issue to such corporation a permit to transact business in the state. If such corporation is created for more than one purpose the permit may be limited to one or more purposes; and such corporation on obtaining such permit, shall have and enjoy all the rights and privileges conferred by the laws of this state on corporations organized under the laws of this state, and shall be authorized and empowered to hold, purchase, sell, mortgage, or otherwise convey such real estate and personal estate as the purposes of such corporation may require, and also to take, hold, and convey such other property, real, personal or mixed, as may be requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability due, or which may become due or belonging to the corporation: provided, that if such corporation so obtaining a permit to do business in this state shall acquire any real estate under the powers herein conferred, it shall alienate all real property so acquired by it not necessary for the purposes of such corporation, within fifteen years from the time of acquisition; and, provided, further, that such corporation shall alienate all real estate acquired by it for the purpose of such corporation, within fifteen years from the expiration of the time for which the permit is issued, or if such permit be renewed or such corporation be otherwise authorized to carry on business in this state, then such corporation shall alienate such real estate within fifteen years after the expiration of the time for which such permit is extended, or it is so authorized to carry on business in this state; and provided, further, that if such corporation shall cease to carry on business in this state it shall alienate all such real estate so acquired by it, within fifteen years after the time it shall so cease to carry on business in this state.

"Art. 746. No such corporation can maintain any suit or action, either legal or equitable, in any of the courts of this state upon any demand, whether arising out of contract or tort, unless at the time such contract was made or tort committed the corporation had filed its articles of incorporation under the provisions of this charter in the office of the secretary of state for the purpose of procuring its permit."

The cases of *Paul v. Virginia*, 75 U. S. 168, *Horn Silver Min. Co. v. State*, 143 U. S. 305, 12 Sup. Ct. 403, and *Huffman v. Investment Co. (Tex. Civ. App.)* 36 S. W. 306, are cited by the plaintiffs in error

in support of their proposition and statement. We have carefully examined and considered the cases just cited, and find nothing in any of them to support the contention that the dealing of the plaintiff, as shown in its petition, brings it within the meaning of the terms of the statute of the state of Texas above set out. The allegations of the plaintiff's petition show that it is a citizen of the United Kingdom of Great Britain and Ireland, and has its principal office at Hanley, county of Stafford, England; that at Hanley, England, it made the certain foreign bills of exchange, addressed to the defendants and accepted by them, declared on in the petition, and, at the special instance and request of the defendants, had sold and delivered to them certain goods, etc., mentioned in the account sued on. There is nothing in this, nor in the whole petition, to show that the plaintiff was engaged in business in the state of Texas, within the meaning of the statute cited.

The fifth assignment presents substantially the same question in another form. It is to the effect that the court erred in sustaining the plaintiff's exception to that part of the defendants' answer which alleges that the plaintiff, though a foreign corporation doing business in Texas, had never filed a copy of its charter with the secretary of state of Texas, and obtained a permit to do business in that state, and that the plaintiff should not be permitted to maintain this suit because, under the allegations of the answer, it appeared that, if the plaintiff had been doing business in that state, all such business was done through defendants as its agents, and it further appears from the answer that the plaintiff is subject to the act of congress regulating commerce, and under such allegations it was not necessary for the plaintiff to file a copy of its charter and obtain such permit. It is clear, from the whole answer, that it nowhere avers that the plaintiff was doing business in Texas, or soliciting business in Texas, except with and through the defendants. The defendants call themselves in their pleadings, or, rather, assume in their answer that they were, the agents of the plaintiff in the dealings that they had with it. But it does not so appear to us from our construction of the terms of the answer; and, if it was so, the nature of their dealings with and through these agents constituted foreign commerce, or commerce between a foreign country and the United States, within the authority of *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681; *Miller v. Goodman*, 91 Tex. 41, 40 S. W. 718; *Allen v. Buggy Co.*, 91 Tex. 22, 40 S. W. 714. We conclude that the first and fifth errors assigned are not well taken.

The second error assigned is that the court erred in sustaining the plaintiff's exception to the answer of the defendants on the ground that the defendants have not alleged any valid contract between themselves and the plaintiff, and therefore cannot claim damages for the breach of the alleged contract. The answer shows that, during the years 1894, 1895, and 1896, the defendants were wholesale dealers and manufacturers' agents of china and crockeryware of all descriptions, doing business at San Antonio, Tex.; that in the years 1894 and

1895 they purchased of the plaintiff goods for use in their retail business and for sale to other retail dealers in Texas and Mexico; that the plaintiff agreed to ship the goods, by way of New Orleans, to San Antonio, crating, separating, and marking the goods so as to enable the defendants to break bulk at New Orleans, and forward the goods to their several destinations; that shipments were to be billed direct to the defendants at San Antonio, who were to pay the prices set out in Exhibit No. 13 attached to the answer, and all costs of transportation and delivery; that all orders were filled, the goods packed, marked, and shipped, as directed by the defendants, until the latter part of the year 1895, when the plaintiff desired to discontinue to fill orders taken by the defendants in the state of Texas, whereupon the defendants sent their agent to the plaintiff's place of business, at Hanley, England, to arrange with the plaintiff for the continuance of their dealings. Here the answer begins to use the word "contract," but no previous contract is shown to have existed,—only a kind of historical statement of the dealings between the parties prior to November 1, 1895. The answer then proceeds: That, with a view of securing an extension of the contract between themselves and the plaintiff, the agent went to its place of business in England, and about the 1st of November it entered into a contract with the defendants, through its agent and business manager, J. H. Meakin, to extend the contract for and during the year 1896,—that is to say, that the defendants should solicit such orders for goods in the state of Texas and the republic of Mexico, have the goods manufactured by the plaintiff, it agreeing to fill and ship all such orders, and to pack such goods in crates as might be provided in the orders, and to be marked for specification, so as to enable the defendants to break bulk at New Orleans, and then to transport them in car-load lots to the purchasers at such points in Texas, and the defendants to pay therefor the prices set out in Schedule No. 13, attached to the answer; that the plaintiff agreed to furnish the defendants not less than 30 car loads of goods to fill such orders as the defendants then had or would make during the season. But the answer does not show that at that time the defendants engaged to make any orders, or submitted to the plaintiff any orders for its acceptance, or that the defendants had obtained and submitted to the plaintiff any such orders for its acceptance, much less which it had accepted, prior to the 20th day of February, 1896, when the defendants received written notice from the plaintiff that it would no longer fill orders for the direct shipment of goods to the defendants' customers in Texas. Here it is well to observe that the first of the foreign bills of exchange declared on in the plaintiff's petition bears date the 14th of February, 1896, just seven days before the date on which the answer shows the defendants to have received written notice of the plaintiff's withdrawal of its consent to make such shipments to the defendants. This bill of exchange was subsequently accepted by the defendants, and on the 15th of July, 1896, they asked and obtained an extension of four months on the same. The second bill of exchange, which was accepted by the defendants, bears date the 30th of May, 1896. These acceptances, being fully set out in the plaintiff's petition as the founda-

tion, in part, of its action, are not disputed, or in any way qualified, by any part of the defendants' answer. Therefore, waiving any question as to the vague and indefinite manner in which the alleged contract is averred in the pleadings, it seems clear to us that there is no valid consideration shown in the defendants' answer to support any promise on the part of the plaintiff to ship any goods to the defendants. We conclude that the second error assigned is not well taken. *Morrow v. Express Co. (Ga.) 28 S. E. 998.*

In view of the conclusions we have announced as to first, second, and fifth errors assigned, the other rulings of the court become immaterial. The judgment of the circuit court is therefore affirmed.

NEIN v. LA CROSSE CITY RY. CO.

(Circuit Court of Appeals, Seventh Circuit. February 23, 1899.)

No. 522.

STREET RAILROADS—COLLISION WITH BICYCLE—NEGLIGENCE.

Plaintiff, who was deaf, was riding a bicycle, and crossed one of the two parallel tracks of an electric street railroad, not more than 50 feet in front of an approaching car, and, turning, continued in the same direction the car was moving, riding in the space between the two lines, which was 4 feet wide. Not exceeding 20 seconds later his arm was struck by the passing car, and he was thrown from his bicycle, and injured. The motorman on the car turned off the current when he saw plaintiff start across the track, but turned it on again when plaintiff had crossed, though he continued to sound his gong until the accident occurred. He had no knowledge of plaintiff's deafness. *Held* that, giving plaintiff the benefit of the broadest construction of the qualification of the rule as to contributory negligence, which would permit him to recover notwithstanding his own gross negligence, if defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of such negligence, there was nothing in the evidence to charge the defendant with liability, as the motorman was justified in supposing that, after having crossed in safety, plaintiff would keep at a safe distance from the track until the car passed.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

This was an action by August Nein against the La Crosse City Railway Company for personal injury. The court directed a verdict for defendant, and plaintiff brings error.

This suit is brought to recover for personal injuries sustained under the following circumstances: Caledonia street, in the city of La Crosse, runs north and south, is about 50 feet in width, from curb to curb of the sidewalk, and at the time of the injury was a smooth macadamized street. The center of the street was occupied by the two tracks of the railway of the defendant company, the west track being used for south-bound cars, and the east track for north-bound cars. The space between the tracks was 4 feet in width, also smooth paved. Each track was 4 feet 8½ inches in width. It was the custom of cyclists to ride in the space between the two tracks on this street, and such riders ordinarily turned out of the space upon hearing the gong of an approaching car, but, as stated by one witness for the plaintiff in error, "some leave just at the last moment, and some don't; some turn out pretty quick, and others take more chances." In the early afternoon of July 1, 1896, the plaintiff in error, a man of mature years, was riding his bicycle, going north, on the east side of Caledonia street, until he arrived at the crossing of Wind-

sor street, when he turned west, crossing the east track, and continued north-
erly on Caledonia street, in the space between the two tracks, and at a speed
of from 10 to 12 miles an hour, as estimated by him. He testified that, as
he crossed, "I looked around after I reached the center of the tracks, but
I did not see a car near enough to strike me when I went between the tracks.
I did not see a car at all, as far as I looked. This is a straight street. I could
see a car three blocks away on it, if I looked back far enough and looked high
enough. I don't remember how far back I did look, but I simply used my
judgment to see if I could reach the track before a car reached me, and I came
to the conclusion that I could reach the track before the car reached me,
and I paid no further attention to it. One thing you must remember, I took
care to ride fast. I relied upon my speed to keep out of the way of a car,
if a car should approach me, if it did not approach me too suddenly. I
could see the dashboard, if it did not approach me too suddenly. * * *
I glanced around to see if there was any car coming from the south, but I
don't think I looked quite far enough." At another time he said, "I rode fast,
to keep out of reach of the car, if one should come." As a matter of fact,
a north-bound car was approaching, and was from 30 to 50 feet south of the
rider of the bicycle as he crossed the track into the space between the two
tracks, at the intersection of Caledonia and Windsor streets. The speed at
which this trolley car was going was variously estimated at from 10 to 18
miles an hour, but the testimony is concurrent that it was proceeding at the
usual and ordinary rate of speed. The plaintiff was extremely deaf, and
could not hear the sound of the gong on the car. He proceeded northward,
in the space between the tracks, without looking around, and at a point, as
stated by Steves, a witness for the plaintiff, who was an eyewitness of the
accident and of the circumstances leading up to the accident, and who meas-
ured the distance, 100 feet north of the center of Windsor street the car over-
took plaintiff, and some portion of it, probably not the dashboard but the
forward part of the body of the car, struck his elbow, he lost his balance,
fell against the side of the car as it passed, was thrown to the ground as the
car got beyond him, and received the injury complained of. The motorman
in charge of the car was not acquainted with the plaintiff, and did not know
that he was deaf. When he saw the plaintiff cross the track from the east
side of the street, he shut off the electric current, and "took up the slack
in the brake." When the plaintiff got to the west side of the track, the
motorman turned on the current. He sounded the gong from the time he
saw the plaintiff attempt the crossing of the track until the latter was struck.
No attention was paid by the plaintiff to the gong, nor did he change his di-
rection or look around. The issues presented by the pleadings are: (a) Was
the defendant guilty of negligence in the management of the car? (b) Was
the plaintiff guilty of negligence contributing to the injury? (c) Did the
motorman, knowing that the plaintiff was unaware of the approach of the car
and that it would be dangerous to attempt to pass him, neglect to stop the
car or to decrease its speed? At the trial, upon the conclusion of the evi-
dence, the court below directed a verdict for the defendant, which ruling is
here alleged for error.

R. P. Wilcox, for plaintiff in error.

G. M. Woodward, for defendant in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, after the foregoing statement of the
case, delivered the opinion of the court.

No negligence is seriously imputed to the defendant in the man-
agement or operation of the car up to the moment when it is said
the motorman should have appreciated the situation and turned off
the current, decreasing the speed of the car, or have brought it to a
stop. The ordinance of the city expressly permits a speed of 20
miles an hour, and there is nothing in the situation to charge a less-

speed as negligence up to the moment before the collision. It is plain as noonday, and practically conceded, that the conduct of the plaintiff was grossly negligent, amounting to recklessness. The space between the tracks is a dangerous place in which to drive a bicycle. It is recklessness to ride there while a car is passing. Those who ride wheels in that space rely upon the warning of the gong to enable them to make timely escape from collision with a coming car. Under those circumstances, the act is more or less negligent; for the rider may not accurately estimate the speed of the car, or know the possible obstacles in the road to his speedy escape from danger. Some riders, it seems, more reckless than others and confident of their own ability and skill, would wait until they saw the dashboard of the passing car before turning out, and, as a witness expresses it, "take more chances." The plaintiff, by reason of his infirmity, could not depend upon hearing the gong. He knew he might be overtaken by an approaching car, and, to use his own language, he relied on his speed to keep out of the way of a car if a car should approach him, if it did not approach him too suddenly; "I could see the dashboard, if it did not approach me too suddenly." If he was traveling, as he says, at the rate of 12 miles an hour, and the car was traveling at the rate of 18 miles an hour, the highest limit of speed stated, the car was moving, as to him, at the rate of 6 miles an hour. Without assuring himself that no car was approaching, when in fact the car was not to exceed 50 feet south of him, he crossed the track. He proceeded in this dangerous path, knowing that he was liable to be overtaken by a car, and relied upon his ability, after seeing the dashboard of the passing car, to turn out and escape the danger. Being deprived of hearing, he was bound to greater diligence, in the exercise of the sense of sight, to ascertain the danger that he knew was probable and likely to come upon him. Therein he wholly failed. If he looked as he crossed the track, he looked, as he says, merely to see if he could cross without being overtaken by a car. It is incomprehensible that, with nothing to obstruct the line of vision, he did not see this car 50 feet away from him when he looked. We are constrained to believe that his glance, as he crossed, was merely along the track for a few feet, to see if he could cross it ahead of any coming car. His relation of the transaction shows that, as he traveled northward in the space between the tracks, he paid no attention to the coming of a car; relying, as he states, upon his speed to keep ahead of a car, and, if one should overtake him, upon his ability to turn out upon seeing the dashboard of the overtaking car. It is difficult to find language to fittingly characterize the recklessness of the plaintiff's conduct. Beyond any question, as matter of law upon undisputed facts, he was guilty of gross negligence. It is possible, perhaps probable, that rapid passage through the air causes exhilaration to a degree that begets indifference to and disregard of danger, or possibly a desire to incur it; but whether such perversion of judgment or aberration of the intellect results from voluntary intoxication caused by the inhalation of ozone, or from the imbibing of spirituous liquors, the law does not excuse the want of ordinary care which one should take to guard one's personal safety.

It is, however, insisted that, notwithstanding his negligence, the plaintiff is still entitled to recover if the defendant, or its agent, the motorman, after becoming aware of the plaintiff's danger, did not use ordinary care to avoid injuring him. This proposition is founded upon the qualification of the general rule that no action will lie if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, the qualification being that the contributory negligence of the injured party will not defeat the action if the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. This qualification is asserted and upheld in *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653; *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679; and has been recognized by this court in *Railroad Co. v. Wilson*, 46 U. S. App. 214, 22 C. C. A. 101, and 76 Fed. 127; and in *Railroad Co. v. Johnson*, 53 U. S. App. 381, 27 C. C. A. 367, and 81 Fed. 679. The rule is commonly grounded upon the theory that in such case the negligence of the injured party is not the proximate cause of the injury, but a remote cause, inducing the dangerous position; and as that was known to and could have been avoided by the exercise of reasonable care, the act or omission of the injurer, in doing or in failing to do that which with such knowledge he ought not to have done or should have done, was the proximate cause of the injury. In some jurisdictions this qualification of the rule is limited to cases where the negligent acts of the parties are distinct and independent, the act of contributory negligence preceding in point of time the negligent act occasioning the injury; and it is held that when both parties are contemporaneously and actively in fault, and the fault of each relates directly and proximately to the occasion from which the injury arises, no recovery can be sustained. *Murphy v. Deane*, 101 Mass. 455; *O'Brien v. McGlinchy*, 68 Me. 552; *Holmes v. Railway Co.*, 97 Cal. 161, 31 Pac. 834. If this limitation of the qualification of the rule is proper, it is clear that the plaintiff ought not to recover, for his negligence was active up to the time of the injury and efficient to promote it. In the conclusion to which we have arrived upon the evidence, we find it unnecessary to consider the correctness of this limitation of the qualification of the rule, and for the purposes of this case, without deciding the question, we assume as correct the qualification of the rule in its broadest significance. We therefore examine to see if upon that ground the evidence was sufficient to carry the case to the jury, and in such an investigation we give to the facts, as we ought, that construction, and allow all inferences that are most favorable to the plaintiff. It is a fact established beyond contention that when the plaintiff crossed this track the car was from 30 to 50 feet south of him, and northward bound. The man who was an eyewitness to the transaction from the time the plaintiff crossed the track to the time when he was struck, who knew where he fell and who measured the distance, states that the car overtook plaintiff 100 feet north from the center of Windsor street; so that the car went 150 feet in distance while plaintiff was going 100 feet. That corresponds with the relative speed established by the evidence. At the highest rate of speed testified by the plaintiff's

witnesses, the car would traverse that distance of 150 feet in 10 seconds, and the plaintiff would traverse the distance of 100 feet in the like time, and this proves that the relative speed of the car and of the plaintiff was in the ratio of 3 to 2. At the lowest rate of speed testified as to either, namely, 9 miles an hour for the car and 6 miles for the plaintiff, the distance would have been passed in 20 seconds. This is, perhaps, material only as suggestive of the time which the motorman had to comprehend the situation, and to be satisfied that for some reason the plaintiff did not propose to leave his dangerous position, and collision was probable. The motorman had the right to presume that, upon the sounding of the gong, the man would timely leave his position of danger. He had the right to presume that the plaintiff either knew of his danger or would discover it in time to leave the space between the tracks before injury resulted. Seeing the plaintiff cross the track, he turned off the current until the plaintiff had passed; then turned it on again, as was right. He sounded his gong, and continued to sound it until the collision. He knew that cyclers, accustomed to drive their wheels in the space between the tracks, usually turned out upon the sounding of the gong, while more venturesome, and possibly more expert, ones, delayed, as it would seem, from mere disposition to incur hazard, until they saw the dashboard of the passing car. He did not know of the infirmity of the plaintiff. What was there in the situation to cause him to believe that the rider of this bicycle, following the natural instinct to escape from danger, would not leave his exposed position? In that period of 10 or 20 seconds of time, having the right to presume up to the last moment, when collision was certain and imminent, that the plaintiff would abandon his dangerous position, we see nothing in this evidence which can reasonably charge him with the knowledge or the belief that the rider was not in full possession of his senses, knew the car was coming, and would timely remove himself from danger. The rider, so far as the motorman could know, was in full possession of all his faculties and in full control of his bicycle. He knew that the slightest change to the left in the rider's course would carry him beyond danger of being touched by the coming car, and that act on the part of the rider could be instantaneous,—much more rapid than a step by a pedestrian. We perceive nothing in the evidence which indicates wantonness or recklessness or failure of reasonable care on the part of the motorman, nor anything in the situation that suggested the necessity of stopping the car or slackening its speed. If we should hold that it was the duty of the motorman to decrease the speed of the car immediately upon sounding the gong, we should impose upon these public carriers the duty of the highest diligence, and not the duty of ordinary care, which the law requires. In our judgment, it would have been the duty of the trial judge, under the circumstances, to have set aside a verdict which found otherwise than as directed, and therefore the ruling complained of was correct. The judgment is affirmed.

STOWE et al. v. BELFAST SAV. BANK.

(Circuit Court, D. Maine. November 23, 1897.)

1. DEED—VALIDITY—EFFECT OF ACKNOWLEDGMENT OF CONSIDERATION.

An acknowledgment of the receipt of the consideration in a deed under the law of Maine, while it does not estop the grantor from denying the actual payment of the price, will prevent him from defeating the operation of the deed, or showing that it was executed without consideration.

2. ASSIGNMENTS FOR CREDITORS—ASSENT OF CREDITORS—RECORD.

That the assets of creditors to an assignment by a debtor in Massachusetts were subsequent to the recording of the deed of assignment in Maine, where real estate of the assignor was situated, so that the record did not exhibit such assets, did not affect the validity of the assignment, nor prevent the record from operating as notice to creditors attaching the property after the assets were given.

3. SAME—EFFECT OF STATE INSOLVENCY LAWS.

The insolvency laws of a state are limited in their operation to the territory of the state, and cannot be invoked in aid of, nor to defeat, an assignment for the benefit of creditors made in another state by an inhabitant of the latter state.

4. SAME—EFFECT OF DEED—PROPERTY IN ANOTHER STATE.

A voluntary deed of assignment made by a debtor for the benefit of all of his creditors is effective to transfer to the grantee the title to real estate situated in another state when executed and recorded in accordance with the requirements of the law of such state, and where, by such laws, nonresidents are permitted to hold and convey real estate therein.

5. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The courts of the United States are not required by Rev. St. § 721, to follow state decisions made on grounds of public policy or comity merely; and a single decision of the supreme court of a state, made in 1828, holding that, as to property situated in that state, a general assignment made by a debtor in another state would not be allowed to defeat an attachment of such property by one of its own citizens, which decision has never been repeated, will not be accepted as binding on a federal court in the state.

This was an action at law by William E. Stowe and others against the Belfast Savings Bank, involving the validity of an attachment, and a sale thereunder of certain land claimed by plaintiffs as trustees under a general assignment for the benefit of creditors, made by the attachment debtor.

Edward Woodman, for plaintiffs.

Symonds, Snow & Cook, for defendant.

WEBB, District Judge. This is a real action. The plea is, did not disseise. The parties submit the case to the court upon the following stipulation and agreed statement:

"As there is no controversy between the parties as to the facts in this case, it is agreed that the case may be submitted to the court upon the subjoined statement of facts, which may be treated by the court as the findings of a jury. To the rulings of the court upon the facts thus presented, each party reserves the right of exception and appeal by writ of error to the circuit court of appeals.

"Facts: The property in controversy is a tract of real estate, situated in the town of Eden, Hancock county, Maine, and its value is about \$7,500. Prior to February 8, 1889, the legal title was vested in one George W. W. Dove, of Andover, Mass. On February 8, 1889, said Dove, being insolvent,

made a common-law assignment and conveyance of all his property, of every kind, not exempt by law from attachment and seizure on execution, to John C. Ropes, of Boston, Mass., for the equal benefit of all of his creditors, without preferences of any kind, a copy of which assignment is hereto annexed, and made a part of the case. Said assignment and conveyance was duly recorded February 11, 1889, in the registry of deeds for the county of Hancock, in which county the land in controversy is situated. Subsequently, on the 11th day of March, 1889, said Ropes resigned his trust as assignee under said assignment; and the plaintiffs in this action are his duly-appointed successors in his said trust, as assignees of said Dove, and, by appropriate conveyances, have become invested with such title as said Ropes took under said assignment to the real estate in controversy. The total amount realized by the assignees from the sale of Dove's property, and the collection of his assets up to the present time, has been less than twenty-six thousand dollars; and the only property remaining, upon which they have not realized, is the real estate in controversy, and some corporation stocks, which are worthless. After said assignment was recorded as aforesaid, and prior to September 11, 1889, creditors of said Dove to the aggregate amount of \$396,961.33 had become parties to said assignment, and assented to its provisions; but there is no record in the registry of deeds for said county of Hancock of such joinder and assent of such creditors, and there is not in said registry any record of said assignment after the same had been joined in and assented to by such creditors; but defendant bank never became a party to said assignment, or assented thereto. On September 11, 1889, the Belfast Savings Bank, the defendant herein, attached the real estate in controversy, as the property of said Dove, in suit brought by said bank against said Dove, in the supreme judicial court of the state of Maine. In this suit said bank recovered judgment against said Dove for the sum of \$17,190 debt and \$33.94 costs of suit, on the 8th day of May, 1891, upon which judgment execution was issued; and on the 5th of June, 1891, the real estate in controversy was duly seised upon said execution, and subsequently advertised and sold at public auction, by the officer holding said execution, to the Belfast Savings Bank, for the sum of \$7,500, said bank being the highest bidder therefor; and said officer subsequently executed and delivered to said bank a proper deed conveying to said bank all the right, title, and interest which said Dove had in and to the premises in controversy on the 11th day of September, 1889, when the same were originally attended as above set forth. All the proceedings attending said seizure and sale were regular and in accordance with the provisions of the statutes of the state of Maine, and the officer's deed was effective to convey to the defendant all the right, title, and interest of said Dove in the real estate in controversy which it held by its attachment of September 11, 1889.

"Under the foregoing stipulation and agreed statement, it is the intention of the parties to submit to the court the single question whether or not the common-law assignment for the benefit of creditors, executed by Dove on the 8th of February, 1889, duly recorded as aforesaid, and subsequently assented to by creditors whose aggregate demands exceeded the total value of the property assigned, as above set forth, is valid as against the subsequent attachment of the defendant, on the 11th of September, 1889. If the court shall rule, as matter of law, upon the foregoing facts, that the assignment from Dove to Ropes, takes precedence over the subsequent attachment by the defendant bank, judgment is to be entered for the plaintiffs; but, if otherwise, then judgment is to be entered for the defendant."

The agreed statement relieves the court of any inquiry as to the facts of this case, and the distinct statement of the question of law involved might excuse a simple answer of that question; but it will be more satisfactory and better to state the reasons for the conclusion reached.

The assignment is a common-law assignment, which recognizes the statute of insolvency of Massachusetts in force at its date. It has been argued that the assignment was under and dependent upon that

statute. This position cannot be approved. It is true that, for some of its conditions and provisions, reference is made to that statute, but only to save the labor and trouble of enumerating specially such conditions and provisions. The assignment is made specially subject to abrogation by the institution of proceedings in the insolvency court within six months. It is under seal, and properly acknowledged and recorded. Such an assignment is valid under the laws of Massachusetts and of Maine, as well as at common law. *National Mechanics' & Traders' Bank v. Eagle Sugar Refinery*, 109 Mass. 38; *Todd v. Bucknam*, 11 Me. 41; *Frank v. Bobbitt*, 155 Mass. 112, 29 N. E. 209; *Train v. Kendall*, 137 Mass. 366; *Mayer v. Hellman*, 91 U. S. 496, 500; *Reed v. McIntyre*, 98 U. S. 507, 511; *Pickstock v. Lyster*, 3 Maule & S. 371.

In *Train v. Kendall*, the plaintiff, a citizen of Massachusetts, attached by trustee process a debt due from a citizen of the same state to Kendall Bros., the principal defendants, citizens of New York. Kendall Bros., before the attachment, had made a general assignment of all their real and personal property to one Hall, in trust to pay, first, certain preferred creditors, and then their other debts ratably. The assignee appeared as claimant. The superior court dismissed the claim, and charged the trustee. On exceptions by the assignee (claimant), the supreme court sustained the exceptions. The following extract from the opinion of the court in that case, delivered by Judge Field (now the chief justice), is peculiarly appropriate here:

"If Kendall Bros. [the assignors] were domiciled in Massachusetts, this assignment, having been assented to by creditors who held claims in amount exceeding the value of the property assigned, would be good against an attaching creditor; and there is nothing in the policy of our laws that invalidates the assignment because Kendall Bros. are domiciled in New York. If the assignment is also valid by the laws of that state, Kendall Bros. cannot, under our statutes, be adjudged insolvent debtors; and it therefore becomes impossible to invalidate the assignment by proceedings instituted by an assignee in insolvency; but, in the absence of any statute making this assignment void or voidable by Massachusetts creditors, the common law prevails in actions at law, for it is the common law which the plaintiff invokes, and not any process, if there be any, for the equitable distribution of the assets of Kendall Bros. found in Massachusetts. In so deciding, we do not give effect to a foreign law prejudicial to our own citizens; we give effect to an assignment which is good against the plaintiff in this action by our own law." *Cemetery v. Davis*, 76 Me. 289, 292; *Chaffee v. Bank*, 71 Me. 514, 523, 524.

Objection has been made that the instrument of assignment was not duly recorded. The cases cited in support of this objection were cases of recording deeds, which had not been acknowledged pursuant to statutory requirement, and are not pertinent to this case. This assignment was sealed and acknowledged, and was lawfully recorded. But it is further said it was without consideration. Passing for the present the question of fact, it is to be said that the right to be recorded is not dependent on the consideration of a deed.

Rev. St. Me. c. 73, § 17, provides that "deeds shall be acknowledged before * * * any justice of the peace, magistrate or notary public within any of the United States." Subsequent sections of the same chapter provide for the death or departure of a grantor without ac-

knowledging his deed, and for cases where he refuses to acknowledge, and direct the manner of supplying the defect, so that the instrument may be recorded. Then follows section 23:

"A certificate of acknowledgment or proof of execution, as aforesaid, must be indorsed on or annexed to the deed, and then the deed and certificate may be recorded in the registry of deeds. No deed can be recorded without such certificate."

The case shows that all these requirements were strictly complied with respecting this assignment. It is further urged that the record of this assignment was not notice to the savings bank. A sufficient answer to this is supplied by the Revised Statutes of this state (chapter 73, § 12):

"The title of a purchaser for a valuable consideration, or a title derived from levy of an execution, cannot be defeated by a trust, however declared or implied by law, unless the purchaser or creditor had notice thereof. When the instrument creating or declaring it is recorded in the registry where the land lies, that is to be regarded as such notice."

Dove's assignment was recorded in the registry of deeds in Hancock county (the registry where the land lay), February 11, 1889, at 30 minutes past 1 o'clock p. m. The attachment was not made until the 11th day of the following September.

Coming to the question of consideration: The assignment says:

"The said party of the first part, in consideration of one dollar and other good and valuable consideration to him paid by the said party of the second part, the receipt whereof is hereby acknowledged."

It has been repeatedly held by the highest court of Maine that such acknowledgment will not estop the grantor from denying the actual payment of the price, but will prevent him from defeating the operation of the deed, or showing that it was executed without consideration. *Goodspeed v. Fuller*, 46 Me. 141; *Bassett v. Bassett*, 55 Me. 127; *Morrill v. Robinson*, 71 Me. 24; *Beach v. Packard*, 10 Vt. 100. Indeed, a consideration is not necessary, in this state, to the validity of a deed between the parties. *Green v. Thomas*, 11 Me. 318, 321; *Laberee v. Carleton*, 53 Me. 211. It is claimed, however, that the assignment is void and without consideration for lack of the assent of the creditors of Dove, or, at least, of his creditors, the aggregate of whose demands against him equaled the value of the property assigned. Admitting the principle of law to be so, the agreed statement shows that the total value of the property assigned was less than \$50,000, and that creditors whose claims amounted to \$396,961.33 had become parties to the assignment, and assented to its provisions before the bank attached the land in controversy.

The defendant cites and relies on numerous cases in Maine and Massachusetts where attachments were made before any creditors had assented to the assignment, or where, at the date of the attachments, the demands of the assenting creditors were less in amount than the value of the property assigned, in which cases the attachments have been held good, at least upon the excess of the property above the demands of assenting creditors. Those decisions are of no assistance in this case, whose conditions are so different. *Halsey v. Fairbanks*, 4 Mason, 206, 213, 214, Fed. Cas. No. 5,964; *Brooks v.*

Marbury, 11 Wheat. 78. Felch v. Bugbee, 48 Me. 9, only decided that the insolvency law of Massachusetts had no extraterritorial force, and that a discharge under it is no bar to an action by a citizen of Maine. Pearson v. Crosby, 23 Me. 261, declares the assignment void for noncompliance with the terms of the Maine statute of 1836. South Boston Iron Co. v. Boston Locomotive Works, 51 Me. 585, was a question of the application of the insolvency law of Massachusetts to a debtor in Maine, summoned as trustee by a Massachusetts creditor of the insolvent. Moreover, the attachment was prior to the assignment. The trustee was charged. Chaffee v. Bank, 71 Me. 514, sustains the title of the assignee in a voluntary assignment made in another state against a foreign creditor attaching in Maine.

The argument that because an assignment made in the state of Maine, by a resident, might have been defeated by proceedings under the insolvent law of the state, seasonably instituted, fails for two reasons: First. It overlooks the fact that the statute cannot be invoked by or against one not an inhabitant of the state of Maine, and only by or against such an inhabitant owing debts contracted while such an inhabitant. Dove was not an inhabitant of Maine at the date of his assignment, nor at any time between then and the date of this defendant's attachment; nor does it appear that he was an inhabitant when he contracted any debt, nor, indeed, that he was ever an inhabitant of this state. Second. The insolvency statute declared void only such assignments, pledges, transfers, and conveyances, by an insolvent or one in contemplation of insolvency, as were made within four months (the time is now six months) of the filing of a petition by or against the debtor. In the present case the assignment was executed February 8, 1889, recorded February 11, 1889, and the attachment by the bank was made September 11th following,—a period of seven months after the assignment. It may be added that the argument, if followed, would lead to an extension of extraterritorial effect of the statute of Maine. The strict limitation of the validity of state insolvency laws to the territory of the state always gives to nonresidents some advantages not enjoyed by residents. They are not bound by the discharge of the insolvent, and may maintain actions on their demands notwithstanding such discharge, if they have taken no part in the proceedings in insolvency. Barnett v. Kinney, 147 U. S. 476, 13 Sup. Ct. 403. The constitutional question suggested in argument calls for no discussion, and adds nothing to the position of the plaintiff. He does not claim anything on constitutional grounds.

The principle that the law *rei sitae* must govern and control the transfer of title to real estate, and that the rule of property in real estate prevailing where it is situated must be applied by the courts of the United States, is recognized in its fullest extent. But it is believed that there is no incident or detail required by the laws of Maine lacking in this case for a legal conveyance of the land in controversy. The conveyance was by deed, duly executed under seal, acknowledged and recorded in the registry of the county where the land was situated. The title to the property was in the grantor. His right to convey the same is not disputed, and no omission of any formality of a valid conveyance under the laws of Maine is pointed out

or suggested. That the grantor and grantee were citizens and residents of Massachusetts did not affect the right to hold and convey real estate. Such rights are extended by statute even to aliens.

That no rule of property established in Maine is violated by this assignment is manifested by the fact that the court upholds such conveyances *per se*. The conveyance is good between the parties to it, which it could not be if in contravention of any rule of the state regulating the conveyance or transfer of title of real estate.

In Chaffee v. Bank, 71 Me. 514, an assignment of real estate situated in Maine, between parties resident in Rhode Island, is held valid. It is no answer to say such an assignment is in that case declared valid against a nonresident attaching creditor. If it violated any rule of conveyance or transfer of title established in the state, or lacked any essential of a legal conveyance, it could not be good against anybody. The provision of state law is as follows:

"A person owning real estate and having a right of entry into it, whether seized of it or not, may convey it or all his interest in it by a deed to be acknowledged and recorded, as hereinafter provided." Rev. St. Me. c. 73, § 1.

The requirements of acknowledgment and record referred to were fully complied with.

The validity and effect of assignments executed in another jurisdiction have been considered in a great number of cases, and by many courts. Examination will show that the decisions have largely involved the subject of the extraterritorial force of local statutes of insolvency and bankruptcy, under and in compliance with which the assignments were made; and the principle is fully and everywhere settled that such statutes, *ex proprio vigore*, have no validity or binding force beyond the jurisdiction of the state which enacted them, although as a matter of comity they may be applied elsewhere, when not conflicting with positive statute or prejudicially affecting the interest of citizens. Similarly, the powers and functions of executors and administrators are restricted to the limits of the jurisdiction of the state in which they are appointed, and that it is only by comity that they are permitted to do any administrative act within the territory of another state, the rule being that the estate of one dying testate or intestate must be administered conformably to the laws prevailing where it is situated and found. Failure to note the distinction between cases like that now before this court and those involving the extraneous validity and effect of local statutes, or the powers of foreign executors and administrators, has led to confusion, and caused difficulty in cases like this. "In most [states] the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvency laws, and a voluntary conveyance, is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation outside the state in which the law was passed." Chief Justice Fuller, in Cole v. Cunningham, 133 U. S. 107, 129, 10 Sup. Ct. 269.

Comity concedes and allows, but does not withhold or prohibit. It yields as favor what cannot be claimed as a right. When it is the basis of judicial determination, the court extending the comity out of favor and good will extends to foreign laws an effect which they would not otherwise have. It is not an exercise of comity to administer the local law, though it agrees with the foreign law. Then, as Judge Field says, in the passage already quoted from *Train v. Kendall*, in so deciding the court does not give effect to a foreign law; it gives effect to its own law. "If the objection to so doing was founded upon an assumed violation of the comity existing between the several states of the United States, that did not reach the jurisdiction of the court, a rule of comity being a self-imposed restraint upon an authority actually possessed." Chief Justice Fuller in *Cole v. Cunningham*, 133 U. S. 107, 113, 10 Sup. Ct. 271.

In *Fox v. Adams*, 5 Me. 245, the facts were like those in this case, the only difference being that there the attachment was of personal property, a chose in action, by trustee process, while here we have an attachment of real estate. It was in that case held that, on principles of comity, the court was not required to give effect to the assignment to the prejudice of an attachment by a citizen of the state. It is not plain how the principle of comity was involved. The assignment was not by virtue of any local statute or peculiar law. It was the personal act of the debtor, disposing of his property, and that "every person having property in a foreign country may dispose of it in this."

Hunter v. Potts, 4 Term R. 182, 192, is a principle repeatedly affirmed. The real question was the validity of the assignment in this state. The opinion of the court shows the ground of the decision; and we think, when it is carefully examined, it is apparent that it is based and rests on the law relating to the powers of foreign administrators, and foreign bankruptcy and insolvency laws. The authorities cited by the court in support of the opinion are *Dawes v. Head*, 3 Pick. 128; *Le Chevalier v. Lynch*, 1 Doug. 170; *Harrison v. Sterry*, 5 Cranch, 289; and *Ingraham v. Geyer*, 13 Mass. 146. How completely the court was affected by the doctrines applicable to foreign insolvent and bankrupt laws, and to foreign executors and administrators, is evident by this portion of the opinion:

"In foreign administrations, to which proceedings here are made ancillary, funds thus collected within this jurisdiction are held subject to the claims of our own citizens, to whom payment is to be made in full or in part, according to circumstances. *Dawes v. Head*, 3 Pick. 128, and the cases there cited. In the case of *Le Chevalier v. Lynch*, 1 Doug. 170, the assignees of a bankrupt were not permitted to defeat a process of foreign attachment made after the bankruptcy, although the policy of the bankrupt system is much favored in England, and the attachment was made in a colonial jurisdiction. The bankrupt law of a foreign country does not legally operate to transfer property in the United States. *Harrison v. Sterry*, 5 Cranch, 289. Nor can property in this state be put out of the reach of creditors here by the insolvent laws of another state. Comity between states is not thus to be extended, to the prejudice of our own citizens. The case of *Ingraham v. Geyer*, 13 Mass. 146, cannot be distinguished in principle from the one before us. There, an assignment made in Pennsylvania, resembling the one in question, except that four months instead of seventy days were allowed to creditors to accede to

its provisions on their part, was not permitted to defeat a foreign attachment made in Massachusetts, by a creditor resident there, although the trustee had notice of the assignment, and set it forth in his disclosure. Trustee charged."

We have here quoted the whole of the opinion of the court relating to the present matter, so that there may be no suggestion that is not fully and correctly represented. An examination of the cases invoked in support of this opinion will make evident the infirmity of the decision.

Dawes v. Head (decided in 1825) 3 Pick. 128, was an action in the name of the judge of probate in Massachusetts, for the benefit of sundry persons, one of whom was a citizen of New Hampshire, and one a British subject, resident in London, on the bond of Head as administrator with the will annexed of one Thomas Stewart, a native subject of Great Britain, domiciled in Calcutta, Bengal, who died in 1816, testate. His last will was duly proved by one of the executors named in it, in the supreme court of judicature in Bengal, and his estate and effects were in regular course of administration at Calcutta before the allowance and registry of the will in the probate court in Massachusetts. Stewart died insolvent, and his estate and effects in the hands of his executor in Calcutta were insufficient to pay the demands duly registered there against the estate, among which were those of the parties for whose benefit the action was commenced in the name of Dawes, J. The issue was whether there had been a breach of the condition of the bond, and was decided in favor of the defendant. This case therefore seems to afford no support to Fox v. Adams, but the court says, in the course of its opinion (page 146):

"We cannot think, however, that in any civilized country, advantage ought to be taken of the accidental circumstance of property being found within its territory, which may be reduced to possession by the aid of its courts and laws, to sequester the whole for the use of its own subjects or citizens, where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts. Such a doctrine would be derogatory to the character of any government. * * * There cannot be, then, a right in any one or more of our citizens, who may happen to be creditors, to seize the whole of the effects which may be found here, or claim an appropriation of them to the payment of their debts, in exclusion of foreign creditors. It is said this is no more than what may be done by virtue of our attachment law, in regard to the property of a living debtor who is insolvent. But the justness of that law is very questionable, and its application ought not to be extended to cases, by analogy, which do not come within its express provisions."

Le Chevalier v. Lynch (1779) 1 Doug. 170, is not more in point, as it arose under a bankruptcy law. There the creditor and bankrupt were both residents of England. The creditor sent to the Island of St. Christopher, a British colony, and, before the colonial court, attached a debt due from Lynch to the bankrupt. The report of the case in 1 Doug. does not indicate whether the assignee in bankruptcy made any claim to the fund in the court of St. Christopher. Lynch afterwards came to England, and was there sued by the assignees, and it was held that they could not "in such case" recover the debt. Subsequent to this decision it was held, in Sill v. Worswick (decided in 1791) 1 H. Bl. 665, that in such case the assignees might, in an

action for money had and received, recover from the creditor the amount he had so collected. So, also, in *Hunter v. Potts* (1791) 4 Term R. 182, and in *Phillips v. Hunter* (1795) 2 H. Bl. 402. In all these cases the attachment was of personal property.

The only point in *Harrison v. Sterry*, 5 Cranch, 289, pertinent to the present inquiry, is the declaration that "the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States." It must be admitted that these cases, cited by the court in *Fox v. Adams*, fall far short of sustaining its conclusion. But the court further says: "The case of *Ingraham v. Geyer*, 13 Mass. 146, cannot be distinguished in principle from the one before us." It is on that case, probably, that it mainly based its decision. Recurring, then, to *Ingraham v. Geyer*, it is found that it rests on the authority of *Le Chevalier v. Lynch*, and of *Dawes v. Boylston*, 9 Mass. 337. Of *Le Chevalier v. Lynch* it is not necessary to add anything to what has been already said. *Dawes v. Boylston* does not touch this question. That was an action of debt on a probate bond. The facts were: Thomas Boylston, a British subject, resident in England, in 1793 became bankrupt, according to the laws of Great Britain, and a commission was duly issued. He died in 1798, testate, and his will was duly approved. The executors named by him in his will having refused to accept the trust, Ward N. Boylston was appointed administrator with the will annexed by the competent court in England. Ward N. Boylston, the defendant, was also appointed administrator in Massachusetts. The English assignees in bankruptcy, after the defendant's appointment as administrator by the English court, assigned to him, by indenture, a claim due to the estate from a party in Massachusetts, on which he recovered judgment for upward of \$100,000, on which he sued out execution as administrator, procured the judgment to be satisfied, and, as administrator, received the money recovered. This money, Ward N. Boylston, the defendant, contended, was no part of the estate of which he was administrator, but was recovered to his own use and in his own right. The court of Massachusetts held that the money belonged to the estate, and must be accounted for to the creditors of the deceased, or to those entitled under his last will. This bare statement of the case shows that it has no tendency to uphold the decision of *Ingraham v. Geyer*, in which it is cited. Nor is this all that must be said about *Ingraham v. Geyer*.

In *Blake v. Williams*, 6 Pick. 286, 307, Parker, C. J., who gave the opinion also in *Ingraham v. Geyer*, speaking for the court, says, in reference to that case:

"This case has been sometimes cited in this court and elsewhere as having decided that in all circumstances an attaching creditor here would prevail over the assignee of the debtor under a transfer made abroad; but we do not think it was intended or that it does in its terms go to that extent. The assignment set up was clearly void according to the law of this state."

In *Hanford v. Paine*, 32 Vt. 442, 457, which upholds the title of an assignee as a matter of comity, the supreme court of Vermont says:

"The principle of the leading case in Massachusetts (*Ingraham v. Geyer*, 13 Mass. 146) where the rule of discrimination in favor of their own citizens,

as to voluntary assignments of insolvents made abroad, is first attempted to be maintained, is virtually condemned by the same court in the case of *Means v. Hapgood*, 19 Pick. 107, when it came under consideration as the decision of a neighboring state. *Shaw, C. J.*, there says that 'the case of *Fox v. Adams*, 5 Greenl. 245, has been repeatedly doubted in this state; and this last case was decided expressly upon the authority of *Ingraham v. Geyer*, and is in principle the same.' What is left of *Ingraham v. Geyer* as a foundation for *Fox v. Adams*? The reasoning failing, the conclusion of that case cannot stand."

There remains for examination the question how far this court is controlled by the decision of the state court in *Fox v. Adams*, under section 721 of the Revised Statutes of the United States. That section is as follows:

"The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

This section has been frequently discussed by the supreme court. It is settled that it includes state decisions construing local statutes and established usages and customs; and that when by a course of decisions, establishing rules of property, they have become laws of the state, such local law or custom so established by repeated decisions of the highest court of the state becomes the law of the state within this section. "It has never been supposed by us that this section did apply, or was intended to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation." *Swift v. Tyson*, 16 Pet. 1, 18. The supreme court, in *Bucher v. Railroad Co.*, 125 U. S. 555, 584, 8 Sup. Ct. 974, thus states the rule: "Where such local law or custom has been established by repeated decisions of the highest courts of a state, it becomes the law governing the courts of the United States sitting in that state."

Now, *Fox v. Adams* does not deal with any local statute. It does not pretend to declare any established usage or custom. It does not express any rule of property, and is not fortified by any previous decisions of the state court. It does not even refer to any previous existing local usage or statute of the state of Massachusetts, of which state Maine had until within a few years been a part, and to whose statutes and usages it had been subject, and, if any statute or use to support the decision had there existed, a reference thereto would naturally have been made. That no such usage or law could be derived from its history as a district of Massachusetts is manifest from *Means v. Hapgood* (1837) 19 Pick. 105, in which the court of Massachusetts denied the existence of such a law, policy, or usage in that state, and, being called upon to mete out to citizens of Maine the same treatment which has been extended to citizens of Massachusetts by the court of this state in *Fox v. Adams*, in a similar case, refused to retaliate. The language of the opinion by Chief Justice Shaw on this point is as follows:

"And we think it would be carrying this principle too far to take a single case, decided several years ago, a case the authority of which, in point of law, has been repeatedly doubted in this state, and consider it as conclusive evi-

dence of the existing law of that state, and thus make it the basis of a decision which would not be adopted if the same act had been done in another state."

Moreover, *Fox v. Adams* is distinctly put upon the principle of comity, and is the first expression in the court of this state of any application of that principle in a like case; and, as before said, comity is a spirit of accommodation and good will, allowing to others what they cannot demand as a right. When courts invoke the doctrine and rule of comity, and refuse to do anything, they simply say, "More is asked of us than any spirit of friendship justifies us in acceding to." The courts of the United States are not required, under section 721 of the Revised Statutes, to follow state decisions made on grounds of public policy or comity merely. *Boyce v. Tabb*, 18 Wall. 546, 548. In that case it was contended that the court was obliged by this statute to follow the ruling, on grounds of public policy, of the highest court of Louisiana, and it was said in the opinion: "This is an erroneous view of the obligation imposed by that section on this court, as our opinions abundantly show."

Finally, *Fox v. Adams* was decided in 1828, and, in the 69 years since, the question it involved has not directly and distinctly come before the highest court in Maine, nor has that decision been repeated or affirmed, though in a few instances that case has been referred to by the courts. The obligation to follow state courts is limited to the point in issue, and incidental expressions of opinion not necessary to the decision of the question are not binding. "The courts of the United States are not bound by any part of an opinion not needful to the ascertainment of the right or title in question between the parties." *Carroll v. Carroll's Lessee*, 16 How. 275, 287.

Upon this examination, it is the opinion of the court, as matter of law, that, upon the agreed statement of facts, the assignment takes precedence over the attachment of the defendant, and decides that the defendant did disseise the plaintiffs, and that judgment must be entered in favor of the plaintiffs. Until December 15th is allowed for preparation and presentation of exceptions before judgment shall be actually entered.

BELFAST SAV. BANK v. STOWE et al.

(Circuit Court of Appeals, First Circuit. January 19, 1899.)

No. 242.

1. ASSIGNMENTS FOR CREDITORS—RECORD—ATTACHMENT.

That the assets of creditors to an assignment by a debtor in Massachusetts were subsequent to the recording of the deed of assignment in Maine, where real estate of the assignor was situated, so that the record did not exhibit such assets, did not prevent the record from operating as notice to creditors attaching the land after such assets were given.

2. CONSTITUTIONAL LAW—DISTRIBUTION OF ASSETS OF INSOLVENT—LOCAL RULE DISCRIMINATING AGAINST NONRESIDENTS.

A local rule of law, which has been maintained by the courts of a state, to the effect that a foreign assignment by an insolvent will not operate on property in the state, so as to defeat an attachment made by a resident, is expressly annulled by *Blake v. McClung*, 172 U. S. 239, 19 Sup.

Ct. 165, in so far as it discriminates against citizens of other states, and it cannot be presumed that the rule, as necessarily limited by *Blake v. McClung*, would be reaffirmed by the local courts. Therefore it is held that the entire rule is abrogated, and that it can no longer be accepted in any part.

In Error to the Circuit Court of the United States for the District of Maine.

This is an action at law by William E. Stowe and others against the Belfast Savings Bank, and involves the validity of an attachment and sale thereunder on certain land claimed by plaintiffs as trustees under an assignment for the benefit of creditors. In the court below, the case was submitted on an agreed statement of facts, and the court held that the assignment took precedence over the defendant's attachment. 92 Fed. 90. Defendant thereupon sued out this writ of error.

Joseph W. Symonds (William H. Folger, on the brief), for plaintiff in error.

Edward Woodman (Anthoine & Talbot, on the brief), for defendants in error.

Before PUTNAM, Circuit Judge, and BROWN and LOWELL, District Judges.

PUTNAM, Circuit Judge. The title to land in Maine is in dispute. The defendants in error claim as trustees under a voluntary assignment for the benefit of creditors, made by George W. W. Dove, of Andover, in Massachusetts, to John C. Ropes, of Boston, in the same state. The present defendants in error succeeded to the title of Ropes. The Belfast Savings Bank, a corporation created by the laws of Maine, plaintiff in error, claims title through an attachment and an execution sale, as the result of a suit against Dove on his indebtedness to it. The attachment was made after the assignment, and after it had been assented to by creditors whose claims were sufficient to absorb the assets covered by it. The bank, nevertheless, contends that its attachment, though later in time than the assignment and its recording in the registry, takes precedence thereof. This contention is based on the rule announced in *Fox v. Adams*, 5 Me. 249, decided by the supreme judicial court of Maine in 1828. In that case the attachment was held to give a title superior to a prior foreign assignment for the benefit of creditors, upon the ground that a general assignment, made by an insolvent debtor in another jurisdiction, will not be permitted to operate upon property in the state, so as to defeat the attachment of a creditor residing there. As explained in the opinion of the learned judge who sat in the circuit court, the details of the execution and registration of the assignment conformed in all respects to the local statutes. The only special objection which appears on this score is that, inasmuch as the assents of creditors becoming parties to the assignment were subsequent to the record in the registry of deeds, the record did not exhibit the assents, and therefore it was not a statutory notice to creditors asserting adverse interests. But the law is so plain oth-

erwise that this proposition needs no discussion, the circumstances being entirely analogous in this respect to the recording of a mortgage, securing bonds or notes which are shown plainly on its face, but which are issued after the mortgage is recorded, and before any hostile attachment or execution is made or levied.

The only substantial question in this case arises from the alleged local rule announced in *Fox v. Adams*. This rule was fully stated in *Chafee v. Bank*, 71 Me. 514, 524, 526. That, by virtue thereof, the assignment in this case was not invalid, appears at page 526: "We think it is clear that the recognized rule in this state is to uphold foreign assignments, except as against our own citizens." In this extract the word "citizens" is used; while in various places where the rule is stated, and even elsewhere in the opinion in *Chafee v. Bank*, in lieu of the word "citizens," expressions are used which indicate mere residents. There can be no question that the two expressions, "citizens" and "residents," have been used in this connection synonymously. The full rule is stated at pages 524 and 525, as follows:

"In *Fox v. Adams*, 5 Me. 245, the court held that an assignment made by an insolvent debtor in another jurisdiction would not operate upon property in this state, 'so as to defeat the attachment of a creditor residing here.' But the court did not decide that such an assignment would not defeat the attachment of a creditor who did not reside here. On the contrary, the doctrine is stated as an exception to the general rule. It is an exception in favor of domestic creditors only. The language of the court clearly implies this. 'Comity between states is not thus to be extended, to the prejudice of our own citizens.' Such is the language of the court; and we think it clearly implies that, while a foreign assignment will not be permitted to defeat the attachment of a domestic creditor, it will have that effect upon foreign creditors. The reason of the rule clearly implies this. It is the supposed duty of every government to protect its own citizens, a duty which it does not owe to foreigners."

Therefore the position under the local rule in question is, as we have already said, that the assignment stands, and that the local law does not assume merely the exclusive right of administering assets of an insolvent within its jurisdiction, so as to save residents of the state from being compelled to go into foreign jurisdictions to obtain their due proportions thereof, but asserts a priority over non-residents, including, of course, citizens of other states. It administers the property within its jurisdiction, through the instrumentality of attachments and levies on execution, so as to give this priority to its own residents. Whether or not a local rule of this kind comes in conflict with the constitution of the United States was not urged in the circuit court, although the question was there referred to; and it has not been submitted to us. But the decision of the supreme court (rendered since this case was argued) in *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, is so far-reaching in its character, and relates to such substantial matters, that we are not at liberty to overlook it. For us to do otherwise would involve us in an apparent acceptance of results thus pronounced by the highest authority to be fundamentally erroneous.

Blake v. McClung relates to the distribution of the assets of an insolvent corporation, which, for the purposes of the case, might

well be regarded as a corporation of Tennessee. The statutes of that state provide that, in the distribution of the assets of corporations in cases of insolvency, residents of Tennessee shall have priority over all simple contract creditors who are nonresidents, and over certain other classes of creditors to which we need not refer. Certain creditors of the corporation who were citizens of Ohio challenged the constitutionality of this statutory provision. The supreme court places its decision on section 2 of the fourth article of the constitution, providing that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." First of all, the court turns its attention to the word "residents," found in the Tennessee statute; and, without following out the reasoning of the court, it is sufficient to say that the citizens of Ohio who were litigants in the case are held by it to be covered by that word, and the court finds that the statute is unconstitutional so far as they are concerned. Some question being made in behalf of the Tennessee creditors arising out of the fact that the debtor was a corporation, the opinion says:

"If a state should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that state over the claims of individual creditors citizens of other states, such legislation would be repugnant to the constitution, upon the ground that it withheld from citizens of other states as such, and because they were such, privileges granted to citizens of the state enacting it."

Then the opinion inquires whether a different principle would apply with reference to the assets of a corporation, and it holds that it would not. It is thus clear that the court is of the opinion that, beyond doubt, statutes of the kind in question, applied to the assets of an individual, as in the case at bar, are clearly unconstitutional so far as they affect citizens of other states; and such is the logic of the decision.

It is not necessary for the purposes of the case at bar that we should follow out what was said in the opinion, or covered by the decision, with reference to residents of other states than Tennessee, not citizens of those other states, or with reference to aliens. All we need to say is that, as to this, the result was left so far indeterminate that we would not be justified in holding that the article of the constitution referred to would render invalid any priority which the statute of Tennessee, or the local rule in Maine, might give to residents over any class of persons who are not citizens of other states.

It remains for us to apply *Blake v. McClung* to the case at bar. As we have already said, the question of the constitutionality of the alleged local rule in Maine was not pressed in the circuit court, and has not been raised before us; and it was very suitable that it should not have been. The facts appearing in this record are not of a character to raise the sharp question of constitutionality determined in *Blake v. McClung*, because there is nothing here to show that the creditors who assented to the assignment, and over whom the plaintiff in error claims priority, are citizens of any state. In-

deed, for this reason, it may well be questioned whether the record states sufficient facts to raise the question of the applicability of the local rule in Maine in any event, if its existence were admitted. The question which we have to consider flows out of the decision of the supreme court in the case referred to, and leads to affirming the judgment of the court below, independently of the fact of the citizenship of the assenting creditors. If, in consequence of *Blake v. McClung*, we must hold that there is no local rule as stated in *Fox v. Adams*, the assignment must prevail beyond doubt. The position of the case is as follows: In *Blake v. McClung* the rule was established by statute. Therefore it follows that the rule, being statutory, could not be set aside except with reference to cases where its application would deprive parties in interest of rights secured them under the constitution. With reference to all other conditions, the statute must necessarily be allowed to stand. The same would be the case on the hypothesis that the local rule in Maine was also the creature of statute. But as, on the other hand, we have in Maine only a supposed rule of the common law, the maxim, "Cessante ratione legis, cessat ipsa lex," broadly construed, applies. This maxim, as interpreted by Broom, lays down the following broad principle: "Reason is the soul of the law, and, when the reason of any particular law ceases, so does the law itself." The decision in *Blake v. McClung* destroys at least the symmetry of the alleged local rule; and, applying the maxim referred to, it is beyond a reasonable possibility to suppose that, after the supreme court had declared its substance to be in violation of the constitution, the state courts could reaffirm it as a principle of law with reference to its remnants, so far as those remnants might give priority to resident creditors over nonresidents not citizens of other states. Under the circumstances of the case, we cannot do otherwise than hold that a decision of the sweeping effect of *Blake v. McClung*, declaring the substantial portions of a local rule of this character unconstitutional, will compel the acceptance of the conclusion that the entire rule is abrogated, and is no longer to be accepted in any part.

The judgment of the circuit court is affirmed, and the costs of this court are awarded to the defendants in error.

UNITED STATES v. CONAN et al.

(Circuit Court, W. D. Wisconsin. February 27, 1899.)

POSTMASTERS—RENTAL OF OFFICE—ACCOUNTABILITY AS AGENT.

The allowance made by the department to a postmaster for the purpose of renting an office is not an absolute allowance, but is to be disbursed by him as agent of the United States, and must be accounted for under the strict law of agency. If he secures an office for less than the allowance, he is entitled to retain therefrom only the amount actually expended. If he contracts to pay more than the allowance for a building or room, and sublets a portion for a sum which, together with the allowance, exceeds the rent paid, he must credit the excess to the government, to be deducted from the allowance.

D. F. Jones and Henry T. Sheldon, for plaintiff.
Catlin, Butler & Lyons, for defendants.

BUNN, District Judge. This is an action brought by the United States to recover from Joseph D. Conan, former postmaster at Superior, Wis., and his bondsmen, the sum of \$215.83 as a balance due from him to the government on his account as postmaster from January 1, 1894, to November 30, 1897. Among other allegations in the complaint is this: That said Joseph D. Conan did not faithfully discharge the duties and trusts imposed upon him by law, and did not faithfully account to the plaintiff for certain moneys received by him as postmaster; but that during said period said Conan did receive, as such postmaster, the sum of \$215.83, being the proceeds of certain subleasing of the building and premises rented by the government for its post-office uses at said Superior, and which said sum rightfully belongs to the plaintiff, and has not been paid over after demand made therefor. The answer admits everything alleged in the complaint except the right to receive the money, and alleges that the money rightfully belongs to the defendant; that it was derived exclusively from the rent of the lobby of the post office, a portion of the building rented by him, not used or required for post-office purposes, and in no manner connected with the business of said office; that said Conan was obliged to and did become personally liable for the rent of the building for post-office purposes in excess of the amount allowed by the post-office department; that, unless he could rent other portions of the building to make up the deficiency, he would be obliged to pay the same out of his own allowance; and, having succeeded in renting the lobby for more than enough to make up the deficiency, he claims and alleges the same to belong to him, and denies that the plaintiff has any right or interest therein. The plaintiff moves for judgment upon the defendant's answer, and the sole question before the court is upon the above state of facts, whether the balance in the defendant's hands received for rent belongs to him or to the government. The conclusion reached by the court is that it belongs to the government, and that the plaintiff is entitled to judgment upon the answer. The reason generally stated is that the postmaster, in renting a building for the purpose of his office, is acting as the agent of the government. He cannot speculate upon the transaction to make something for himself, but the saving in rent, if any, belongs to the government, which is the principal in the transaction. The government pays the postmaster a salary and some other allowances, upon which he must depend for his compensation.

Section 420 of the postal regulations, which have the force of law, provides as follows:

"Expenditures for clerk hire, rent, fuel and light will be fixed by order specifying the allowance for each which shall so remain until otherwise ordered; and other allowances for furniture and miscellaneous and incidental expenses will be made only under special orders specifically for each expenditure. Such allowances will in no case exceed the surplus revenue, as limited by section 415. No postmaster can have credit on account of any

allowance, except to the extent of the money actually disbursed by him accordingly, and for which he renders proper vouchers."

Section 415 provides that:

"The postmaster-general may hereafter allow rent, light and fuel at offices of the third class in the same manner as he is now authorized by law to do in the case of offices of the first and second classes, and that no contract for rent for a third class post office shall be made for a longer period than one year, nor shall the aggregate allowance for rent made in any year exceed the amount appropriated for such purpose. Provided, that there shall not be allowed for the use of any third class post office for rent a sum in excess of \$400 nor more than \$60 for fuel and lights in any one year."

Section 172 provides as follows:

"The salary of a postmaster, and such other expenses of the postal service authorized by law as may be incurred by him, and for which appropriations have been made, may be deducted out of the receipts of his office, under the direction of the postmaster general. No postmaster shall, under any pretense whatever, have, receive, or retain for himself, in the aggregate, more than the amount of his salary and his commission on the money-order business as hereinafter provided."

Another regulation requires the postmaster to report whether the clerk hire or other allowance was more or less than the service required.

It is quite apparent from these provisions what the attitude of the government is towards these allowances for rent. The department fixes a maximum sum which it will allow, and beyond which it will not go. In renting, the government is the principal in the transaction, and the postmaster acts as its agent. Like any other agent, it is his duty to act for the best interest and advantage of his principal, within the scope of his authority. If he is able to rent suitable rooms for a post office for anything less than the maximum sum allowed, it is his duty to do so. The government does not say to the postmaster, "We will allow you \$400 for post-office rent, and you can furnish rooms at any price you can get them for." But under the law he is to act as the agent of the government, and as agent he is bound to use his best endeavors in the interest of his principal. It does not appear in the pleadings what allowance was made by the department for rent of a post office at Superior, nor what rent was actually paid. But from outside sources it seems that the allowance for rent and heating was \$275 per year. The renting was done by the postmaster in the name and for the uses of the government. The defendant rented out certain parts of the building, not required for post-office purposes, to third persons, and in the course of the four years received rent therefor, which, with the maximum amount allowed by the government, leaves in his hands \$215.83 over and above the rent which he has had to pay. If the question were to be decided simply upon equitable principles, who can say that the \$275 allowed by the government for rent would be a fair proportion to be paid for that portion of the building occupied by the government? The presumption would rather be, as there is a surplus left in his hands after the rent account is closed, that a less sum than the amount allowed by the government would belong to it to pay; that is to say, that a less sum than the \$275 per annum would con-

stitute the just proportion of the burden to be borne by that portion of the building devoted to the uses of a post office. But I assume that the question is rather one of strict law, to be decided upon legal rules governing the relation of principal and agent. These rules are very strict, and are of a highly moral tone. The morality of the law of agency and trusts, both at common law and in equity, is, perhaps, of a higher and sterner kind than is practiced in most communities. If an agent takes the money of his principal, and invests it in profitable speculation, he can gain nothing thereby for himself. If profits succeed, they belong to the principal. If loss follows, that must be borne by the agent, and he will be held liable for principal and interest as for a conversion of the funds. Suppose the case of a trustee having possession of a trust fund of \$9,000 for the purpose of being invested in real estate for his principal. The best opportunity presenting itself for such investment is the purchase of a piece of real estate held at \$10,000. He decides to put in \$1,000 of his own money, and make the investment, which results in a great gain. In one year the land is sold for \$20,000. Now, the trustee will not be allowed to take out \$2,000 and hand over the \$18,000 to his principal. The law will only justify the transaction so far as to give him back his \$1,000 with legal interest. It will not allow him to share in the profits with his principal. Such a strict rule is deemed necessary to enforce honesty and fair dealing. The agent is not allowed to make himself a partner, nor to mix up his own business with the business of his principal. He cannot speculate in that way, and, if he does, the law will hold him to a strict account for all profits, while, if there are losses, he will have to bear them. There is no danger of loss if he keep himself in the line of his agency, acting for the sole benefit and advantage of his principal, and does not try to become a partner or principal with his principal. Good faith in his agency is all that is required.

These principles seem decisive of this case. There was nothing improper in renting a building that cost more than the government allowance for a post office. It might well happen that such cases would occur where this would be necessary or preferable. It might not be practicable to obtain just the rooms proper for a post office without taking other rooms in the same building. But in so doing the agent must bear in mind his agency, and not speculate on the transaction. If he sublets the rooms not required for the purposes of the government for a sum which, together with the allowance made by the government for the rent, is in excess of rent paid, the surplus should be credited to the government, and deducted from the government allowance. The same ruling was made in the Eastern district of Michigan by Judges Jackson and Brown in U. S. v. Saylor, 31 Fed. 543. There a postmaster rented a post office for the government at \$1,000 per year, and received a secret rebate of \$150 from his landlord, and also sublet portions of the space so rented for a news stand and a confectionery stand, and received rent therefor. It was held that he and the sureties upon his bond were liable to the government for such rebate and rent; and that it was no defense to such claim for the rebate that the defendant had incurred

expense in procuring and fitting up boxes and making repairs for which no allowance was made by the rules of the department. Judge Brown of the district court, now one of the justices of the supreme court, states the principles applicable to the case very clearly, in part as follows:

"His retention of the rents received from his subtenants is equally indefensible. He rented for the government, and as the agent of the post-office department, certain space for the post office. This space belonged absolutely to the government during the continuance of the lease. If it was larger than was necessary for the purpose of the post office, and defendant chose to lease the superfluous space to private individuals, he did so as the agent of the government, and the government is entitled to the rent. In other words, he has no right to receive rents as an individual for space for which he pays rent as the agent of the government. If the government had placed in his hands a thousand dollars for office expenses, and had taken vouchers from him to that amount, it might well be argued that it was no concern of the government what he did with the money, so long as proper facilities were provided. But the money was placed in his hands to rent a post office."

This Michigan case differs from the one at bar in this: that in that case the sum agreed to be paid for rent was the same as the government allowance for that office, while in this case it was more, the postmaster agreeing to pay the excess; but the principles applicable to the case are much the same. The government was the principal in the transaction, and the agent cannot be allowed a profit on it. There will be a judgment in favor of the plaintiff for the sum of \$215.83, with interest from November 30, 1897.

NEW ORLEANS ICE CO. v. O'MALLEY.

(Circuit Court of Appeals, Fifth Circuit. February 21, 1890.)

No. 728.

ACTION BY SERVANT—PERSONAL INJURIES—QUESTION FOR JURY.

In an action by a servant against the master to recover for personal injuries alleged to have been sustained by reason of defective appliances furnished by the defendant, where the evidence showed that the appliances were not reasonably safe, and was conflicting as to whether the plaintiff was guilty of contributory negligence, and as to whether the injury was due to the negligence of a fellow servant, as well as to the facts from which it must be determined whether plaintiff knew, or should have known, that the appliances were unsafe, the case was properly submitted to the jury.

Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action by Martin O'Malley against the New Orleans Ice Company to recover for personal injuries. There was judgment for plaintiff on the verdict of a jury, and defendant brings error.

Chas. S. Rice, for plaintiff in error.

Thos. M. Gill, for defendant in error.

Before PARDEE, Circuit Judge, and BOARMAN and SWAYNE, District Judges.

PARDEE, Circuit Judge. The plaintiff in error states his case as follows:

"Martin O'Malley claims that while in the employ of the New Orleans Ice Company, on say July 6, 1894, a piece of scantling, six or eight feet long and four inches in width and thickness, with tackle attached, fell from forty feet or more above him upon the back of his head and neck; his skull thereby being broken, and his spine seriously injured, his hearing and sight impaired, etc. He alleges that he never worked above among the appliances which fell, never saw them, and knew nothing of them; the fog or mist rising from the ice and their distance preventing him from seeing them or their operation. That the beams on which the appliances rested were narrow, wet, and slippery, rendering it dangerous to the person upon them adjusting the appliances, and to the workmen below. That there was no floor on the beams where the appliances rested for the security of the person adjusting the appliances or the workmen below. That for want of such floor or planks, 'on which he could have safely walked,' one John Smith, on July 6, 1894, had to walk on the narrow and slippery beams, and, having slipped and lost his foothold, to save his own life dropped the scantling, which, falling on plaintiff, caused the injury complained of. That he was obeying defendant's orders at the time. Did not know, and had no reason to know, that he was in danger; while defendant knew, or should have known, that the appliances and the manner of using them were dangerous, and exposed plaintiff to the greatest risk and danger.

"The answer of the ice company, among other things, avers the common employment of O'Malley, with John Smith and others, in cutting out and removing ice from its factory. That in cutting and removing ice respondent furnished a perfectly safe, sound, and strong tackle of ropes and pulleys, suspended, for greater security, from two scantlings, placed across large and strong beams running overhead from one side of the freezing room to the other; and that, as the ice was cut away from under, it was necessary to shift the tackle along the beams closer to the uncut ice. That the tackle had thus to be shifted many times every day, to the knowledge of the plaintiff. That the labor of and the method of removal was entirely in the hands of the particular gang of workmen; that it was done by hand, as the plaintiff knew; that it was the best method known to the respondent, and had been long in use in the factory, before the accident in question. The answer admits danger inherent in the work, but avers that it is a danger open and apparent at once to any one of the age and capacity of plaintiff, exercising ordinary care. It denies that the plaintiff was required to work and expose himself while the appliances were being shifted; that this practice was well known to and acted upon by the gang to which the plaintiff was attached. It avers contributory negligence on the part of plaintiff in voluntarily and knowingly and carelessly exposing himself, and 'remaining under said tackle and appliances while the same were being shifted, and that he did so without the orders, knowledge, or fault of respondent'; that it was the duty of plaintiff, knowing, as he did, that the tackle was being shifted, to have moved out of the way of possible danger, as he easily could have done; and that by doing so he would have avoided the accident, which befell him solely because of his imprudence and culpable negligence, and without fault of respondent.

"At the first trial by jury in December, 1896, in the circuit court, there was a verdict for plaintiff for \$3,000. A new trial was granted on rule by the defendant. In February, 1898, the cause was tried again, before a jury, and there was verdict for \$750 in favor of plaintiff.

"After the evidence had been closed, defendant's counsel, in presence of the jury, requested the court to direct a verdict for the defendant, and for reasons assigned in writing:

"(1) That plaintiff, on whom the burden of proof rests, has not established any culpable fault on the part of the defendant, whereby the plaintiff was injured. (2) The testimony shows without dispute that the accident in question occurred about 11 o'clock in the morning of July 6, 1894, and that from say 9 o'clock in the morning of every day before and thereafter, including the day and time of said accident, the view of the upper works and the

implements operated by defendant, by which the plaintiff was injured, were plainly apparent and observable, as well as the person operating the same, by the plaintiff. (3) That the testimony showed, without dispute, that the character and condition of the implements used by the defendant in the operation of his factory, and by which the plaintiff was injured, were in plain view, and their character and condition, and their defects, if any, and their manner and method of operation, were plainly visible to any person, including the plaintiff, from the position where the plaintiff was usually occupied, and was occupied at the time of the injury in question. (4) That the testimony shows that the plaintiff could have known, by the use of ordinary judgment and his sense of sight, the character and condition and the method of operating the appliances in use by the defendant, and through the use of which the plaintiff was injured. (5) That the undisputed testimony shows that the plaintiff had every means in his power of knowing and of gaining knowledge as to the character and condition of, and the dangers to be reasonably apprehended from, the appliances aforesaid, as fully as those possessed by the defendant. (6) That the undisputed testimony shows that the appliances used by the defendant were good, sufficient, and reasonably safe, and of such character and in such condition as the defendant had the right to use without further intervening fault on his part in the premises, in the work in which the plaintiff was employed. (7) That the testimony shows that the defendant, by means of suitable flooring and boards to stand upon, while the person engaged in removing the scantling and adjusting the fall and tackle over the position where the workmen had been employed below, had provided means by which said work, with ordinary care and precaution on the part of the person so moving and adjusting the same, could be removed in safety, not only to the person performing the labor, but to those below. (8) That the undisputed testimony shows that the accident in question was caused either by an accident to, or by neglect or want of proper precaution on the part of, one Smith, a fellow servant of plaintiff, in the performance of his duties, while removing the scantling and adjusting the tackle aforesaid. (9) That the testimony establishes that the plaintiff did, by contributory negligence on his part, place himself in a position where he knew, or ought to have known, and was bound to know, the danger to him during the removal of the scantling and adjusting of the tackle above his head, because of which facts, in law, there can be no recovery for damages against the defendant. (10) That the testimony shows that the plaintiff voluntarily entered into the place or position where he was injured, without legal obligation or necessity on his part, or act on the part of defendant amounting to coercion; and that, in law, plaintiff is bound to be held to have voluntarily entered into said position, and to have taken the risks involved in such entry. (11) The undisputed testimony shows that the plaintiff sought the employment in which he was injured, thereby impliedly representing that he was competent to perform its duties, and to apprehend and avoid all dangers that might be discovered by the exercise of ordinary care and prudence."

"The court refused the application, to which refusal the defendant reserved its bill of exceptions, and subsequently presented such bill, with the testimony taken on the trial as part thereof, which bill was signed by the judge and filed. An application for a new trial was refused. The error assigned is that the trial court erred in refusing the motion made by defendant in open court, and on the trial of said cause, and at the conclusion of the testimony adduced and offered herein by both plaintiff and defendant, requesting the court to direct a verdict for the defendant, and refusing the said motion and request made in writing, as fully shown by the reasons and statements contained in the bill of exceptions and the testimony and evidence aforesaid, to be annexed thereto and made part thereof, as if repeated and copied therein, in full, filed and to be filed within the delay allowed by order of said court."

A study of the 363 printed pages of evidence found in the record as a part of the bill of exceptions satisfies us of the following propositions: That the evidence was conflicting as to whether O'Malley

contributed by his negligence to his own injury; that it is also conflicting as to whether O'Malley was injured through the negligence of a fellow servant; that the appliances in use in the ice factory, by which O'Malley was injured, were not reasonably safe; that O'Malley was not directly informed nor instructed as to the dangerous and unsafe appliances to be used over his head, and in connection with the work which he was to perform; that whether he knew, by the circumstances and his observation, or ought to have known, that the appliances were unsafe, and therefore assumed the risk thereof by accepting his employment, was a question to be determined wholly by proper and legitimate inferences to be drawn from a number of facts as to which the evidence was conflicting. In our opinion, the case was one eminently proper to be submitted to a jury, and it would have been error for the trial judge to have charged the jury to find for the defendant for any one of the reasons assigned. The judgment of the circuit court is affirmed.

PALATINE INS. CO. v. EWING et al.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1890.)

No. 583.

INSURANCE—CONSTRUCTION OF POLICY—PERMISSION FOR ADDITIONAL INSURANCE.

A policy of fire insurance contained a provision that "unless otherwise provided by an agreement indorsed hereon or added thereto," the policy should be void if the insured then had, or should thereafter procure, any other contract of insurance on the property. At the time the policy was issued, an additional paper, or "rider," was attached, stating that it was attached to and formed a part of the policy, and containing a clause as follows: "Total insurance permitted is hereby limited to three-fourths of the cash value of the property hereby covered, and to be concurrent herewith." No other permit was indorsed on the policy, though there was at the time other insurance on the property, as the company knew. Held, that the rider constituted an agreement permitting additional insurance, within the provision in the body of the policy, which applied to the previous insurance, and to any thereafter procured, not exceeding in all three-fourths of the value of the property.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

This was an action on a policy of fire insurance. There was a verdict and a judgment for plaintiffs, and defendant brings error.

On the 3d day of April, 1895, the plaintiff in error, the Palatine Insurance Company, issued its policy of insurance in the sum of \$3,000 to Gerstle Bros., on their stock of merchandise at Pulaski, Tenn. Gerstle Bros., on November 21, 1895, made an assignment, which included the insured merchandise, to the defendants in error, Solinsky and Ewing, as trustees for the benefit of their creditors. On the following day they also assigned to the said Solinsky and Ewing the above-mentioned policy of insurance. On the night of November 23, 1895, the insured property was partially destroyed by fire, the damage amounting to \$16,250. There was other insurance on the property at the time when this policy was issued, and the whole amount of insurance, including the latter, was \$7,500. On the day before the fire occurred, the trustees, Ewing and Solinsky, procured three additional contracts of insurance on the assigned stock of \$2,500 each, without the knowledge of the Palatine

Insurance Company. Upon the refusal of the Palatine Insurance Company to recognize its liability upon the policy issued by it as above stated, this action was brought by Ewing and Solinsky, as trustees, to recover thereon. The defense was that the policy was avoided by the additional insurance procured by the trustees on the 23d of November, as above stated. The ground for this defense was a clause in the policy which reads as follows: "This entire policy, unless otherwise provided by an agreement indorsed hereon or added thereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." The plaintiffs relied on the last two of the following clauses, which were contained in a rider, or additional paper, attached to the policy of insurance at the time of its issuance: "It is part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that in the event of loss this company shall not be liable for an amount greater than three-fourths of the actual cash value of the property covered by this policy at the time of such loss; and in the case of other insurance, whether policies are concurrent or not, then for only its pro rata proportion of such three-fourths value." "Total insurance permitted is hereby limited to three-fourths of the cash value of the property hereby covered, and to be concurrent herewith." "Attached to, and forming part of, policy No. 444,557 of the Palatine Insurance Company. Will S. Ezell, Agent." Upon the trial of the case the plaintiffs contended that the proviso contained in the clause upon which the insurance company relied was fulfilled by attaching to the policy the "three-fourths value clause," as it is termed in the record, and which is above set forth. On the other hand, it was contended by the insurance company that this attached clause only had the effect to limit the amount of subsequent insurance in case consent should be given to the procuring of the same. The court held with the defendant,—that this latter was the proper construction of the policy with the attached clause. Thereupon the plaintiffs were allowed, against the objection and exception of the defendant, to introduce evidence tending to show that it had formerly been the practice of the agent of the company at Pulaski to issue policies like that in question without the three-fourths value clause above quoted; and in case the insured desired to obtain further insurance, and the company consented to it, such consent was written upon the face of the policy, but that after a certain date (which was a considerable time anterior to the issuance of this policy) the use of the "three-fourths value clause" was inaugurated in the business of the defendant; and thereafter, when that clause was attached to the policy of insurance, the practice of writing the consent into the policy in case of further insurance permitted by the company, was discontinued. Evidence was given by both parties relative to this practice by the defendant's agent, and also in respect to the custom of other insurance companies at that place in the transaction of insurance business there. Peremptory instructions to the jury in favor of the defendant were requested by counsel upon the ground that the alleged custom by which the defendant was proposed to be bound had not been established. This request was refused by the court and an exception was duly taken. The trial judge submitted the case to the jury upon the question as to whether or not such a usage or custom on the part of the defendant company had been proved, and instructed them, if the custom was found to exist, was known to the insured, and relied on by them, and was known to the company, and it did not object to it, but consented to it, then the company would be estopped to claim that the failure to procure its express consent to the additional insurance by the insured would avoid the policy. This instruction was duly excepted to by the defendant. The jury rendered a verdict for the plaintiffs for the amount of the policy, and judgment was entered accordingly. The errors assigned by the plaintiff in error relate to the rulings of the court in the admission of the evidence offered to show the usage and custom of defendant, above mentioned, and to the sufficiency of such evidence to establish such custom.

Albert D. Marks, for plaintiff in error.

Z. W. Ewing and John T. Allen, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

The only controversy between the parties raised upon the trial in the circuit court related to the sufficiency of the consent of the insurance company to the additional insurance procured by the trustees on the 23d day of November, 1895,—the day before the fire. And the only question which we are required to determine is whether the court committed any error in its rulings upon that subject for which the judgment ought to be reversed. The trial judge was of the opinion that upon the proper construction of the policy and the clauses contained in the rider attached thereto such consent was not made out, and in consequence of that ruling the parties went into further evidence upon the question whether there had been a custom in the course of the defendant's business at Pulaski, known to the defendant, and relied upon by the insured, whereby the attaching of the so-called "three-fourths value clause" to the policy was treated as signifying, without more, the consent of the company to additional insurance to the limit therein prescribed. Upon mature consideration we are of the opinion that the plaintiff's contention in the circuit court in respect to the construction of the policy and the attached clause was right, and that they did import a present consent, at the time when the policy was issued, to additional insurance not in excess of three-fourths of the value of the insured property, which limit it is not claimed was transcended.

It is not necessary to hold that the consent intended by the clause in the policy proper was a permission to be thereafter given. It might be a consent given contemporaneously with the issuance of the policy itself. Indeed, it is not unusual in such instruments to employ language which, although it might upon one, and perhaps the more common, interpretation in ordinary use, have reference to the future, yet, upon comparison with other provisions therein, indicates that reference was had in the general form to the final insertion in the instrument of special provisions which might or might not be required to express the contract in the particular case. An instance of the flexibility of language in such instruments is found in the very case we have under consideration. The policy declares that it shall be void "if the insured now has" other insurance. But the insured did, in fact, have other insurance, and this fact was known to the insurer. The "three-fourths clause" was added, and it is not doubted, we suppose, that, although literally its language points to prospective insurance, the words "total insurance permitted" refer to and include the insurance already existing at the date of the policy. That this would be the effect of such a stipulation in such circumstances was held in *Kimball v. Insurance Co.*, 8 Gray, 33, and *Blake v. Insurance Co.*, 12 Gray, 265. The only "permission" of such previous insurance is that found in the attached "three-fourths clause," and it is by that clause that the limitation is imposed upon the amount of prior insurance which would be permitted. The prior insurance was parcel of

that amount, but the language of the permission makes no distinction between that already obtained and that contemplated as additional thereto. It is not reasonable to suppose that the parties anticipated any further agreement upon that subject. It is to be further noticed that the clause in the policy requires the consent to be by an agreement "indorsed hereon or added thereto." The "three-fourths clause" responds to this by characterizing itself as "attached to and forming part of policy No. 444,557 of the Palatine Insurance Company." This interpretation is the same as that which the agent of the company who issued this policy testified he had acted upon in transacting the business of the company at that place. He was supplied by it with blank policies and these clauses to be used as occasion should require, and when other insurance was intended to be permitted he used the "three-fourths clause," which covered the whole subject, once for all.

But, if this conclusion were not so clear as it seems to us to be, and were only a permissible one, there are several established rules of construction applicable to the subject which concur in inducing the same result. One of those rules is that forfeitures are not favored in law, and the courts will seek to find, if fairly possible, such a construction of the contracts of parties as will relieve them from the inequitable consequences arising therefrom. *New York Indians v. U. S.*, 170 U. S. 1, 25, 18 Sup. Ct. 531; *Tiffany v. Bank*, 18 Wall. 409; *Cotten v. Casualty Co.*, 41 Fed. 506; *Jackson v. Same*, 21 C. C. A. 394, 75 Fed. 359; *May, Ins. (2d Ed.)* §§ 170, 376. Another rule which is especially, but not solely, applicable to insurance contracts is that, when the meaning of the instrument, taken as a whole, is doubtful, its several provisions should be construed favorably to the party to whom the undertaking is made, and most strongly against the party in whose interest the provisions are introduced. *Insurance Co. v. Wright*, 1 Wall. 456, 468; *National Bank v. Insurance Co.*, 95 U. S. 673, 678; *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466; *Insurance Co. v. McConkey*, 127 U. S. 661, 666, 8 Sup. Ct. 1360; *Thompson v. Insurance Co.*, 136 U. S. 287, 10 Sup. Ct. 1019,—are some of the many cases in which this rule is stated and applied. Still another rule is that, where a special provision is added to the formal contract, the special provision will be taken to dominate the formal part upon the principle that it more surely expresses the final purpose of the parties. It rests upon the same presumption which is applied in giving preference to the written language inserted in an instrument containing formal printed language relating to the same subject, for the reason that the former indicates that the attention of the parties was more particularly called to the written parts. *May, Ins. (2d Ed.)* § 177; *Wood, Ins. (1st Ed.)* § 62.

As this determination is decisive of the main question before us, the exceptions taken to the rulings of the court in respect to the admission of evidence to prove a practice or usage in the conduct of insurance business at Pulaski are immaterial, and the correctness of the rulings upon that subject need not be considered. If there was error in that regard, it was not prejudicial. The judgment will be affirmed, with costs.

SEYMOUR v. WHITE COUNTY.

(Circuit Court of Appeals, Seventh Circuit. February 13, 1899.)

BILL OF REVIEW—PETITION FOR LEAVE TO FILE—PRACTICE IN CIRCUIT COURT OF APPEALS.

On a petition to the circuit court of appeals, after a decision of that court affirming a judgment of the circuit court, for leave to file in the lower court a bill in the nature of a bill of review, it is deemed the better practice to grant such leave as a matter of course, unless there are special reasons to the contrary, without considering the merits of the proposed bill.

On Petition for Leave to File a Bill in the Nature of a Bill of Review.

Wm. E. Church and Geo. A. Sanders, for petitioner.

J. M. Hamill and J. R. Williams, opposed.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

PER CURIAM. This is a petition to this court for leave to file in the circuit court of the United States for the Southern district of Illinois a bill, in the nature of a bill of review, to obtain a new trial or reconsideration of the case of the petitioner against the county of White, in the state of Illinois, wherein the judgment rendered in favor of defendant was affirmed by this court, as shown by our opinion in Seymour v. White Co., 34 U. S. App. 658, 20 C. C. A. 402, and 74 Fed. 207. For the necessity of obtaining such leave reference is made to Bank v. Taylor, 9 U. S. App. 406, 4 C. C. A. 55, and 53 Fed. 854, in which Southard v. Russell, 16 How. 547, 570, and Kingsbury v. Buckner, 134 U. S. 650, 671, 10 Sup. Ct. 638, and other cases, are cited. A copy of the bill which it is proposed to file accompanies the petition, but, without consideration of its merits, it is deemed the better practice, unless for special reason to the contrary, to grant the petition as of course. To the extent, therefore, that the leave of this court is necessary and may be granted, it is ordered that the petitioner have leave to file in the court below the bill proffered, or such other or amended bill or petition as he may be advised, and that the costs of this proceeding be taxed against the petitioner.

POWELL et al. v. LEICESTER MILLS et al.

(Circuit Court, E. D. Pennsylvania. February 23, 1899.)

PARTIES—EFFECT OF INTERVENTION—PLEADING.

An intervenor cannot enlarge the scope of a suit by setting up a defense not open to the defendant, on the ground that, if he had been sued, such defense would have been available to him.

On Motion for Leave to Amend Answer.

Howson & Howson, for complainants.

H. T. Fenton, for respondents.

DALLAS, Circuit Judge. The leave asked by the intervening defendants to amend their answer heretofore filed by adding five new

paragraphs is, as to the first four of said paragraphs, granted. The proposed fifth new paragraph, as I understand it, sets up a defense which might be available to the intervening defendants in a suit against them, but which is not pertinent to the present one. The intervention of the Macon Knitting Company and Joseph Bennor has not enlarged the scope or varied the nature of this litigation. The interveners may make any defense which the original defendants could make, but they cannot strengthen that defense by showing that, if they had themselves been sued, their position would have been stronger. *Platt v. Railroad Co.*, 65 Fed. 664. Therefore the leave asked is, as to the proposed fifth new paragraph, denied.

All questions respecting costs are reserved, and the suggestion made upon the argument that the intervening defendants should be required to enter security for costs will not now be considered, but may, if desired, be separately presented by motion in writing.

KENNEDY v. GRACE & HYDE CO.

(Circuit Court, S. D. New York. February 27, 1899.)

1. MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE TO WORK.

A master is charged with the duty of providing for the safety of the place where his servant is required to work, except as it may be changed by the progress of the work itself.

2. SAME—CONCURRENT NEGLIGENCE OF FELLOW SERVANT.

Plaintiff was working, in the night, on tall timbers provided by his employer, the defendant, and supported by guys in the street. The guys were not guarded nor lighted, as was customary and necessary for their safety, and a passing wagon struck one, throwing plaintiff from the timbers, and causing his injury. *Held*, that the fact that the guys were placed by fellow workmen, and that their negligence, as well as that of the driver of the wagon, may have contributed to the injury, did not relieve defendant from liability.¹

On Motion for New Trial.

Gilbert D. Lamb, for plaintiff.

Charles C. Nadal, for defendant.

WHEELER, District Judge. The plaintiff is a carpenter, and was at work for the defendant, at night, on tall timbers above the sidewalk on Vanderbilt avenue, steadied by guys across the avenue. In the early morning a mail wagon going along the avenue hit one of the guys, and thereby the plaintiff was thrown from the timber where he was at work to the sidewalk, and seriously injured. This suit is brought for that injury, and now, after verdict for the plaintiff for not properly guarding the street for the protection of the work, has been heard on a motion for a new trial.

The guys were moved from place to place along the avenue by the fellow workmen of the plaintiff, as the work progressed. This guy had been moved but a short time before, and so placed that it might

¹ As to fellow servants generally, see note to *Railroad Co. v. Smith*, 8 C. C. A. 668, and, supplementary thereto, note to *Flippin v. Kimball*, 31 C. C. A. 286.

be hit by high wagons passing along the avenue. The principal ground urged in support of the motion is that the injury was caused by the negligence of fellow servants, of which the plaintiff took the risk, and not by anything for which the defendant was responsible.

The employer provides the place. That this imposes the duty of providing for the safety of the place, except as it may be changed by the progress of the work itself, seems to now be well settled. The cases cited for upholding the exception prove the rule. *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433; *Finalyson v. Milling Co.*, 14 C. C. A. 492, 67 Fed. 507; *City of Minneapolis v. Lundin*, 7 C. C. A. 344, 58 Fed. 527, and others. This place was a public street, where teams and high vehicles were likely to pass at all hours. There was evidence that watchmen, or red lights, are usually and necessarily stationed about the places of such work to warn drivers, for safety; and that there were none about this work at this time. The progress of the work did not displace these safeguards. The lack of them was negligence of the defendant, which the jury found to be unreasonable, and to have caused the injury to the plaintiff, without fault of him. In all the cases, enforcing the exception, noticed, the progress of the work affected the place itself as to safety. As in *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, the place complained of was a building in process of construction. In *Finalyson v. Milling Co.* it was a mine being worked; and in *City of Minneapolis v. Lundin* it was a sewer being constructed, and in each the work being done caused the danger resulting in the injury. In the latter case the court said the street furnished by the city was safe, and the negligence was that of those at work upon the sewer. Here the street was made unsafe for the work by the lack of warning, with which the work in which the plaintiff was engaged had nothing to do. Carelessness in placing the guy or in driving the mail wagon may have concurred, but that would not relieve the defendant from liability for what its own negligence also concurred in. Motion denied.

BAKER V. BARBER ASPHALT PAV. CO.

(Circuit Court, W. D. Missouri, W. D. January 16, 1899.)

No. 2,291.

1. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—ISSUES AND PROOF.

In an action to recover for the death of a servant, alleged to have been due to the failure of the master to provide him with a safe place to work, that the defect complained of was obvious and well known to the servant, so that the risk incident thereto was assumed by him, need not be specially pleaded as a defense, to render evidence on the subject admissible, but such facts go to the question of whether a right of action ever existed in the plaintiff, and are provable under a general denial.

2. PLEADING—AMENDMENT AFTER VERDICT.

A court may permit an amendment after a verdict rendered by its direction to conform a pleading to the proof and the issues actually tried.

On Motion for New Trial.

Meservey, Pierce & German and Wm. E. Higgins, for plaintiff.
Lathrop, Morrow, Fox & Moore, for defendant.

PHILIPS, District Judge. This is an action by the surviving wife of Wells H. Baker to recover damages for the death of her husband, occasioned by the alleged negligent act of the defendant company. The action grows out of the following state of facts, briefly stated: The defendant company, engaged in the construction of asphalt pavements at Kansas City, maintained a storage room for material used in its business. This storage building was surrounded by a high board fence, and access to the platform of this building, from which the materials were loaded into the wagons for conveyance therefrom, was through a gateway about 30 feet wide. The wagons reached said platform by being backed, so that, when the rear end of the wagon struck against the platform, the heads of the horses were near to this gateway. The posts to this gateway were bound together at the top with a beam, under which said wagons had to pass in backing into the platform, and passing therefrom after being loaded. This beam is alleged in the petition to have been at the time of the accident 7 feet 9 inches from the ground; so that, when a wagon was loaded in the customary way, there was not left room for the driver to sit upon the front end of the wagon, and pass out under this beam, without stooping considerably. The evidence showed, in a general way, that, after said Wells H. Baker had loaded his wagon, he was either in a position on the front end of the wagon, or was standing on the side thereof, when his team suddenly started, and passed through the gate; and in passing under said beam, in stooping, he was struck near the back of the neck, and received injury from which he died.

The evidence elicited from plaintiff's witnesses disclosed the fact that the team in question belonged to the deceased, as also the running gear of the wagon, and that the wagon bed was furnished by the defendant; and the further fact that the deceased, for a number of years previous to this accident, had been hauling material for the defendant from this platform, and had been passing in and out under said crossbeam, and was perfectly familiar with its position, and the difficulty and danger, if any, of passing thereunder on his wagon. He had sole control and management of the horses and wagon. On this state of the evidence, the jury, under direction of the court, returned a verdict for the defendant.

The plaintiff has filed a motion for new trial, on the principal ground that the court erred in holding that, as the deceased was perfectly familiar with the place where he was assigned to work, and the position of the crossbeam and its height from the ground were quite obvious and well known to him, and he continued in the service of the defendant to work in and about said place without protest, he assumed the risk incident to any defective construction of said beam, for the reason that no such fact was pleaded in the answer as a specific defense to the plaintiff's cause of action; in other words, the

contention of plaintiff's counsel is that this fact was not within the issues under the pleadings in the case. The answer tendered the general issue, and also a plea of contributory negligence, and further pleaded that the deceased negligently failed to observe the crossbar, and to take precautions to prevent being struck by it; that he negligently loaded his wagon in an improper manner, negligently failed to properly control his horses or heed the warnings given him, and assumed an improper position upon the wagon immediately preceding the accident.

There has perhaps been no better or more succinct statement of what is admissible in evidence under the general issue than the following exposition, by Judge Dryden, in *Greenway v. James*, 34 Mo. 328:

"Where a cause of action which once existed has been determined by some matter which subsequently transpired, such new matter must, to comply with the statute, be specially pleaded; but, where the cause of action alleged never existed, the appropriate defense under the law is a general denial of the material allegations of the petition; and such facts as tend to disprove the controverted allegations are pertinent to the issue."

The very groundwork of the plaintiff's cause of action was the negligence of the defendant, as master, in failing to furnish the deceased a reasonably safe place in which to perform the work in which he was engaged. This obligation on the part of the master is not, however, so absolute and unconditional that he is made responsible for any injury occasioned to an employé by imperfect construction or arrangement of the place in which the employé is assigned to work. As the master is ordinarily permitted to conduct his business in his own way, and to apply such appliances and structures as he may deem essential for his use, he is only liable to his servant for an injury when it results by reason of the neglect of the master to furnish the servant reasonably safe appliances with which to work, and a reasonably safe place in which to perform it, where the servant himself is not aware at the time of the injury of the imperfection of the structure or the danger incident to the place. There is no rule of law better settled than that where the structure or place which caused the injury is perfectly obvious to the eye, and well known to the servant, both before and at the time of the accident, he himself assumes the risk of working under such conditions, and the master is excused from any liability therefor to the servant.

As said by the court in *Coal Co. v. Reid*, 29 C. C. A. 475, 85 Fed. 917:

"Where the servant possesses actual knowledge of the risk, obtained both before and during the engagement of service, he is not merely required to exercise greater vigilance to avoid the danger, but he assumes the risk. *Peirce v. Clavin*, 27 C. C. A. 227, 82 Fed. 550."

In *Tuttle v. Railway Co.*, 122 U. S. 195, 7 Sup. Ct. 1166, the supreme court approved the following announcement of the rule by Judge Cooley:

"The rule is now well settled that, in general, when a servant, in the execution of his master's business, receives an injury which befalls him from one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself. The reason most generally as-

signed for this rule is that the servant, when he engages in the employment, does so in the view of all the incidental hazards, and that he and his employer, when making their negotiations fixing the terms, and agreeing upon the compensation that shall be paid to him, must have contemplated these as having an important bearing upon their stipulations. As the servant then knows that he will be exposed to the incidental risk, 'he must be supposed to have contracted that, as between himself and the master, he would run this risk.'

The logical sequence, therefore, of this proposition, is that, as to such servant, the master is not chargeable with actionable negligence for an injury sustained by the servant from an obvious defective appliance or dangerous place, well known to him when he enters the service and undertakes to work in such a place; and the proof of this fact is involved within the very terms of the allegation of the petition, as it establishes the fact that no cause of action ever existed in favor of the deceased or his legal representative.

The petition in this case shows on its face that, "for a long time prior" to the date of this accident, the deceased was in the employ of the defendant as a teamster, and that it was his duty as such to haul paving material from said place of business, and that he was required to use this platform, and to reach it through said gateway and under said crossbeam. It occurred to the court when this petition was read that it disclosed on its face that, as to the alleged injury, the rule of "volenti non fit injuria" should be applied. And when the facts were fully developed by the plaintiff's own witnesses that whatever defects existed in the manner of the construction of said beam, and whatever dangers were incident to working about said place, were not only perfectly obvious, but were better known to the deceased than to his employer, she had established affirmatively the fact that there was no negligence on the part of the defendant, and therefore the cause of action was disproved. Her husband had not only been driving in and out of this gate, under this beam, for years prior to the accident, but, as the evidence disclosed, he had passed in and out at this place with his team two or more times the day of the accident.

This is clearly the view of the supreme court of the United States in *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298. The injury complained of resulted from the plaintiff, an employé of the railroad company, being caught between the deadheads of the car while coupling them. The evidence showed that he was familiar with coupling such cars, and that the defects in the deadheads were obvious to any one making the couplings, and the danger therefrom was apparent. The court said:

"The intervener was no boy, placed in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to any one. Under those circumstances, he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

So, in *Railroad Co. v. Baugh*, 149 U. S. 386, 13 Sup. Ct. 914, Mr. Justice Brewer, while recognizing the doctrine of the obligation imposed by law, on grounds of public policy, upon the master, to furnish the employé efficient machinery with which to work, and a reasonably safe place therefor, excepts from its operation such defects as are "obvious and necessary."

I do not think it too much to say that neither the supreme court of the United States nor any of the courts of appeal have ever regarded it as essential to plead specifically the fact of the assumption of the risk by servants, in order to make it available to the master. In Railroad Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, under the general issue, the case was tried throughout, as it was also discussed by the learned judge who wrote the opinion, as if that issue had been fully presented under the general issue. It was so treated by the court of appeals in this circuit in West v. Pacific Co., 29 C. C. A. 219, 85 Fed. 392, and in Coal Co. v. Reid, 29 C. C. A. 475, 85 Fed. 914. In Hudson v. Railway Co., 123 Mo. 445, 27 S. W. 717, the plaintiff sought to recover for an injury received from the defendant railway company by leaving its cars in a certain position in violation of an ordinance of the city, and the answer was a general denial. The evidence elicited from plaintiff's witnesses showed that he received the injury under circumstances of assumption of the risk, and through his contributory negligence. It was held that the question of defendant's negligence was immaterial, for the reason that no cause of action was predictable thereon. See Epperson v. Postal Tel. Co. (recently decided by supreme court of Missouri) 50 S.W. 795.

Counsel for plaintiff have cited the court to a number of rulings by some of the state courts, which are very fitly characterized by the last one cited,—Stock-Yards Co. v. Goodwin (Neb.) 77 N. W. 357. The injury in that case resulted from the breaking of a hand brake while the brakeman was working it; and it was sought to be shown by the defendant that there was a well-known rule, custom, and manner of moving the cars, and for the inspection of brakes. It was ruled that such a defense was not available to the defendant, for the reason that it was not pleaded. The defendant merely pleaded that, when the brakeman attempted to set the brake, he knew that the car had not been inspected, the court saying: "A judgment whose sole support is evidence which did not tend to prove or disprove any issue made by the pleadings in the case could not stand." This ruling of the court is justified on the ground that, while the brakeman may have known the car had not been inspected, he did not know that it was out of order. It is quite clear from the further discussion in that case that the court recognized the fact that where the injury results from a patent and obvious defect, known to the workman at the time he engages upon the service, such evidence would defeat a recovery, because it inheres in the very cause of action the plaintiff asserts. The court cites the case of Arnold v. Canal Co., 125 N. Y. 15, 25 N. E. 1064, where the injury resulted while the plaintiff was attempting to couple two cars, one of which had a broken drawhead, and the negligence imputed was because of that defect. As the evidence disclosed that the defect was obvious, and known to the employé, or should have been known to him, it was held that under the general issue no recovery could be had. And the Nebraska court, commenting upon this decision, said:

"Under these circumstances, the court held that the company was not liable for his injury. We think the holding in that case was correct, and that it is justified on two grounds: (1) The defect which caused the injury was an

obvious one. That the drawhead of the car was broken was discernible from a casual glance. * * * By engaging in this business, he assumed the risk of receiving an injury from the defective car. He was bound to know or presume that the cars which he was handling were defective, and to be on his guard."

And the court concludes by saying that:

"The doctrine of this court is that an employé assumes the risk arising from defective appliances used or to be used by him, or from the manner in which a business in which he is to take a part is conducted, and such risks are known to him, or are apparent and obvious to persons of his experience and understanding."

—The evident conclusion from which is that if the evidence in the case before the court had shown, as here, that the risk was an obvious one, and known to the employé, it would have been admissible in evidence, for the palpable reason that the employé assumed it; and, under his implied contract with the employer, no negligence could be imputed by him to the employer for failure to remove the defective appliance or provide a safe place.

Defendant's counsel ask the court, in the event it entertains the opinion that the defendant could not avail itself of the evidence in question for not having specifically pleaded the assumption of the risk by the deceased, to be permitted to amend the answer in that particular, to conform to the evidence. We entertain no doubt of the authority of the court, even after verdict, to permit such amendment. See *Bamberger v. Terry*, 103 U. S. 40-44; *Bowden v. Burnham*, 8 C. C. A. 248, 59 Fed. 752-755; *Rev. St. Mo. 1889*, §§ 2098, 2101. While the court is quite firm in its opinion that such amendment is not necessary to support the verdict and judgment in this case, leave is granted to the defendant, instanter, if it so desires, to add to its answer herein such plea, as it would in no wise alter the issues as they were tried, and is conformable to the evidence. The motion for a new trial is denied.

SEYMORE v. FRANKLIN.

(Circuit Court, W. D. Missouri, W. D. January 16, 1899.)

No. 2,090.

PLEADING—AMENDMENTS—DEPARTURE.

Where a petition on which plaintiff obtained an attachment against property of defendant, a nonresident, counted on judgments which were described, the dates, amounts, and parties being given, plaintiff will not be permitted to file an amended petition, after defendant has appeared, setting up judgments of different dates and amounts, and between different parties, such amended petition not being a continuation of the original action, but the substitution of a new cause of action.

On Motion to Strike Out Amended Petition.

Charles Thomas and Johnson & Lucas, for plaintiff.
Wollman & Wollman, for defendant.

PHILIPS, District Judge. On the 26th day of April, 1894, the plaintiff brought suit in the circuit court of Andrew county, Mo., against the defendant by attachment. The plaintiff is a citizen and

resident of the state of Iowa, and the defendant is a citizen and resident of the state of Illinois. Under the writ of attachment issued therein, a lot of personal property, alleged to belong to the defendant, was seized in said Andrew county. To this action the defendant appeared, gave a delivery bond, and retained possession of said property. On his petition the cause was removed into the United States circuit court for the St. Joseph division, and by written consent of parties the cause was transferred to this division. The plaintiff has filed an amended petition herein, which the defendant moves to strike out, on the principal ground that it substitutes a new cause of action.

To more clearly present the differences between the original petition and the amended petition, the court will state, in juxtaposition, the original and amended causes of action:

Original Petition.

First count: The petition alleges that on the 6th day of March, 1888, in the district court of Taylor county, state of Iowa, the plaintiff recovered against the defendant and one J. C. Johnson and P. C. King a judgment for the sum of \$2,000, with six per cent. interest thereon from December 13, 1881; that on said judgment there was paid on May 13, 1889, the sum of \$1,380.57, and the further sum of \$463, derived from the sale of land in St. Clair county, Missouri.

Amended Petition.

First count: The amended petition, in the first count, alleges, in substance, that on the 13th day of December, 1881, the defendant, Lesser Franklin, with one Peter C. King and Joseph C. Johnson, in consideration of the sum of \$2,000, executed and delivered to plaintiff a warranty deed for the southeast quarter of section 36, township 70, range 34, in said county of Taylor, state of Iowa. Said deed contained a certain covenant and warranty of title. The petition avers the breach of this warranty, in that one Eunice Hodgin was at the time of the execution of said deed seized of a life estate in said lands, and one Ben H. Steele, Alonzo Doudny, and Martha Outlander were seized in fee of the said premises, and that these seisors, in said county of Taylor, brought an action of ejectment for the recovery of said land, of which suit in ejectment the defendant and said King and Johnson were duly notified, and required to defend said title; that the defense made thereto was unsuccessful, and that the defendants therein were ejected from said premises. It is then alleged that the plaintiff expended in and about the defense of said suit the sum of \$500, and judgment is asked for said sum of \$2,000, the purchase consideration of said land, and said sum of \$500, with six per cent. interest thereon from December 13, 1881. A credit of \$1,380.57 on May 13, 1889, is given on said judgment, and judgment is prayed for \$2,692.11, balance due.

Second count: The second count alleges that on the 6th day of March, 1888, by the judgment of said court in Taylor county, state of Iowa, one R. A. Toler recovered against the defendants named in the first count a judgment for the sum of \$1,700, with six per cent. interest thereon from December 13, 1881; that on said judgment there was paid, May 13, 1889, the sum of \$1,809.05, paid by one Berry; that on the ____ day of April, 1894, said judgment was sold and assigned to the plaintiff; and that, after deducting said payments

Second count: The petition then proceeds as follows: "And for a second count of this petition, but not for an additional cause of action," plaintiff alleges that on the 6th day of December, 1888, he recovered in said Taylor county court, in Iowa, against the defendant Franklin and said King and Johnson, a judgment for the sum of \$3,100 for debt and for costs, in a suit wherein said Eunice Hodgin, Alonzo Doudny, Ben H. Steele, and Martha Outlander were plaintiffs, and this defendant and said King and Johnson et al. were defend-

and computing the interest, there remains due to plaintiff the sum of \$2,321.30, for which judgment is asked.

ants, on which judgment there has since been paid the sum of \$1,380.50; and prays judgment for the sum of \$2,361.91, balance due thereon.

Third count: The third count is for a further cause of action against the defendant, which alleges that in December, 1881, this defendant and said King and Johnson sold to one David E. Funkhouser, for a consideration of \$1,700, the southeast quarter of section 30, township 69, range 34, situate in said Taylor county, state of Iowa; that thereafter, on the 2d day of January, 1882, said Funkhouser conveyed said land to one R. A. Toler for a consideration of \$1,800 cash and the assumption of a mortgage placed thereon by said Funkhouser of \$200; that both of said deeds contained certain covenants of warranty of title, which said covenants, the petition alleges, were broken, and that on the 1st day of June, 1889, one Eunice Hodgin brought suit in the circuit court of said Taylor county, Iowa, against the plaintiff, R. A. Toler, and said Johnson and King and this defendant and one Berry and said Steele, Doudny, and Outlauder, to have said deeds of conveyance aforesaid set aside and vacated; that final decree was entered thereon against said defendants in November, 1888; that said Toler, in defending said last-named suit, expended the sum of \$500; that this sum of \$500 and the sum of \$1,700 purchase money have been due thereon since January 6, 1882, and that the plaintiff claims as assignee under said Toler; that there has been collected thereon \$809.05, May 13, 1889, and judgment is prayed for a balance of \$1,804.44.

Fourth count: The amended petition then proceeds: "And for a fourth count, but not an additional cause of action to that stated in the third count of the petition," that on the 9th day of December, 1888, in said district court of Taylor county, Iowa, in a certain suit wherein Eunice Hodgin was plaintiff and this defendant and Joseph C. Johnson, Peter C. King, R. A. Toler, Samuel Berry, et al., were defendants, the said Toler recovered judgment against this defendant and Peter C. King and Joseph C. Johnson in the sum of \$2,800, and costs, taxed at \$63, which judgment bears interest at six per cent. per annum from the 6th day of January, 1882; and there has been paid thereon the sum of \$1,809.05; and plaintiff sues as assignee of said Toler, alleging that there is now due on said judgment the sum of \$2,592.37 and interest thereon, and asks judgment for the sum of \$4,954.28, with interest thereon.

From the foregoing comparison it is quite apparent that the petitions are for different causes of action. The first count of the original petition is simply an action to recover on a judgment alleged to have been recovered by the plaintiff against the defend-

ant and Joseph C. Johnson and Peter C. King, rendered the 6th day of March, 1888, with two credits thereon of \$1,380.57 and \$463, paid May 13, 1889. The second count of the original petition is an action on a judgment of date March 6, 1888, alleged to have been recovered by one Toler against this defendant and said Johnson and King for \$1,700, with 6 per cent. interest from December 13, 1881, entitled to a credit, May 13, 1889, of \$1,809.05, alleged to have been assigned to plaintiff in April, 1894; balance claimed is \$2,321.30. The first count of the amended petition is for a breach of covenant of title to certain lands sold by this defendant and said Johnson and King to the plaintiff, with a claim of damages for \$2,692.11; while the second count of the amended petition, with the singular statement that it is not an additional cause of action, alleges that on the 6th day of December, 1888, the plaintiff recovered against the same defendants a judgment for the sum of \$3,100 in the ejectment suit last above named, and judgment is asked for \$2,361.91, but not in addition to the sum mentioned in the first count. And the third count of the amended petition counts on a sale of other real estate by this defendant and said Johnson and King to one Funkhouser, who sold to one Toler, which deeds were set aside at the suit of one Eunice Hodgin, and judgment is prayed for \$500 expenses in and about defending said suit by said Toler and \$1,700 purchase money paid by Toler to said Funkhouser; and plaintiff sues, as assignee of that judgment, for a balance of \$1,804.44. If the amended petition does not count upon new and substituted causes of action, and is not a continuation of the original cause of action, my analysis of these pleadings is at fault. There is nothing whatever in the original petition to indicate that the defendant, Franklin, ever conveyed to the plaintiff, or anybody else, any land with covenants of title which had been broken, and that it was intended to recover from the defendant damages resulting therefrom, whether based on judgment or otherwise. If it be said that, inasmuch as the original petition did not state the contract or transaction on which the judgment arose, it is no departure to recite such facts by way of inducement, the answer is that the judgment counted on in the first count of the original petition is described as having been recovered on the 6th day of March, 1888, in favor of the plaintiff against the defendant and J. C. Johnson and P. C. King, which is entitled to credits of a given amount, and of a certain date; whereas the first count of the amended petition counts on a judgment in favor of a different party, in an action of ejectment, and recovery is sought for the original purchase money and \$500 expended in the defense of the action of ejectment, from which it is apparent that it is not based on a judgment at all inter partes. And, while protesting that the second count of the amended petition is not intended to be predicated of an additional cause of action, it nevertheless alleges a judgment between different parties plaintiff and defendants, of a different date, and for a different sum. To sustain such an amendment it must, therefore, be held that a party may bring suit in attachment in this state against a nonresident defendant, based upon a certain described judgment, and obtain jurisdiction by seizure of the property of the defendant within the state, and

then, after the nonresident defendant has thus been induced to enter his appearance and give a forthcoming bond for the property seized, the plaintiff may abandon the original cause of action, to wit, a given judgment of a particular date, for a given sum, and substitute the history of an action for breach of covenant on a deed of conveyance and for moneys expended in the defense thereof, in which a judgment of a different date and for a different sum is claimed. As said by the supreme court of this state in *Lumpkin v. Collier*, 69 Mo. 170, if this be permissible, "a defendant served with process on one cause of action suffering default might be confronted with a judgment on a cause of action totally different from that which he was summoned to answer." In this case, for instance, the writ of attachment, as already stated, was obtained against the nonresident defendant on a simple action of debt, based upon certain alleged judgments obtained in the state of Iowa, stated in the form of two counts, with varying statements, made, doubtless, to meet the possible state of the evidence as to whether the judgment was one way or the other as to the plaintiffs and defendants therein, wherein the amount of the judgment prayed for is a balance of \$2,321.30, to which the defendant was induced to enter his appearance and give a forthcoming bond for the attached property; whereas in the amended bill two other distinct substituted causes of action are interposed,—one growing out of a breach of covenant in warranty deeds, alleged to have been set aside, whereby the defendant is attempted to be held for the consideration money in the deed of conveyance and for expenses in defending the same, and the others are judgments obtained between different parties than those named in the original petition, of different dates, and the plaintiff sues as assignee of the judgment creditor, and claims judgment in the aggregate sum of \$7,646.39.

Under the Code of Missouri, amendments of pleadings are allowed with liberality, but always subject to the qualification that they must be in furtherance of justice, and with the further limitation that the amendment must be a continuation of the original action, and not the substitution of another cause of action. The rule is succinctly stated by the supreme court in *Buel v. Transfer Co.*, 45 Mo. 562, as follows:

"Where the amendment sets up no new matter or claim, but is a mere variation of the allegations affecting a demand already in issue, then the amendment relates to the commencement of the suit, and the running of the statute is arrested at that point; but where the amendment introduces a new claim, not before asserted, then it is not treated as relating to the commencement of the suit, but as equivalent to a fresh suit upon a new cause of action."

Another test as to whether or not it is the same cause of action, to a limited extent, is applied by the supreme court of the state, and that is whether the evidence essential to sustain substantially the original cause of action would be admissible to sustain the amended cause of action. *Lumpkin v. Collier*, supra, and *Scovill v. Glasner*, 79 Mo. 449. Nor is the contention of plaintiff's counsel correct that, inasmuch as the different causes of action stated in the two petitions might have been embraced in the original petition in separate counts, the same end may be accomplished by setting out, by way of substi-

tution, the other causes of action in the amended petition. *Scovill v. Glasner*, *supra*. It has been expressly held that, where a party sues upon a contract under which he claims as assignee, he cannot amend so as to count on a contract alleged to have been made directly with himself. *Bigham v. Talbot*, 63 Tex. 271, approved in *Railway Co. v. Wyler*, 158 U. S. 292, 15 Sup. Ct. 877. The converse of this proposition must obtain,—that where the plaintiff, as in this case, first declares on a judgment obtained in his favor against certain named parties, or on a contract between him and such parties, he cannot amend by declaring as an assignee of the judgment obtained between the other parties, or of a right of action inhering in other parties. In *Sicard v. Davis*, 6 Pet. 124, the plaintiff brought an action of ejectment, laying his demise as having been made by Stephen Sicard on January 30, 1815, and at a subsequent term of court he was given leave to amend by laying the demise in the name of the heirs of the original grantee, Joseph Phillips, and others, to whom the land had been conveyed before the execution of the deed under which Sicard acquired title. In respect of this, Chief Justice Marshall said that "limitations might be pleaded to the second allegation, though not to the first, because the second count in the declaration, being on a demise from a different party, asserting a different title, was not distinguishable, so far as respects the bar of the act of limitations, from a new action." In short, this amended petition is a clear departure from the original petition within the principle of the ruling of the supreme court in *Railway Co. v. Wyler*, *supra*. Among the instances given in illustration of the rule is that an action of assumpsit, changed by amendment into an action of debt, is a substitution, and not an amendment. *Crofford v. Cothran*, 2 *Sneed*, 492. The motion to strike out the amended petition is sustained.

UNITED FIREMEN'S INS. CO. V. THOMAS.

(Circuit Court of Appeals, Seventh Circuit. February 7, 1899.)

No. 404.

1. INSURANCE—AGENCY OF BROKER—NOTICE TO COMPANY.

An insurance broker was employed by an owner of property to effect insurance thereon in such companies as he should approve. He went to the general agents of an insurance company, and made and signed an application in behalf of the property owner for a part of the amount, on which a policy was issued and delivered to him; and, on his collection of the premium from the insured, he was allowed by the general agents a share of their commissions thereon. He was not otherwise employed either by them or the company. *Held*, that he was not either in fact or law an agent of the company in the transaction, so as to charge it with his knowledge that other insurance on the property was effected at the same time, in violation of a condition of the policy.

2. SAME—CONSTRUCTION OF STATUTE.

Rev. St. Ill. c. 73, § 40, relates to the regulation of foreign insurance companies doing business in the state, and prescribes that they shall appoint an attorney, file a copy of their charter, and obtain a permit, and in certain cases deposit security. It imposes penalties, not only on the

companies, but on their agents, for doing business in the state without a compliance with such requirements. Section 40 provides that "the term 'agent' or 'agents,' used in this section, shall include an acknowledged agent, surveyor, broker or any other person or persons who shall, in any manner, aid in transacting insurance business of any insurance company not incorporated by the laws of the state." Held, that such provision relates solely to the matter of agency as between foreign companies and the state authorities, and does not change the rules of law as to principal and agent as between the company and a policy holder.

8. SAME—CONDITION AGAINST OTHER INSURANCE.

Other insurance, though effected at the same time, is within a condition of a policy making it void "if the insured now has or shall hereafter make or procure" other insurance on the property without the consent of the insurer.

On Rehearing.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge. The facts in this case are sufficiently stated in our former opinion. 53 U. S. App. 517, 27 C. C. A. 42, and 82 Fed. 406. We granted a rehearing of the cause principally for a discussion of the question whether Prindiville, either as a matter of law or as a matter of fact, could be deemed the agent of the insurance company, appellant, in effecting the insurance in question. Aided by the oral arguments at such rehearing, and in view of certain decisions of the supreme court of the state of Illinois, we have carefully considered the case, both with respect to the question whether such agency can be deemed established as matter of fact or as matter of law, and the further question whether, under the statute of the state of Illinois, he must be deemed to be the agent of the insurance company because he participated in procuring the insurance in question. The evidence to our minds is undisputed and conclusive that Prindiville had never been in the service of this insurance company, was never authorized by it or its general agents to procure any insurance for it, was employed by the defendant in error to procure insurance for him in such companies as he might approve; that he placed such insurance in several companies, applying to the general agents of the plaintiff in error for a policy in that company; that he signed, on behalf of the defendant in error, the application for that insurance, and authorized the statements therein contained; that neither the plaintiff in error nor its general agents were at any time advised by Prindiville or by the defendant in error or by any other person that other insurance upon the property insured had been or was expected to be procured; that Prindiville received from the several companies, probably upon the same day, the policies for which he had applied, delivered them to the defendant in error, and received from him the premiums. He thereupon paid to the general agents of the plaintiff in error the premium due to the company, and was allowed by the general agents a certain commission. The question, then, is (irrespective of the statute of the state of Illinois, which we will consider hereafter) whether Prindiville, by reason of the facts stated, was the agent of the insurance company in such manner and to such extent that the company is chargeable

with the knowledge that he possessed of other insurance upon the property insured. We are of opinion that he was not, and that the insurance company was not bound by his knowledge. Unless the fact that he was allowed by the general agents a commission—a certain proportion of the amount which they received from the company for placing insurance—can be deemed to constitute him an agent, there is no color for declaring him such. It might with equal propriety be said that if the son of the plaintiff in error had, on behalf of his father, sought this insurance and that placed in other companies, the plaintiff in error would be chargeable with the knowledge that the son possessed of other insurance obtained by him for his father. The payment by the general agents to Prindiville of a certain share of the commissions which they were entitled to retain of the premium did not constitute him an agent of the company. That fact did not authorize him in any way to represent the company by his act, or to charge them with his knowledge. He never had been, and was not then, in the service of the insurance company. He was employed by the defendant in error. Prindiville made application for him, and made the representations and warranties in his behalf. The policy was delivered to Prindiville as the agent of the defendant in error. It does not matter that the general agents of the insurance company delivered the policy to Prindiville for the defendant in error without exacting payment of the premium at the moment. If they saw fit to trust either of them for the amount until Prindiville could hand to his principal the policy and receive the premium, that was their choice and risk. The policy was none the less delivered when it was handed to Prindiville as the agent of the defendant in error, and was in force from that moment. If the property covered by it had been destroyed before Prindiville had opportunity to hand the policy to his principal, it would have been a loss covered by this policy. It was effective according to its terms from the moment of the delivery of the policy to Prindiville. Upon the question whose agent was he, the fact that the general agents allowed to Prindiville a certain proportion of their commission for placing the insurance in their company, if coupled with other facts, might be of some avail in determining the question of agency; but, standing alone, it is without probative force.

Thus, the supreme court of Illinois has said, in *Insurance Co. v. Rubin*, 79 Ill. 404:

"This supposed agent is Mr. Ludlum, who was not at that time, nor at any other time, the appointed agent of the company. He was a man in the habit of picking up, as a broker on the street, any risk of which he might get information. It was on his application to appellee that the policy was written. After this, Ludlum took the application to the agent of the company, and obtained the policy in question. In this he was the agent of appellee, and not of appellant. The fact that the agent allowed him a commission does not change the character in which he acted."

And so, also, in *Insurance Co. v. Brooks*, 83 Md. 22, 34 Atl. 373, the principle is thus stated:

"It appears to be well settled that, when one engages another to procure insurance, the person so employed is agent for the insured, and not for the insurer, in all matters connected with such procurement."

See, also, Insurance Co. v. Klewer, 129 Ill. 599, 611, 22 N. E. 489; Standard Oil Co. v. Triumph Ins. Co., 64 N. Y. 85; Devens v. Insurance Co., 83 N. Y. 168; Mellen v. Insurance Co., 5 Duer, 101; Insurance Co. v. Reynolds, 36 Mich. 502; Insurance Co. v. Hartwell, 123 Ind. 177, 24 N. E. 100; Hamblet v. Insurance Co., 36 Fed. 118; Ostr. Ins. § 45; Mechem, Ag. § 931; Whart. Ag. § 708; May, Ins. §§ 122, 123.

We come, then, to the question whether, under the statute of the state of Illinois, Prindiville must be regarded as the agent of the insurer, and in what respect such agent, and whether his knowledge should be imputed to the insurer. In other words, has the statute, as between insurer and insured, worked any change in the law? The statute to which we are referred is part of chapter 73 of the Revised Statutes of Illinois, and is part of section 40. That section treats of the terms upon which foreign companies may be authorized to do business in the state of Illinois. It provides for the appointment of an attorney in the state upon whom process may be served, and that a written instrument certifying such appointment shall be lodged with the auditor of public accounts. It provides that a copy of the charter shall be filed with the auditor, for the deposit of certain securities by a company organized under any foreign government, and that it shall not be lawful for any agent to act for any company referred to in taking risk or transacting the business of fire or inland navigation insurance in the state of Illinois without procuring from the auditor of public accounts a certificate of authority stating that the company has complied with the requisitions of the act, and providing a certain penalty for violation of the act. Then follows the provision in question:

"Every agent of any insurance company shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town or village in which the company is located, and the state or government under the laws of which it is organized. The term 'agent or agents,' used in this section, shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall, in any manner, aid in transacting insurance business of any insurance company not incorporated by the laws of this state."

The subsequent section of the chapter provides for revocation of the certificate by the auditor in case of false annual reports, for the examination by the auditor into the business of the company, and contains general provisions with respect to the inspection of state and foreign companies. The part of the statute quoted is the only provision to which we are referred, or which we have been able to find, upon which is rested the contention that Prindiville is thereby created the agent of the insurance company.

It is apparent from the examination of the provisions of this chapter that the legislature of the state of Illinois is dealing with the relations which shall exist between foreign insurance companies and the authority of the state, and, as to them, declares what shall be done by such companies before they shall be authorized to do business within the state, or to continue the business of insurance under such authorization. It provides penalties for any infraction of the law. It sought to so hedge about the transaction of the business of

insurance that no foreign insurance company, by any cunning device, could overreach the statute and transact business within the state without compliance with the terms of the statute. It imposes penalties, not only upon the company which should so unlawfully transact business within the state, but, since the company was beyond the reach of its courts, like penalties were imposed upon any one within the state who should act for such company unlawfully transacting business within the state. And, that there might be no escape from compliance with the law, it was enacted that the term "agent," as used in the section in question, should include an acknowledged agent, surveyor, broker, or other person or persons who shall in any manner aid in transacting insurance business of any insurance company not incorporated by the laws of the state. Any such person was declared to be the agent of the company with respect to the penalties declared by the statute. This was done that there might be no evasion of the statute. This view of the sense in which the term "agent" is defined, and the purpose sought to be accomplished, throws light upon the decisions of the supreme court of Illinois which we are about to consider. The statute did not undertake to say that, as between the insurer and insured, one who acts for the insured in procuring insurance should be deemed to be the agent of the insurer.

The case of *People v. People's Ins. Exchange*, 126 Ill. 466, 18 N. E. 774, was an action brought in the name of the people to recover certain penalties provided by the section of the statute to which we have referred. The defendant was a corporation of Illinois, had an office in Chicago, and was engaged in soliciting and procuring insurance, delivering the policies, and collecting premiums. It clearly appeared that its actual business was to procure insurance for various parties in insurance companies doing business in other states which were not allowed to transact the business of insurance in the state of Illinois; and the defendant insisted that it acted, not as agent of the insurer, but as agent of the insured. It clearly was a case of an attempted evasion of the statute. It solicited the insurance. Policies were issued upon its representations to the foreign companies as to the condition and situation of the property proposed to be insured. The policies were sent by mail to the defendant, and by it delivered to the insured. It collected the premium, and remitted the same to the insurance companies, deducting the commissions. Clearly, it was the agent of the foreign companies, within the meaning of the statute, and properly subject to the penalties the statute imposed. As the court remarked:

"Suppose the defendant corporation was not the agent of the foreign insurance companies, in the ordinary sense of that term, still, if it in any manner aided these companies in the transaction of the business, it will, within the meaning of the act, be liable."

We certainly are not inclined in any way to dissent from that decision.

In *Insurance Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77, an action in chancery was brought by the insured for the reformation of a policy of insurance, and for a decree for the amount of the loss. Whipple and Smiley were the agents of the insurance company at Alton. Milne

was in their service, and accustomed to solicit insurance for them. He solicited the insurance then in question, and assured the complainant that, if the insured premises did not remain vacant to exceed 30 days, the insurance would not be affected thereby, and agreed that the policies to be issued should so provide. On the following day, the complainant applied at the office of Whipple and Smiley for the policy, and found Milne there alone. The latter filled up a blank policy, delivered it to the complainant, and received from him the premium. The complainant was an illiterate man, being unable to read or write, which fact was known to Milne at the time. Upon being asked whether the clause in relation to the vacancy of the buildings was in the policy, Milne assured him that it was, and the complainant had no knowledge to the contrary until after the destruction of the buildings by fire. Here was clearly a case of fraud, and the policy was properly reformed to correspond with the contract made. And it is equally clear that Milne was authorized and accustomed to solicit and to make contracts of insurance. Having determined the case upon the ground that the act of Milne was the act of Whipple and Smiley, the agents of the company, and was within the authority which they had from the company, the opinion proceeded obiter to consider the statute in question. The writer of the opinion would seem to have inadvertently overlooked the sense in which the word "agent" is used in the statute, or the purpose for which it was employed. The opinion says properly enough that the general assembly had the undoubted right to make foreign companies responsible, not only for the acts of those who are in fact their agents, but of those who assume to act as their agents, and in fact aid them in the transaction of their insurance business, and then proceeds: "That such was the intention of the statute seems too plain to admit of doubt. We placed this construction upon said statute in *People v. People's Ins. Exchange*, 126 Ill. 466, 18 N. E. 774." As we have shown, that case was one between the people of the state and the insurance exchange, to enforce certain penalties of the statute, and is not authority for the assertion that as between insurer and insured the statute made or designed any change in the law. It is proper also to observe that Milne was unquestionably authorized to solicit insurance by the general agents of the insurance company, and had authority to make the contract, and that, irrespective of any statute upon the subject; while, in the case with which we have to deal, Prindiville did not assume to act, nor did he aid them in the transaction of its insurance business, but acted for the insured. The opinion asserts authority for its conclusion in the respect mentioned in the decisions of the supreme court of Wisconsin upon the statute of that state. That statute differs widely from the Illinois statute, and does not treat alone of the relations between the state and the company, but is general. It is as follows (Rev. St. Wis. 1898, § 1977):

"Whoever solicits insurance on behalf of any insurance corporation or person desiring insurance of any kind, or transmits an application for or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation, or advertises to do

any such thing, shall be held to be an agent of such corporation, to all intents and purposes, unless it can be shown that he receives no compensation for such services."

Under this statute it is held that the rule was changed which required the insured at his peril to know whether the person with whom he is dealing had the power he assumed to exercise, or whether he was acting within the scope of his authority, and that one who procures policies from an authorized agent, delivers them, and collects and shares in the premium, is the agent of the company (*Schomer v. Insurance Co.*, 50 Wis. 575, 7 N. W. 544; *Knox v. Insurance Co.*, 50 Wis. 671, 7 N. W. 776); and that one who applies for insurance, and delivers a policy in a company not represented by him, but by other agents, is its agent (*Alkan v. Insurance Co.*, 53 Wis. 136, 10 N. W. 91; *Body v. Insurance Co.*, 63 Wis. 157, 23 N. W. 132). But it is also held that the statute does not change the rule respecting the relations of principal and agent, and cannot be construed to prevent an insurance broker employed to procure insurance from another from being the agent of the assured at the same time in procuring the policy; and the same rule applies as in other agencies,—that the principal is bound by the acts and representations of the agent within the scope of his authority. *John R. Davis Lumber Co. v. Hartford Fire Ins. Co.*, 95 Wis. 226, 70 N. W. 84. The true meaning of the statute is well expressed in *Hankins v. Insurance Co.*, 70 Wis. 1, 35 N. W. 34: That the word "agent" is limited to the act of the particular person doing one or more of the things specifically designated; in other words, whenever an insurance company authorizes any person to do any one of the things thus specified, it cannot disclaim the agency of such person in the doing of anything necessarily implied in the specific act thus authorized, and that the word "agent," as used in these statutes, means, as expressly stated in the Illinois statute, an authorized agent of the company.

In *Wood v. Insurance Co.*, 126 Mass. 316, it is said of a similar statute that the statute relating to agents of insurance companies does not change the relation of the common law regulating the power of agents to bind their principals, and that the statute cannot be construed so as to prevent the person who is agent for the insurer for some purpose by virtue of the statute, from being the agent of the insured for other purposes, and that he may well be the agent for each in matters which do not conflict.

We have here the acknowledged fact that Prindiville was never employed by the plaintiff in error, nor authorized to act for it; that he was the agent of the insured in procuring the policy, and in the application which he made. If it may be said with respect to the actual delivery of the policy by him to the assured that he was therein the agent of the insurer, the knowledge which he had of other insurance, derived from his agency for the insured, is not chargeable to the insurer merely because the company authorized him to deliver the policy drawn in accordance with the contract made, and upon representations made by him as agent of the insured. See, also, *Ostr. Ins.* § 40, where the statutes of the various states are reviewed.

We need not stop to consider the Iowa statute, which is widely

different from that before us, nor refer to the case of *Bennett v. Insurance Co.*, 70 Iowa, 600, 31 N. W. 948, further than to say that in that case the agent of the company, having authority to solicit insurance and issue policies, sent his clerk to solicit a risk and take an application, and the clerk soliciting and taking the application knew of other insurance upon the property; and it was held—we think properly so—that the company was bound by the knowledge of the clerk, who must be regarded as the company's soliciting agent.

We recognize the rule that the federal courts are bound to follow that construction of a state statute which has been deliberately placed upon it by the court of last resort of such state. If we could find such deliberate holding and construction here, we should follow it, although it was opposed to our own views of the question. But we cannot say here that there has been any such deliberate construction of the statute. The only expression which in any way can be construed to militate with our own view is, as we have shown, an obiter expression in an opinion, and that expression is not binding even upon the court in which it was rendered. We think the expression is manifestly inadvertent, and without consideration of the sense in which the term "agent" is employed in the statute. It is directly opposed to the construction placed upon much broader statutes by the supreme courts of Massachusetts and of Wisconsin, the latter of which is erroneously invoked as authority by the author of the expression which it is said should control our judgment. We cannot consider the inadvertent expression in that case as a deliberate decision, giving a settled construction to the statute.

It was urged at the hearing that the other insurance effected upon the property was contemporaneous with the insurance in question, and did not fall within the condition which rendered the policy void, "if insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on the property covered, in whole or in part, by this policy." The case of *Insurance Co. v. Davison*, 30 Md. 91, is relied upon to sustain this contention. We think the cases clearly distinguishable. There the plaintiffs applied to the defendant company, seeking their whole insurance from that company; and the latter company, before issuing its policy, and for its own convenience, and not at the request of either of the plaintiffs, applied to the Maryland Company to share the risk. The premises were examined by the secretaries of the two companies together, with the view of taking the risk conjointly. Both policies as originally drawn were alike, of the same date, for the same amount, and the premiums paid to both companies on the same date. The court says, on page 109:

"It thus appears the Maryland policy was effected with full knowledge on the part of the defendant,—indeed, at its request and for its convenience; that both policies were precisely similar, and became effective and binding contracts at the same time. The proviso is that, 'if any other insurance has been or shall hereafter be made on the said property' without the consent of the company in writing indorsed thereon, the policy shall be void."

After observing upon the necessity of such clauses in policies of insurance, the court held that, under the circumstances stated, the

policy in the Maryland Company was neither prior nor subsequent to the policy sued on, but took effect contemporaneously, and was not within the spirit or letter of the clause in question. Without undertaking to criticise the ground upon which that decision rested, it is enough to say that we fully concur in the result there reached. The Washington Company, having itself procured the issuing of this policy, was estopped, in our judgment, to assert the condition prohibiting other insurance, or must be deemed to have waived it. Possibly this would be the better ground upon which to have placed the decision. But the facts of the case are widely divergent from those here presented. We do not think that decision controlling or relevant here. We are satisfied that a correct result was arrived at in our previous decision.

It is proper to say that Judge SHOWALTER sat at the hearing, and is understood to have concurred in the result, but died before the preparation of this opinion.

The judgment is reversed, and the cause remanded to the court below, with direction to award a new trial.

In re SMITH et al.

(District Court, D. Indiana. March 2, 1899.)

No. 159.

1. BANKRUPTCY—SUSPENSION OF STATE INSOLVENCY LAWS.

The statute of Indiana (Rev. St. 1881, §§ 2662-2683, inclusive; 2 Burns' Rev. St. 1894, §§ 2899-2920, inclusive) regulating assignments for the benefit of creditors, and investing the circuit courts of the state with jurisdiction and control over the administration of estates so assigned, including the proof and allowance of claims, the collection and distribution of assets, and the discharge of the assignee, is an insolvency law, and its operation was suspended by the enactment of the bankruptcy act of 1898.

2. SAME—ASSIGNMENT UNDER STATE LAW VOID.

Under Bankruptcy Act 1898, § 3, declaring that it shall be an act of bankruptcy if a person shall have "made a general assignment for the benefit of his creditors," such an assignment, made in pursuance of a state insolvency law which is rendered inoperative by the enactment of the bankruptcy law, by a debtor who is afterwards adjudged bankrupt, vests no title in the assignee, as against creditors in the bankruptcy proceedings; and any acts of the assignee touching the estate of the bankrupt, or of the state court in the administration of the same, are null and void.

3. SAME—PROPERTY IN POSSESSION OF ASSIGNEE.

Where an insolvent debtor makes an assignment for creditors in pursuance of the terms of a state statute, the operation of which is suspended by the national bankruptcy law, and is afterwards adjudged bankrupt, the court of bankruptcy has power, on a summary petition, to order the assignee to surrender the property in his possession to a receiver appointed by the court of bankruptcy.

4. SAME—JURISDICTION OF BANKRUPTCY COURT EXCLUSIVE.

Where an assignment for the benefit of creditors has been made in pursuance of a state insolvency law, the operation of which was suspended by the enactment of the national bankruptcy law, and the assignee is in possession of the estate under the authority of the state court, and the assignor is afterwards adjudged bankrupt, there is no such con-

current jurisdiction, or prior right of possession, in the state court, as will prevent the bankrupt court from assuming exclusive jurisdiction of the estate of the bankrupt.

In Bankruptcy. On petition of certain creditors for an order requiring the assignee of the bankrupts, under a previous general assignment for the benefit of their creditors, to surrender the assets and estate in his hands to the receiver of the court of bankruptcy.

Griffiths & Potts and Cohen & Mack, for petitioning creditors.
Byron K. Elliott and W. F. Elliott, for respondent.

BAKER, District Judge. On February 24, 1899, certain creditors filed their petition in involuntary bankruptcy against Aaron J. Smith and Josephus G. Dodson, composing the firm of Smith & Dodson. The petition alleged the insolvency of said firm and of each member thereof, and stated a single act of bankruptcy. The allegation touching this act of bankruptcy is as follows:

"And your petitioners further represent that said Aaron J. Smith and Josephus G. Dodson, partners as aforesaid, are insolvent, and that within four months next preceding the date of this petition the said Aaron J. Smith and Josephus G. Dodson, partners as aforesaid, committed an act of bankruptcy, in that they did heretofore, to wit, on the 28th day of January, 1899, make a general assignment for the benefit of their creditors to Edwin F. Hedges, of Lebanon, in Boone county, state of Indiana."

On February 25, 1899, said Smith and Dodson appeared in open court, in their own proper persons, and filed their written admission that they did on January 28, 1899, execute a deed of assignment for the benefit of their creditors, under the law of the state of Indiana, to Edwin F. Hedges, who, as such assignee, took possession of all their property, real and personal, and is now in possession of the same. Thereupon this court, as a court of bankruptcy, at once entered an order adjudging them bankrupts. As soon as such adjudication had been made, the petitioning creditors filed and presented to the court their petition against Edwin F. Hedges, as such assignee, asking that he be enjoined from disposing of or interfering with the assets and estate of the bankrupts, and that he show cause, if any he had, why he should not surrender and turn over to the receiver of this court the assets and estate of the bankrupts in his possession. This petition to show cause alleges, in substance, that on January 28, 1899, the bankrupts made a general assignment for the benefit of their creditors to said Hedges, who thereupon qualified as such assignee, and took possession of all the property of the bankrupts, and is now in possession of the same; that among the assets so in the assignee's hands are a valuable stock of general merchandise, accounts, notes, and other evidences of indebtedness due and owing to the bankrupts, as well as a number of tracts of land and other real estate belonging to them; that the assignment for the benefit of creditors was and is illegal, fraudulent, and void, under the act of congress relating to bankruptcies, now in force, and in force on the day when said assignment was made; that, on proceedings duly had, said Smith & Dodson have been adjudged bankrupts, on their written admission that they were insolvent and had executed a deed of gen-

eral assignment of all their property for the benefit of their creditors to said Hedges; that said Hedges is now in possession of said property of the bankrupts, without right, under said illegal and void assignment, and not otherwise. Prayer for a temporary restraining order, and that the assignee show cause why he should not surrender the property in his possession to the receiver of this court. On the filing and presentation of said petition the court issued a temporary restraining order, and an order to show cause, as prayed for. This order was duly served, and on the return day the assignee appeared, in person and by counsel, and admitted the matters and things set up in the petition to be true, and submitted the question whether, on the facts so admitted, the court could, in a summary manner, order a surrender of the property of the bankrupts in his hands as such assignee to a receiver appointed by this court.

The statute of this state (2 Burns' Rev. St. 1894, §§ 2899-2920, inclusive; Rev. St. 1881, §§ 2662-2683, inclusive) provides that any debtor or debtors in embarrassed or failing circumstances may make a general assignment of all his or their property in trust for the benefit of all his or their bona fide creditors, and all assignments hereafter made by such person or persons for such purpose, except as provided by the statute, should be deemed fraudulent and void. The debtor or debtors making a general assignment are authorized to select his or their trustee, who shall qualify and serve, unless the creditors representing in amount one-half of the liabilities petition the court for his removal and the appointment of another trustee. The administration of the debtor's estate so assigned is placed under the control and jurisdiction of the proper circuit court of the state. The statute provides for the conversion of the assets into money, the collection of debts due the insolvent, the proof of claims by creditors, the distribution of the proceeds arising from the property assigned among the creditors according to their respective priorities, and for the final settlement of the trust estate and the discharge of the trustee. There is no provision for the discharge of the insolvent debtor. This statute constitutes an insolvency law, and regulates the making of an assignment, which must embrace all the property of the debtor, as well as every step to be taken in winding up the estate of the bankrupt, to the distribution of its proceeds among those entitled to share therein, all to be administered in a state court possessed of general jurisdiction at law and in equity. It embraces the same persons and subject-matter as the bankruptcy act, and, if the state law still remains in force, every insolvent's estate may be administered in a state court, and must be so administered, if it first acquires jurisdiction, because, if the state statute continues in force, there would be two courts (state and national) possessing concurrent jurisdiction over the same person and the same subject-matter, and whichever of the two first acquired jurisdiction would retain it, and administer the estate of the insolvent, to the exclusion of the other. The bankruptcy act contemplates no divided jurisdiction. It would cease to possess any vital force or efficiency, if the state court, proceeding under our state insolvent law, may hold possession of the bankrupt's estate, collect in the debts, allow claims, and make final

distribution among those entitled to participate therein, leaving to this court nothing but the adjudication of bankruptcy and the discharge of the bankrupt. Such a construction is inadmissible, because it would render inoperative numerous express provisions of the bankruptcy act. The state statute and the bankruptcy act cannot stand together. The bankruptcy act is the supreme law of the land, enacted in pursuance of an express grant of constitutional authority; and, in so far as any state law is in conflict with it, such law is suspended and remains inoperative until the federal enactment is repealed. All matters embraced in the bankruptcy act must be controlled and governed by its provisions. Among these are the right and duty of the bankruptcy court to have insolvent estates settled in and by it, under and in accordance with the provisions of the bankruptcy act; to have acts of bankruptcy affecting the settlement of estates determined by it (section 3); to have the rights of debtors to file voluntary petitions, and of creditors to file involuntary petitions, determined by it (section 4); and to have liens and preferences governed by it (sections 60, 67). These and various other provisions of the bankrupt act affecting the conduct and rights of debtors and creditors are different from those found in the statute of this state touching general assignments. In my opinion, the operation of the state law is suspended, and the state courts are without any jurisdiction or authority to administer the estates of bankrupts or insolvents.

The fourth clause of section 3 of the bankruptcy act declares that the making of a general assignment for the benefit of creditors shall constitute an act of bankruptcy. The making of the assignment constitutes, ipso facto, an act of bankruptcy, without regard to the motive which prompted it. Declaring such assignment an act of bankruptcy amounts to a prohibition of the act. The assignee under the inoperative state law takes no title, as against the creditors by the deed of assignment; and all of his acts touching the estate of the bankrupt, as well as all acts by the state court in the administration of the same, are unauthorized and void, and will be treated as nullities wherever drawn in question. These consequences necessarily follow from the terms of the bankruptcy act, and this conclusion is supported by the following, among many cases in which the question is considered: *In re Hathorn*, Fed. Cas. No. 6,214; *In re Bininger*, Id. 1,420; *In re Wallace*, Id. 17,094; *In re Washington Marine Ins. Co.*, Id. 17,246; *In re Merchants' Ins. Co.*, Id. 9,441; *Thornhill v. Bank*, Id. 13,992; *Manufacturing Co. v. Hamilton* (Mass.) 51 N. E. 529; *In re Bruss-Ritter Co.*, 90 Fed. 651; *Lea v. George M. West Co.*, 91 Fed. 237. It follows that the assignee is a mere naked bailee for the creditors, without a shred of title or lawful authority to the possession of the bankrupts' estate; and it would certainly be strange if, when the bankruptcy court finds property in the possession of such a bailee, it may not in a summary way require him to surrender possession to the court which alone has the power to administer the estate. The fifteenth clause of section 2, which grants authority to the courts of bankruptcy to "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act," in my

judgment, confers ample authority on the court, in a summary way, to reduce into its possession property in the unauthorized possession of an assignee or receiver of a state court. If the property of the bankrupt is in the possession of a person who has a colorable title, as purchaser or otherwise, it may be that the court would not compel him, by a summary proceeding, to surrender the possession; but where the possession, and only right of possession, are under the authority of a state court by virtue of a general assignment for the benefit of creditors, no contestable question is presented. The possession of the assignee and of the state court are unauthorized, and it seems to me that this court may well hold, as it does, that their possession is held for the benefit of the creditors of the bankrupts and subject to the paramount authority and jurisdiction of this court. No question of concurrent jurisdiction, or of the conflict of jurisdiction, can possibly arise. The jurisdiction of the bankrupt court is supreme, it is exclusive, and the acts of the state court are unauthorized and void, because jurisdiction over the person and estate of the bankrupts is drawn to, and vested exclusively in, this court by the adjudication of bankruptcy. An order may be drawn directing the assignee to deliver up the property of the bankrupts to the receiver of this court.

STEINHARDT et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 22, 1898.)

No. 1,945.

CUSTOMS DUTIES—CLASSIFICATION—BLACK-HEADED PINS.

Black-headed pins were dutiable under paragraph 206 of the act of 1890, as "pins, metallic," and not under paragraph 108, as manufactures of glass, or of which glass is the component material of chief value.¹

This was an application by A. Steinhardt & Bros. for a review of a decision of the board of general appraisers in respect to the classification for duty of certain imported black-headed pins.

Albert Comstock, for importers.

J. T. Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question comprises certain black-headed pins, which were classified for duty under paragraph 108 of the act of 1890, as "manufactures of glass, or of which glass shall be the component material of chief value," and claimed in the protest of the importers to be dutiable under paragraph 206, as "pins, metallic," at 30 per cent. ad valorem. An examination of the samples and the record herein shows that the merchandise in question clearly falls within the principle of the case already considered, namely, Worthington v. U. S. (No. 1,792) 90 Fed. 797, and the decision of the board of appraisers is therefore reversed.

¹ As to interpretation of commercial and trade terms, see note to Dennison Mfg. Co. v. U. S., 18 C. C. A. 545.

UNITED STATES v. NADAY et al.

NADAY et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 22, 1898.)

Nos. 2,560, 2,562.

CUSTOMS DUTIES—CLASSIFICATION—GAUFFRE LEATHER.

"Gauffré leather," in pieces 28 inches wide, and from 32 to 36 inches long, plain on one side, and covered with designs in silver and various colors on the other, was dutiable under the act of August 28, 1894, as "leather not specially provided for," under paragraph 340, and not as manufactures of leather not otherwise provided for, under paragraph 353, or as skins not otherwise provided for, under paragraph 341.¹

These were applications made both by the United States and by the importers, Naday & Fleischer, for a review of a decision of the board of general appraisers in respect to the classification of certain imported goods.

J. T. Van Rensselaer, Asst. U. S. Atty.

Everit Brown, for importers.

TOWNSEND, District Judge (orally). The merchandise in controversy is "Gauffré leather," imported in pieces 28 inches in width, and from 32 to 36 inches in length. These pieces of leather are plain on one side; on the other, the surface is covered with designs in silver and various attractive colors. They were assessed for duty at 30 per cent. ad valorem, under paragraph 353 of the tariff act of August 28, 1894 (28 Stat. 509), as "manufactures of leather not otherwise provided for." They were claimed to be dutiable by the importers at 10 per cent. ad valorem, under paragraph 340, as "leather not specially provided for"; or, alternatively, at 20 per cent. ad valorem, under paragraph 341, as "skins not otherwise provided for," or as other articles enumerated therein; or at 20 per cent. ad valorem, under paragraph 342, as "leather cut into shoe uppers or vamps or other forms suitable for conversion into manufactured articles." The board of general appraisers, after taking evidence, held that the articles were not "manufactures of leather," but that they were properly dutiable as "skins dressed and finished," and sustained that alternative claim of the importer, under paragraph 341, at 20 per cent. Both the United States and the importers appeal to this court, the United States contending that the original assessment at 30 per cent. was the correct rate, and the importers contending that 10 per cent. was the correct rate.

The article in question is invoiced as "Gauffré leather." The board, while holding that it is included within and dutiable at 20 per cent., under paragraph 341 of said act, find that the article is leather in fact. The appearance of the article indicates that it has been advanced from the condition of a skin to the condition of leather. In view of the decision in *DeJonge v. Magone*, 159 U. S. 562, 16 Sup. Ct.

¹ As to interpretation of commercial and trade terms, see note to *Dennison Mfg. Co. v. U. S.*, 18 C. C. A. 545.

119, and other cases, it cannot be held to be a manufacture of leather; and I think, with considerable hesitation, in view of the shape in which the article comes, that it is not a skin, but "leather not specially provided for," and therefore dutiable at 10 per cent. ad valorem under the provisions of paragraph 340. The decision of the board of appraisers is therefore reversed.

UNITED STATES v. WONG CHUNG.

(District Court, N. D. New York. February 21, 1899.)

ALIENS—PROCEEDINGS FOR DEPORTATION OF CHINESE PERSON.

In a proceeding before a commissioner for the deportation of a Chinese person, the action of a deputy collector, some months previously, in refusing the defendant entry into the United States, is not an adjudication which constitutes a bar to the consideration of defendant's rights by the commissioner on the merits, where the deputy entered no decision, made no findings, and heard no evidence to rebut the *prima facie* showing made by defendant of his right of entry, but acted solely on statements made to him by a third person in a conversation in another city regarding a statement the latter had heard, and which was irrelevant, if true.

This is an appeal from a judgment of a United States commissioner ordering the deportation of the defendant to the empire of China.

On the 6th of December, 1898, the defendant was arrested and taken before the United States commissioner at Malone, N. Y., charged with being a Chinese person unlawfully in the United States, under section 12 of the act of May 6, 1882, as amended by the act of July 5, 1884. He offered in evidence as proof of his right to remain a certificate under section 6 of the act of July 5, 1884, permitting him to enter the United States as a student. This certificate complied in all respects with the law. It is signed by A. W. Brewin, acting registrar general, at Hong Kong, and is viséed by R. Wildman, United States consul general. Such a certificate is by said section 6 made *prima facie* evidence of the facts stated therein, "but said certificate may be controverted and the facts therein stated disproved by the United States authorities." No pretense was made at the hearing that this certificate did not in all things comply with the law and it seems to have been admitted at all stages of the proceeding that the defendant was the person mentioned in the certificate; at least nothing has ever appeared to the contrary. The only proof offered by the United States was in the nature of a plea in bar to the effect that the defendant had applied for admission into the United States at the port of Malone on the 13th of October, eight weeks before, and had been rejected by the deputy collector and returned to Montreal. The deputy collector testified that when the defendant appeared at Malone his identity seemed to be established and his papers appeared to be regular and genuine. He testified further as follows: "I went to New York on that evening. I met Mr. Clemenshire in New York that evening, on October 15th. Defendant was going to 11 Mott street, and Mr. Clemenshire told me that they did not know anything about him at that address, and that he heard that where he was going was in Hartford, Conn., was in laundry, and I telegraphed Mr. Shufelt to return these two men to Montreal, one of whom was defendant. * * * The defendant's identity seemed to be established by the paper. * * * I did not question the genuineness nor truthfulness of the statements of the certificate when presented. I never questioned the certificate about its being regular." It further appears from the testimony of the deputy collector that he had no reason to doubt the right of the defendant to enter the United States until his interview with Mr. Clemenshire. His action in rejecting the defendant was based solely upon what Mr. Clemenshire told him. Who Mr. Clemenshire is does not appear from

the record. It does not appear that the deputy collector ever reduced to writing the information he obtained from Clemenshire or that he made any formal decision at the time or gave any reason for his action. A letter was introduced in evidence signed by the deputy collector and addressed to "John Martin, Spl. Deputy," in which he says:

"We rejected and returned to Canada Ma Thui No. 1127 and Wong Chung No. 1128 as their stories were conflicting and contradictory."

This letter is dated November 10, 1898, four weeks after the defendant had been returned to Montreal, and cannot, in any view, be regarded as the "decision" upon which the deputy collector's action of October 15th was based.

There was also introduced a memorandum in the handwriting of the deputy collector, which is as follows:

"Malone, N. Y., Oct. 13, 1898.

"Name Wong Chung, 19 years old. Father's name Goon Laeu, lives 108 State St., Hartford, Conn. Uncle name One Bing Sing, lives 108 State St., Hartford, Conn. Been a student 5 yrs. in San Ning. Going to New York first. Queng Tuck Leung & Co., No. 11 Mott St. Do not know the number. Held for further investigation. Returned to Montreal on Saturday, Oct. 15, 98."

It appears, however, from the testimony of the deputy collector that he was in New York on October 15th and that he decided defendant's case while in New York and communicated the result by telegraph to Mr. Shufelt.

The proceedings before the deputy collector so far as they can be inferred from this record were as follows:

On October 13th the defendant appeared before the deputy collector and demanded entry into the United States by virtue of his certificate, duly signed and countersigned. On the same day he made several statements as to his age and destination. The case was then held for further investigation. On the 15th of October the deputy collector had an interview in New York with a Mr. Clemenshire, and soon thereafter telegraphed from New York to send the defendant back to Montreal.

Whatever decision the deputy collector made, the ground for such decision and the reasons which induced his action must be inferred from the foregoing facts and circumstances. There is nothing else in the case. The commissioner declined to consider the defendant's status upon the merits, taking the ground that the rejection by the deputy collector was final and controlling, and that he had no jurisdiction to proceed further in the case; he, therefore, ordered the defendant deported. From this decision the defendant appeals.

No question is raised by the United States attorney as to the regularity of this practice. U. S. v. Gee Lee, 1 C. C. A. 516, 50 Fed. 271.

R. M. Moore, for appellant.

Emory P. Close, U. S. Dist. Atty.

COXE, District Judge (after stating the facts). The court cannot resist the conclusion that the defendant has not, as yet, had a fair hearing. Upon the faith of a passport, issued under the treaties and laws of the United States, signed by the registrar general and viséed by the United States consul general at Hong Kong, the defendant has journeyed many thousand miles to secure advantages to which he is entitled if the statements of his certificate be true. He was turned back without even the pretense of a legal investigation. He was arrested, imprisoned and ordered back to China without a single fact to warrant such a course appearing on the record. The action of the collector was based upon an irrelevant rumor. It would be a misnomer to call it hearsay evidence; it was not evidence at all. In an ordinary conversation Mr. Clemenshire told the collector not what he knew, but what he had been told by some unnamed person. It was conjecture only. It was the merest shadow, not the shadow of

anything tangible, but of a nebulous and attenuated shade. It was "such stuff as dreams are made on," and the collector could have justified his course as well by asserting that it was dictated by a communication from the spirit world, or that it was supported by the revelations of the Koran. No man whose brain is in a normal condition would regulate the most trivial affairs of life upon such information.

When he left Malone the collector was, apparently, satisfied that the defendant was entitled to enter the United States. He knew nothing against the defendant. His papers were regular; his identification complete. Mr. Clemenshire knew nothing of the defendant, but he had heard something; where he heard it, when he heard it and from whom, does not appear. He had heard that "where the defendant was going was in Hartford, Conn., was in laundry." This is the sole basis for the collector's telegram ordering the defendant back to Montreal. No witness was sworn, no statement was reduced to writing, no written decision was made and no reason for his action was ever given by the collector to the defendant, who had no opportunity to answer or explain the rumor regarding his destination. With the aid of electricity and steam the defendant was sent forthwith out of the country. No opportunity to appeal was given.

In Gin Fung's Case, 89 Fed. 153, the court says:

"The time for appealing does not expire until two days after the decision; yet the petitioner was being hurried away to China on the very day of the pretended hearing. A decision which denies the right of appeal is not the decision which the statute intends shall be final."

See, also, In re Monaco, 86 Fed. 117.

No doubt the courts have gone far in sustaining the autocratic power vested in the officers of the customs under the acts in question. The widest latitude is given, and no doubt such authority is necessary and proper, but in every reported case where the decision has been upheld some semblance of legal procedure has been observed. The courts should not, unless the language of the law is too plain to admit of doubt, throw down every barrier which the rules of the common law have erected against the encroachment of arbitrary power. Not only was the information obtained from Mr. Clemenshire of a character too unreliable to sustain the action of the collector, but if true and proved to be true it was a wholly immaterial circumstance, in no way affecting the defendant's right to enter the United States. A student may go to a laundry or he may live at a laundry without changing his status as a student. In U. S. v. Chu Chee, 87 Fed. 312, not only did the defendants, who were minors, reside in a laundry but their father was the laundryman. They were shown to be students and were permitted to remain.

When the collector's action is founded upon a total misconception of the law the invalidity of his proceedings is recognized by the courts. In Re Leong Youk Tong, 90 Fed. 648, the court says:

"If, in this case, the collector had in fact decided * * * that the petitioner was a merchant, and as such, entitled to admission into the United States, but that he was denied admission for some other reason not connected with his status as a merchant, and not by statute or treaty made a ground of exclusion the order of deportation would undoubtedly be void."

The duty of the court to ignore a decision excluding an alien upon a ground not recognized by statute is also sustained in *Re Kornmehl*, 87 Fed. 314.

Again, it is doubtful, at least, whether the collector ever made such a decision as is contemplated by the statute. It is difficult to perceive how his action is entitled to any probative force whatever. When he concluded to reject the defendant he was in New York. His direction to Mr. Shufelt was by telegram. The telegram was not produced. No reason for his action was given. No fact was found by him. No conclusion was stated. While the collector was still in New York the defendant was returned to Montreal. The collector's report of his proceedings made a month afterwards cannot, of course, be regarded as a "decision" on which the rejection of October 15th was based. It will be noted as indicating the unreliable character of the proceedings before the collector, when offered as proof of the defendant's status, that in the report of November 10th he bases the rejection upon a ground which there appears for the first time, namely, "We rejected and returned to Canada Ma Thui and Wong Chung as their stories were conflicting and contradictory." This statement seems to be unsupported so far as the record is concerned, but if true it states no fact which warrants the deportation of the defendant.

The question presented by this appeal is whether the commissioner was concluded from considering the defendant's right to remain in the United States upon the merits because of the so-called decision of the collector. In other words, was this decision a bar to further investigation and conclusive evidence against the defendant? This question the court is constrained to answer in the negative, for the following reasons:

First. There was no decision such as the law contemplates. The decision, if there was one, was too informal, uncertain and contradictory to be accepted as an estoppel, or as conclusive evidence of any fact. *In re Gin Fung*, 89 Fed. 153.

Second. There was nothing before the collector authorizing the rejection of the defendant. The unsupported rumor on which he acted offered no statutory ground for rejection even if true. It is thought, moreover, that a decision by the collector, even if valid and based upon legal proof, would not operate as a bar in a subsequent proceeding before a commissioner. The cases holding such decisions to be final were, in a great majority of instances, rendered in habeas corpus proceedings to review the action of executive officers of the government vested by congress with the exclusive authority to admit or exclude aliens seeking admission to this country. *Lem Moon Sing v. U. S.*, 158 U. S. 538, 15 Sup. Ct. 967, and cases cited; *In re Moses*, 83 Fed. 995.

The attention of the court has not been called to an authority for the proposition that the decision of an executive officer is final in an entirely distinct judicial proceeding. A United States commissioner is an officer charged by law with the duty of investigating these cases. He cannot order a Chinese person deported until such person is brought before him and "found to be one not lawfully entitled to re-

main." Act 1882, amended by Act July 5, 1884 (23 Stat. 115). This injunction to find the status of the Chinese person imposes upon the commissioner a duty which cannot be discharged if he be precluded from making an investigation because of a ruling of a collector made long before under a different statute and upon a different state of facts. If the contention of the district attorney be correct it is difficult to perceive how a Chinese person once rejected can ever afterwards enter the United States even though his right to do so can be established beyond the peradventure of a doubt. It is thought that congress did not intend so sweeping and far-reaching an interpretation of the act of August 18, 1894 (28 Stat. 372, 390). When a Chinese person is brought before a United States commissioner the burden is upon him to establish his right to remain. This he does by introducing his certificate. The burden then shifts and the United States must produce some proof to overcome this *prima facie* evidence or it will be the commissioner's duty to discharge the defendant. The United States may introduce a valid decision of a customs officer rejecting the defendant, but the introduction of this decision does not end the inquiry; it may throw light upon the question at issue, but it is not conclusive. The commissioner must still investigate and determine the question before him, which is, whether the defendant is, at the time of the hearing, not at some previous time, a person not entitled to remain.

A portion of the argument of the district attorney is based upon alleged facts not appearing in the record. The court, on appeal, is not permitted to consider such facts.

The conclusions reached are as follows:

First. The decision of the collector cannot be regarded "as a plea a bar and as evidence conclusive" in a subsequent judicial proceeding under a different law and to determine a different question.

Second. Even though the foregoing proposition were doubtful, the record in the present case fails to show a decision which justifies the conclusion that the defendant was unlawfully in the United States.

Third. As the United States relied in good faith upon the conclusive character of the collector's action as evidence, it should have an opportunity to offer such proof as it may be advised to rebut the *prima facie* case made by the defendant.

The judgment is reversed and the case is remanded to the commissioner to hear and determine the same upon such proof, in accordance with this opinion, as the parties may offer.

A similar order should be made in the case of Ma Suey.

BEACH v. HOBBS et al.

HOBBS et al. v. BEACH.

(Circuit Court of Appeals, First Circuit. February 13, 1899.)

Nos. 246, 247.

1. PATENTS—EFFECT OF PRIOR DECISIONS BY CIRCUIT COURTS OF APPEALS.

As a general rule, and especially in patent cases, for the purpose of according to a patent the same recognition throughout the country, as contemplated by law, the decision of a circuit court of appeals of another circuit should be followed with respect to the issues determined, if based on substantially the same state of facts.¹

2. SAME—VALIDITY OF REISSUE—DECISION OF PATENT OFFICE.

Where a patentee promptly applies for a reissue under Rev. St. § 4916, on the ground that by inadvertence or mistake in the drawings or specification the patent is rendered in part inoperative, and no substantial rights are affected, or fraudulent intent charged, the decision of the commissioner as to the facts giving jurisdiction to issue a new patent is conclusive.

3. SAME—INFRINGEMENT—LIMITATION OF CLAIMS.

A patent for a machine for attaching stays to the corners of boxes contained claims for a combination of feeding mechanism, cutting mechanism, and pasting mechanism with other devices, the claims ending with the words, "substantially as described." *Held*, that the acquiescence of the patentee in a requirement of the commissioner that the words, "substantially as described," should be used to limit the word "mechanism" wherever it occurred in the claim did not preclude him from invoking the doctrine of known equivalents with respect to alleged infringers, nor, where his invention was a broad one, of merit, did it estop him from asking the court to apply a more liberal rule as to equivalents than is applicable to an invention which is merely an improvement on an old one.

4. SAME—VALIDITY AND CONSTRUCTION—BOX MACHINES.

The Beach reissue, No. 11,167 (original No. 447,225), for improvements in machines for attaching stays to the corners of boxes, for the first time described a machine in which were organized clamping dies, and feeding, pasting, and cutting mechanism, which automatically attached stays of paper or like material to the corners of paper boxes, and the elements of its combination claims are entitled to a broad range of equivalents. The fact that another machine has a different feeding mechanism will not prevent its being an infringement of claims 1, 2, and 3, where such mechanism was well known as a proper substitute for that described at the date of the patent.

Appeals from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by Fred H. Beach against Clarence W. Hobbs and others for alleged infringement of a patent. From the decree entered (82 Fed. 916) both parties have appealed.

John Dane, Jr., for F. H. Beach.

Edward S. Beach, for C. W. Hobbs and others.

Before COLT, Circuit Judge, and BROWN and LOWELL, District Judges.

COLT, Circuit Judge. The subject-matter of this suit is reissued letters patent No. 11,167, dated May 26, 1891, granted to Fred H. Beach for an improvement in machines for attaching stays to the

¹ See note to *Emigration Co. v. Gallegos*, 32 C. C. A. 484.

corners of boxes. The court below decided that the defendants' machine infringed the sixth claim of the patent, and did not infringe the first, second, and third claims. Hence these cross appeals.

The Beach patent, for the first time in the history of the art, describes a machine for staying the corners of paper boxes with short strips of paper or muslin. Before this invention, the work had been done by hand. The original application was filed June 10, 1885. This application was put in interference with several others. After a controversy of five years in the patent office, the several interference proceedings were dissolved, leaving the priority of invention with Beach. The original patent was issued February 24, 1891. In October, 1890, Inman and Jaeger, two of the parties to the interference proceedings, brought suit in the United States circuit court for the Northern district of New York to set aside the patent to Beach, and award the invention to Inman. Upon proofs taken, and after arguments by counsel, the case was dismissed. A suit for infringement was afterwards brought in the same court by the complainant against the American Box-Machine Company and others. The record in that case was voluminous. The prior art was exhaustively investigated, including some 50 prior patents. After full hearing upon bill, answer, and proofs, Judge Coxe, in a carefully-considered opinion (63 Fed. 597), sustained the validity of claims 1, 2, 3, 4, 5, and 7 of the patent, and held that the defendants' machine infringed these claims. On appeal to the circuit court of appeals the case was again fully heard before Judges Wallace, Lacombe, and Shipman, and that court affirmed the decision of Judge Coxe. 18 C. C. A. 165, 71 Fed. 420. Subsequently another suit for infringement was brought in the same court by the complainant against the Inman Manufacturing Company and others, and, after hearing, a preliminary injunction was granted. 75 Fed. 840. This decision was affirmed by the circuit court of appeals. 24 C. C. A. 408, 78 Fed. 923. Although the defendants in this case are not the same, or in privity with the defendants in the other cases, we think, as a general rule, and especially in patent cases, we should follow the decision of the circuit court of appeals of another circuit upon final hearing with respect to the issues determined, if based upon substantially the same state of facts, unless it should clearly appear that there was manifest error. In discussing this question in the court below, Judge Putnam said:

"These considerations have a special importance as applied to a solemn and well-considered judgment of any circuit court of appeals with reference to a patent for an invention issued by the United States, when the state of the proofs remains substantially the same, in view of the reluctance of the supreme court to issue writs of certiorari in causes of this character, involving mainly questions of fact; otherwise such patents, although intended by statute to have effect throughout the whole country, would, for practical purposes, be territorially limited, and would be of effect only in portions thereof, and practically invalid in other portions. It is also to be borne in mind that there is no serious danger that the courts in any circuit, by following the decisions of the circuit court of appeals in other circuits, would perpetuate any seeming error, because of the power vested in the supreme court to rectify the same by issuing its writs of certiorari." 82 Fed. 916, 919.

The circuit court of appeals, on final hearing in the American Box-Machine Case, in affirming the decision of Judge Coxe, said:

"The elements of the first claim are the opposing clamping dies, the feeding mechanism, and the pasting mechanism. The second claim omits the pasting mechanism, and adds the cutting mechanism. The third claim is substantially a combination of all the elements of the first and second. The first three claims are broad ones, covering the particular combinations referred to, without any restriction to the details of mechanical construction; and defendants concede that, if these claims are to be sustained broadly as they are expressed, they are infringed. As to this first set, therefore, the only question is whether, in view of the state of the art, Beach was entitled to appropriate as broad a combination as he has set forth in his first three claims, which cover every device for affixing stay strips to the outside of box corners, where the operation is performed by the combined action of a feeding mechanism, a cutting mechanism, and a pasting mechanism, in combination with any opposing clamping dies whose faces diverge. The circuit court sustained these broad claims, and we concur in this decision. It is hardly necessary to add anything to the elaborate discussion of this part of the case, which will be found in the opinion of the learned judge who heard it in the circuit court. The patentee indisputably made a machine which did work that theretofore was always done by hand. * * * Certainly, the state of the art exhibits a necessary part of the work of box making as done by hand, with no machine existing in the art to do it. That machine the complainant was the first to supply. Moreover, the evidence leaves no doubt that it did the work it was devised to do. Subsequent improvements have made it do that work better, have made it practicable to apply stay strips to more varieties of boxes than Beach's original machine could readily handle; but that is immaterial when it is shown, as it has been here, that machines made in strict conformity to the patent have been used by manufacturers for years in doing this very work of applying short stay strips, and to the satisfaction of the users. So far as the record shows, no machine presenting the complete combination of the first three claims existed before Beach's invention, either in this art or any other. The nearest approach to it is the Dennis and Yorke machine, which pastes labels on folded newspapers. That has feed, pasting, and cutting mechanism combined with a vertical reciprocating plunger descending with a flat head on a flat platen, the newspaper being interposed between. This is quite a close approach to the machine of the patent. It is only necessary to change the flat head and the flat platen to clamping dies with diverging faces, and to make the machine stronger, in order to enable it to fasten stay strips to box covers. That is shown by the old Dennis and Yorke machine in evidence, which has been thus altered, and does such work. If this Dennis and Yorke machine were already in the box-makers' art; if some one prior to Beach had cut away part of its framework, had made its flat platen rigid, and increased its power, and employed it to affix adhesive labels to the tops or sides of boxes,—it might not be invention merely to change the shape of the dies so as to fit into and over box corners, and there apply adhesive strips. But no one had done this. The Dennis and Yorke machine was not in this prior art, and when Beach took it from another art, where it was doing different work, and by modification adapted it to efficient use in his own art, and thereby gave to his own art the first machine it ever had which could do work necessary to be done, and always theretofore done by hand, he made an invention to the fruits of which he should be entitled."

Upon a state of facts, in which the prior art was fully presented, the circuit court of appeals for the Second circuit sustained, on broad grounds, and, as we think, rightfully, the validity of the first three claims of the Beach patent. The defendants in this case have introduced several alleged anticipatory patents which were not before the court in the prior litigation, but it is apparent on inspection that they are much more remote from the Beach invention than some of the patents which were before the courts in the New York case, and which were commented upon in their opinions. As to the validity

of claims 1, 2, and 3, there is no new evidence in this case which should lead the court to reach any different conclusion from that of the court of appeals for the Second circuit.

It was contended in the prior litigation that the first three claims had been unlawfully expanded during the long proceedings in the patent office. Upon this issue the circuit court of appeals for the Second circuit said:

"Nor does the contention of the defendants that there has been some broadening or expansion of the first three claims during the long period of time that the patentee was in interference call for any extended discussion. When Beach first applied for a patent, in June, 1885, he described his entire machine, and each of the claims he submitted then covered the devices for turning in the end of the stay strip under the edge of the box. He filed amendments in May, 1886, in which he added to the specification the statement that where the stay is to be simply pasted down over the corners of the box, and is not to be turned under, the work can be done by his machine by using the angular form and one plunger with a corresponding angular notch. This was self-evident on the original specification and drawings, and the statement thus added to the specification described no new or enlarged invention. The original drawings and specifications suggest the claims finally made."

We agree with the statement and conclusion of the court on this point.

Upon the question of the validity of the reissue the same court observed:

"No question as to the effect of the reissue was argued in this court. It is unnecessary, therefore, to add anything to the opinion of the circuit court on that point."

The original patent was issued February 24, 1891, and the reissue was granted May 26, 1891, or three months thereafter. The reissue did not seek in any way to enlarge the scope of the original patent, or to appropriate other inventions or improvements. It was obtained solely to correct a mistake in the drawings of the original patent. On this point Judge Coxe said in the New York case:

"No authority is cited to sustain the defendants' theory, and it is thought that no tribunal will ever take the harsh and narrow view contended for; certainly this court will not be the first to do so. It appears from the original patent, assuming it to be properly in evidence, that there was a clear mistake in the drawings. Though this mistake did not render the patent wholly inoperative, it was of such a character that a machine constructed in accordance with the drawings would have been inoperative for some purposes which the inventor was entitled to cover by his claims."

Upon this question the court below observed:

"We may add, however, that in U. S. v. American Bell Tel. Co., 167 U. S. 224, 17 Sup. Ct. 809, the court, at page 267, 167 U. S., and page 809, 17 Sup. Ct., reaffirmed the statement that, even in matters of reissues, the commissioner of patents exercises quasi judicial functions. We are not aware of any decision of that court which deprives him of such functions with reference to questions of mere detail, and affecting no substantial right."

If by reason of any inadvertence or mistake in the drawings or specification a patent is rendered in part inoperative, and the patentee promptly applies for a reissue, and no substantial rights are affected, or fraudulent intent charged, we think the commissioner has the right, under section 4916 of the Revised Statutes, to cause a new patent to

issue, and that, under such circumstances, his decision is conclusive. We know of no authority in conflict with this proposition.

Upon the question of infringement we do not understand that the defendants' machine made under the Horton patent differs substantially from the Jaeger machine before the New York courts, so far as the appropriation of the Beach invention is concerned. Both structures infringe under the broad construction given to the first three claims of the Beach patent in the prior litigation. The main issue on this point relates to the feed mechanism. In the Beach machine the strip is fed from the side or across the apex of the box support, and in the defendants' machine the strip is fed from the rear in the direction of the apex of the box support. It is a "back feed," and not a "side feed," machine. The back feed is shown in the Knowlton machine, which was put into interference with Beach, and the patent office decided that it was covered by the Beach invention. However this may be, it cannot be questioned that the back feed was a known equivalent for the side feed at the date of the Beach patent. It also appears that the machine before the courts in the second circuit, which was held to be an infringement of the Beach patent, had a back feed. Horton, in his patent, under which the defendants manufacture, makes no claim to the feeding mechanism.

In the court below, the learned judge said:

"We bear in mind that the reciprocating plates of the respondents' mechanism, carrying the stay strip, are generally regarded as the equivalent of the complainants' feed rolls with their intermittent motion; but, notwithstanding this, the respondents' device for feeding seems to omit the complicated details which are parts of the complainants' device."

Reference was also made to the fact that in the circuit court the complainant did not elaborate his case on that question, and to the possibility that the court did not fully understand the nature of complainant's combination with reference to the feeding device. It seemed to the learned judge that these details were apparently intended to accomplish special functions not set out in the patent. Upon the presentation of the case made in this court, however, we think that the differences in details are unessential, and do not affect the question of mechanical equivalence.

While we give full weight to the recent decision of the supreme court in *Westinghouse v. Power-Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, and recognize that it is an abuse of the term "equivalent" to employ it to cover every combination of devices in a machine which is used to accomplish the same result, we are of the opinion that the feeding mechanism of the defendants, according to the repeated expressions of the supreme court left unqualified by the decision in *Westinghouse v. Power-Brake Co.*, and recognized in that case by its citation of *Imhaeuser v. Buerk*, 101 U. S. 647, 656, is a mechanical equivalent for the feeding mechanism of the complainant, since it was well known as a proper substitute for the one described in the complainant's specification at the date of his patent. Upon a liberal construction of the first three claims of the Beach patent, and recognizing the doctrine of known equivalents as applicable thereto, we hold that the defendants' machine embodies the combinations covered

by these claims; and we also hold the same to be true of claim 6, in which the combination is limited to the opposing dies constructed and operating as described. In our opinion, neither the words "substantially as described" in the claims, nor the proceedings in the patent office in which the patentee acquiesced in the decision that these words must be inserted after the word "mechanism" in the claims, prohibit the patentee from invoking the doctrine of known equivalents with respect to alleged infringers. Nor in dealing with a broad invention which represents a distinct advance in the art does it estop a meritorious inventor from asking the court to apply a more liberal rule as to what constitutes equivalents than is applicable to a narrow invention which is only an improvement on what was old and well known. "The range of equivalents depends upon the extent and nature of the invention" *Miller v. Manufacturing Co.*, 151 U. S. 186, 207, 14 Sup. Ct. 310. The Beach patent for the first time describes a machine in which were organized clamping dies, feeding, pasting, and cutting mechanism, which automatically attaches stays of paper or like material to the corners of paper boxes. The patent says:

"As far as the main features of my invention are concerned, forms other than those illustrated of the several parts of the machine may be employed without departure from my invention,—as, for instance, in place of the particular mechanisms shown for feeding or delivering fastening strips or stay strips to and between the clamping dies, or for applying paste or glue to the said stay strips; other forms of strip-feeding and pasting devices may be used in practice with the same general result, as above described."

It would be giving too broad a construction to the Beach patent to hold that it covered every combination of clamping dies, feeding, pasting, and cutting mechanism which accomplished the same result, but it should be held to cover a combination of these elements, or their known equivalents, at the date of the patent. The patent should not be limited to the particular form of devices described. *Winans v. Denmead*, 15 How. 330; *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299; *Tilghman v. Proctor*, 102 U. S. 707; *Proctor v. Bennis*, 36 Ch. Div. 740. The decree of the circuit court is reversed with respect to the first three claims of the patent, and affirmed as to the sixth claim, and the cause is remanded to that court with directions to proceed in conformity with this opinion. Costs in this court are awarded to the complainant, Fred H. Beach.

PATENT BUTTON CO. V. SCOVILL MFG. CO.

(Circuit Court, D. Connecticut. January 24, 1899.)

No. 902.

1. PATENTS—OPERATIVENESS AND UTILITY—ANTICIPATION.

The mere issuance of a patent raises a presumption of its operativeness and utility; and defects, merely in minor details of construction, will not defeat the efficiency of the patent as an anticipation, provided it sufficiently discloses the principle of the alleged invention.

2. SAME—BUTTONS.

Patent No. 429,530, for a button particularly designed for trousers, which is to be attached to the goods by metal fasteners, and in which

the essential feature is an "independent die or clinching piece," construed, and held not infringed by a button made under the Shipley patent, No. 548,143; or, if construed to cover the Shipley device, held, that the patent is void for want of novelty.

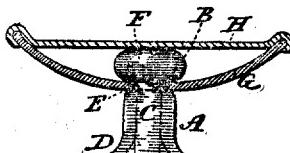
This was a suit in equity by the Patent Button Company against the Scovill Manufacturing Company for alleged infringement of patent No. 429,530, to W. E. Jackson and L. A. Platt, for a button.

Gross, Hyde & Shipman and Mr. Cook, for complainant.
Mitchell, Bartlett & Brownell, for defendant.

TOWNSEND, District Judge. On June 3, 1890, complainant's assignors obtained patent No. 429,530. On October 15, 1895, Alfred J. Shipley obtained patent No. 548,143. Each of these patents is for a button of the class which are attached to fabrics by means of metal fasteners. The buttons in question are particularly designed for use on trousers. The defendant's button is made in conformity with the specifications of said Shipley patent.

Complainant's patent covers a rivet, and a button, with or without a button head, "provided with an independent die or clinching piece, having a shank, A, and a head, B, the said shank which forms the hub of the button being traversed by a longitudinal bore or opening, C, flared at its outer end to form a foot, D, * * * the said head * * * having an enlarged clinching space F, which is intersected by the opening or bore thereof."

Fig. 1



In attaching it to a garment, "the point of the rivet is then passed through the cloth and into the bore of the shank of the die, in which it is centered by the flaring outer end thereof. From the said bore the point of the rivet emerges into the clinching space of the die, and the pressure being continued, and the point of the rivet being confined in the said clinching die, it is forced to curl upon itself, * * * and so bind the several parts of the button" and the cloth together.

The term, "independent die or clinching piece," describes the essential element of the alleged invention of complainant's patent, the only novel feature therein. As complainant's expert says, "the die is a structure integrally in one piece, and may be cheaply and easily made in various ways." That is, the "independent die and clinching piece" was a single piece of metal, which guided, supported, upset, and retained the end of the tack, "without requiring the co-operation of any part of the button," as distinguished specifically by the patentee from the dependent dies of the prior art, in which the "work of clinching the rivet" required "aid from other parts of the button," or

the independent die, which "upset the point of a pointed rivet after the same has been assembled with the remaining parts of the button by forcing a cap down over its point."

The patent office rejected all the original claims. Every element of the combination was old. In fact, this art was so crowded that there was scarcely standing room for an inventor when complainant's assignors entered the field. Patent No. 183,996, to Wheeler, showed that this type of metal-fastened buttons was known in 1876. Patent No. 222,309, to Robertson, showed a longitudinal bore and a dependent die to turn up the rivet. Patents No. 226,722, to D'Aubigne, and Nos. 241,076, 371,381, and 421,441, to Shorey, showed every element of complainant's device in practically the same combination, except the integral independent die piece.

Complainant's assignors, confronted by this condition, specifically disclaimed clinching a pointed rivet by forcing it against a dependent die or button head, and described and claimed as their invention a button provided with one single integral structure, constituting an independent die or clinching piece having a longitudinal bore, a contracted opening, and an enlarged space at the inner end thereof, and an outwardly flared foot or base; the object being to produce a cheap button by means of a die struck from a single piece of metal. In this construction the longitudinal bore of the independent die piece centered and guided the point of the rivet into its clinching chamber, which upset and clinched it so that the clinched end rested against the wall of the contracted opening, as already stated.

The Shipley patent, under which defendant's buttons are made, covers what the patentee calls a "spacer button"; the spacer constituting a shank elongating device, and consisting of a flaring ring or flange of metal, which is fastened to the button head by an eyelet, and is folded inwardly upon itself. In a closed-head button the rivet is upset against the under side of the depressed face of the button, but in an open-head button it is upset upon the head of said eyelet. In each case, when so upset or curled over, it contacts with, bears on, and is held by, the inturned end of the spacer. The complainant contends that the only structural difference between the two buttons is in defendant's inturned flange, and that this inturned flange is unnecessary to support the upset rivet, because the upset rivet bears upon the neck of the eyelet so far as is essential for commercial purposes, or, if this is not so, that to thus insert a lining to restrict the neck of said eyelet is a mere evasion of the patent.

In support of the contention that the neck of the eyelet furnishes a sufficient bearing for the upturned end of the rivet, complainant introduced, in rebuttal, the testimony of its expert as to certain experiments made by him at complainant's factory with defendant's buttons after the inner cones and base of the spacer had been removed. It is said that the result of these experiments shows that the upset rivet in defendant's button withstood a strain over and above a claimed commercial requirement of 50 pounds. These ex parte expert experiments are not entitled to much consideration. Inasmuch as this point was vital in support of complainant's claim of infringement, it should have been tested, especially on rebuttal, by

experiments at which complainant could be present, or by other evidence which complainant could have an opportunity to investigate. It appears, furthermore, that a strain of 50 pounds is not equal to the commercial requirement, and that in defendant's buttons as actually made the inturned cone of the spacer is the efficient element of support.

The claim that the upturned flange, being a mere lining to restrict the bore for the rivet, thus constitutes, in effect, part of an independent die piece, and therefore unlawfully evades the patent, is untenable. That defendant's construction avoids the patent is true. But it avoids it because the eyelet unites the spacer and button head, and is a separate piece, having independent essential functions, distinct from those of the die. And it is only when the parts are assembled, and the die becomes dependent upon the eyelet, that the two parts are said to constitute complainant's die in any sense. But, when thus combined, the defendant's structure lacks the essential of complainant's die, as defined by its expert, since defendant's die is not a single piece, or "an independent piece," or "integral in one piece so that it may be easily and cheaply made in various ways"; and, further, because, while, according to complainant's theory, the clinching in defendant's button takes place in part against the inserted eyelet piece, in complainant's structure "the clinching of the end of the fastening tack does not take place against the cap piece of the button when present as an anvil or against any specially inserted piece for that purpose."

These considerations sufficiently present the decisive question in the case. If, however, the foregoing statement of opinion as to the facts is incorrect, and if complainant's contention be admitted, that the dependent die and eyelet structure of defendant, when assembled, is so far the equivalent of the independent integral one-piece structure of complainant that defendant infringes, then the patent in suit is void for want of patentable novelty, because the Shorey patents show a face plate or a piece of metal serving as a die in connection with either a spacer when assembled, or a contracted opening, and in each case dependent upon each other.

The Shorey patents are controlled by complainant. Counsel for complainant assert that they are mere paper patents, not adapted for successful practical use. The only proof on this point is the testimony of complainant's general superintendent, that "we do not manufacture buttons under these patents." The fact that the patents were issued raises a presumption in favor of their operativeness and utility (*Dashiell v. Grosvenor*, 162 U. S. 425, 16 Sup. Ct. 805); and, when the defects are merely in minor details of construction, such defects will not defeat the efficiency of such patents as anticipations, provided they sufficiently disclose the principle of the alleged invention (*Pickering v. McCullough*, 104 U. S. 310; *Electric Ry. Co. v. Jamaica & B. R. Co.*, 61 Fed. 655). Furthermore, when the patentees of the patent in suit were referred to these patents, they specifically disclaimed the constructions covered thereby, and limited themselves to a construction which dispensed with the necessity of a spacer, and required a specific form of an independent die or clinching piece.

In view of these conclusions, the further claim that the integral independent die or clinching piece is anticipated by the Prentice, Raymond, and Kraetzer patents, and the further defense that the patent under which defendant manufactures is for a new type of button without the longitudinal bore, shown in all the drawings and expressly covered by all the claims except the second, will not be discussed.

Inasmuch as all the claims cover in terms the independent die or clinching piece, they need not be separately considered. Let a decree be entered dismissing the bill.

GRAHAM v. EARL.¹

(Circuit Court of Appeals, Ninth Circuit. October 18, 1897.)

No. 315.

1. PATENTS—ACTION FOR INFRINGEMENT—PLEADING.

Where the complaint describes the invention of the patent sued on by the name given it in the patent, and then specifically refers to the letters patent "for further and fuller description of the invention therein patented," such reference imports into the complaint the description contained in the patent, and is controlling as to the nature of the invention.

2. SAME—NOVELTY AND INFRINGEMENT—CONCLUSIVENESS OF VERDICT—APPEAL.

The questions of novelty and infringement are mixed questions of law and fact, so that, if the court correctly instructs the jury on the applicable questions of law, the verdict is conclusive on appeal, unless there is an entire want of evidence on which to base it.

3. SAME—CONSTRUCTION OF DISCLAIMERS.

In determining the meaning of a disclaimer, the same rules are to be observed as in construing any other written instrument; the purpose being to carry out the intention of the person executing it, as indicated by its language, when construed with reference to the proceedings of which it forms a part. It must therefore be read in connection with the original specifications, of which it becomes a part when recorded.

4. SAME—DISCLAIMER OF BROAD CLAIMS IN COMBINATION.

A disclaimer of broad claims in a combination does not operate as a disclaimer of other and narrower claims, covering specific means, which are included in the language of such broad claims.

5. SAME—PARTIES LIABLE TO INFRINGEMENT—AGENTS AND MANAGERS.

An agent or manager for a given state, who is engaged in leasing infringing fruit cars to shippers for his principals, who are the owners thereof, is himself liable as an infringer, though he receives a regular salary, and has no interest in the profits of the business.

6. SAME.

The Earl reissue, No. 11,824, for a ventilator and combined ventilator and refrigerator car, is not invalid because of any expansion of the invention described in the original patent; and the claims thereof are infringed by a refrigerator car having ventilators made according to the Kerby patent, No. 537,293.

In Error to the Circuit Court of the United States for the Northern District of California.

This was an action at law by Edwin T. Earl against Robert Graham to recover damages for infringement of a patent relating to

¹ This case was published in 82 Fed. 737, and it is now republished, by request, in order to correct errors in the former report.

ventilators for refrigerator cars. In the circuit court there was a verdict and judgment for plaintiff for nominal damages, in the sum of one dollar, and the defendant brings error.

Wheaton, Kalloch & Kierce, E. S. Pillsbury, and Lewis L. Co-burn, for plaintiff in error.

John H. Miller, John L. Boone, and Guy C. Earl, for defendant in error.

Before GILBERT, Circuit Judge, and HAWLEY and DE HAVEN, District Judges.

DE HAVEN, District Judge. This action was brought to recover damages for the infringement of reissued letters patent numbered 11,324, granted to the plaintiff on the 18th day of April, 1893, and entitled, "Ventilator and Combined Ventilator and Refrigerator Car." The complaint alleges that the invention patented was "a ventilator and combined ventilator and refrigerator car," but makes special reference to such letters "for further and fuller description of the invention therein patented"; and this reference imports into the complaint the description contained in the patent, and is controlling as to the nature of the invention patented.

The action was tried by a jury, and a verdict rendered in favor of the plaintiff for damages in the sum of one dollar. The case is brought here by the defendant on a writ of error to reverse the judgment rendered on such verdict in favor of the plaintiff. The specific claims of invention made by the plaintiff in the application upon which such reissued letters patent are based, so far as necessary to be here set out, are as follows:

"(1) In combination with a car having separate and independent openings, a lid or cover for each opening, adapted to close the latter, and means for holding the lids open in oppositely inclined positions, whereby said lids are adapted, not only to form closures for the openings, but also to act as funnels to insure a circulation of the air within the car. (2) In combination with a car having separate and independent openings, a lid or cover for each opening, adapted to close the latter, and means carried by the respective lids for holding them open in oppositely inclined positions. (3) In combination with a car having separate and independent openings, a lid or cover for each opening, adapted to close the latter, and foldable devices, substantially such as shown and described, for holding the lids open in oppositely inclined directions. (4) In combination with a car having separate and independent openings, movable covers or lids adapted to close such openings, and side wings hinged to such lids or covers, and adapted to sustain them in oppositely inclined positions, and to form, in connection with the lids, a funnel."

On April 11, 1895, the plaintiff filed with the commissioner of patents a disclaimer in full of the foregoing claims 1 and 2. On April 9, 1895, there was granted to one Thomas B. Kerby patent numbered 537,293, for a ventilator for refrigerator cars. This ventilator was afterwards, and before the commencement of this action, attached to and used upon refrigerator cars employed in transporting fruit from California to the East, and such use of the Kerby ventilator constitutes the alleged infringement of plaintiff's patent. A sufficiently accurate description of the Kerby ventilator, and by means of which it can be easily compared with the ventilator covered by plaintiff's

revised letters patent, is contained in one of the briefs filed for the plaintiff in error, and is as follows:

"This Kerby ventilator is applied to the ordinary four openings of refrigerator cars, using the lids of the openings for the upper part of the ventilator. The lids are made of double thicknesses of boards, placed in parallel planes with each other, and far enough apart to leave a pocket between them, into which the screen and side wings of the ventilator are shoved and closed when the ventilator is put out of use. When the ventilator is in use the said lid is held up by the frame of the Kerby screen, and the side wings do not hold or assist in holding the lids in any position, or in any way. The wide ends of the side wings are hinged to the screen frame, and they swing around horizontally when they are being put into or taken out of use."

In addition to the foregoing, other facts will be hereinafter stated in the discussion of the several points to which they more particularly relate.

1. It is earnestly insisted by the plaintiff in error that the court admitted irrelevant testimony tending to show that plaintiff's patent covered a combined ventilator and refrigerator car as well as ventilator. We are satisfied from a careful examination of the record that this contention cannot be sustained. It is possible that some of the questions asked in behalf of the plaintiff, and allowed by the court, were not so specific and accurate in their reference to the particular device covered by the plaintiff's patent as to be entirely free from criticism, but it is clear to us that the jury could not possibly have been misled thereby. And in submitting the case to the jury the judge took occasion to particularly instruct them as follows:

"A patent for invention only covers and protects what is particularly pointed out and claimed as the patentee's invention in the claims of the patent. It is usually expedient for the specifications of a patent to describe things already in use, and which constitute no part of the invention claimed, in order to better explain what the invention is. The present patent mentions 'refrigerator cars,' yet those refrigerator cars were admittedly older than the plaintiff's alleged invention, and are not claimed as any part of his invention in the patent. You will therefore consider that nothing is protected by the patent that is described in its specifications, excepting only what is specified in the claim of the patent as the invention which the patentee claims as belonging to him."

It would not seem possible that, after so explicit an instruction, the jury failed to understand that plaintiff's patent did not cover either a refrigerator or ventilator car, or anything other than the ventilating device claimed by the plaintiff as his invention.

2. It is urged by plaintiff in error that the patent issued to the plaintiff in the action is void for want of novelty in the invention claimed, and also that the device covered by the Kerby patent is not an infringement of the plaintiff's patent. This contention, in each of its branches, presents a mixed question of law and of fact. 1 Rob. Pat. § 272; Paving Co. v. Molitor, 113 U. S. 609, 5 Sup. Ct. 618. The circuit court correctly instructed the jury in relation to the law applicable to each of these questions, and, unless there was an entire want of evidence upon which to base the verdict returned by the jury, such verdict is conclusive here as to every fact embraced within the issues submitted to the jury for decision. This results from the well-settled rule that on a writ of error the appellee

late court can only consider errors of law, and that the review under such writ does not extend to matters of fact. *Zeller's Lessee v. Eckert*, 4 How. 289. Without undertaking to give even a synopsis of the evidence bearing upon the question of the novelty of the invention covered by plaintiff's patent, it is sufficient for us to say that, in our judgment, there was ample evidence to sustain the verdict of the jury upon this point. Nor are we able to agree with the further contention of plaintiff in error that this court should declare, as a matter of law, that the Kerby device is not an infringement upon the invention covered by the plaintiff's patent. Of course, there may be cases in which there is such a marked dissimilarity in the structure and functions of devices covered by different patents that a court may declare, as a matter of law, that the one does not infringe upon the other, but such is not the case before us. Claims 3 and 4 of plaintiff's patent cover a foldable ventilator in combination with a refrigerator car, while the Kerby device is also a foldable ventilator in combination with such a car. There is a slight difference between the two, in reference to the mode by which the side wings are hinged to the cover of the ventilator. In the plaintiff's invention, such wings are hinged directly to the cover, while in the Kerby device the side wings are hinged to the frame of a screen, such screen being placed in front of the ventilator, and hinged to its cover; but, notwithstanding this difference in the mode of holding the side wings of the ventilator in place, we do not think it can be said that the two devices do not perform the same function, and in the same way. It is clear both are foldable devices, and both accomplish the same general purpose of deflecting and directing the air down into a moving car at one end, and permitting it to pass out at the other; and both, when not in use, are folded in such a manner as not to be in the way of those operating the train. In view of these facts, we are not prepared to say, as matter of law, that the one ventilating device is not the equivalent of the other.

3. The plaintiff in error further insists that under the evidence and the instructions of the court the jury could not possibly have found that the Kerby device was an infringement of any other than claims 3 and 4 of the plaintiff's reissued letters patent. And from this it is argued that the judgment should be reversed on the ground that the plaintiff's disclaimer of claims 1 and 2 of his reissued letters patent necessarily operated as a disclaimer of the specific combination or invention described in claims 3 and 4 of the same patent. Claims 1 and 2 of the patent just referred to are exceedingly broad, and cover all possible means for holding the lids of the ventilators open in oppositely inclined positions, while its claims 3 and 4 are more narrow, and cover only the specific means therein particularly described for holding such lids open. The whole argument of the plaintiff in error upon this point seems to rest upon the proposition that, as claims 1 and 2 are broad enough in their descriptive language to include the specific combinations covered by claims 3 and 4, plaintiff's disclaimer of claims 1 and 2 was, in legal effect, a disclaimer of the particular device described in claims 3 and 4; in other words, that the particular means for holding the lids of the venti-

lators open as described in claims 3 and 4 were thus disclaimed, because such means are covered by the broad language of claims 1 and 2. In support of this position it is argued that the disclaimer filed by the plaintiff is not to be treated as a simple withdrawal or expunging of claims 1 and 2 from the specifications of which they originally formed a part, and thus leaving the remaining claims to be construed as if such claims 1 and 2 had never been made, but that the instrument of disclaimer is to be construed by itself as an independent and affirmative declaration by the plaintiff that he was not the first or original inventor of any device covered by claims 1 and 2; and the case of United States Cartridge Co. v. Union Metallic Cartridge Co., 112 U. S. 644, 645, 5 Sup. Ct. 486, is cited to sustain this proposition. In that case it was said:

"The disclaimer was one of the fact of invention. It could not lawfully be anything but a disclaimer of the fact either of original invention or of first invention. It was not merely the expunging of a descriptive part of the specification, * * * but it was a disclaimer of all claims based on such descriptive part," etc.

But in that case the court was discussing the effect of a disclaimer of the fact of invention of a specific and particular mechanical device, the language of the disclaimer thus construed by the court being:

"Your petitioner disclaims the said movable die, D, called a 'bunter,' as being the invention of said Ethan Allen; thus leaving the description of said die, D, the same as shown in the original patent and the drawings thereof."

Of course, in such a case the court properly held that the disclaimer was specific, and must be construed as an affirmative declaration that the patentee was not the inventor of the particular thing disclaimed. In considering the scope and effect to be given a disclaimer, the same rules are to be observed as in construing any other written instrument, and so as to carry out the intention of the person executing it, as indicated by its language when construed with reference to the proceedings of which it forms a part. It cannot be read independently of its relation to the original specifications, of which it becomes a part when recorded. Applying this rule of interpretation to the disclaimer filed by the plaintiff in this action, it would seem too clear to admit of any doubt that such disclaimer cannot be given the broad and sweeping effect claimed for it by the plaintiff in error. On the contrary, the only reasonable construction which can be given the disclaimer of claims 1 and 2 is that the plaintiff intended to thereby limit his patent to the specific invention described in the remaining claims of his specifications, and not to abandon such remaining claims.

4. We do not think the claims of the plaintiff's reissued letters patent are any expansion of the invention referred to in the specifications of his original patent, and such reissued letters are therefore valid, under the rule declared in Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825; Odell v. Stout, 22 Fed. 159; and Gaskill v. Myers, 81 Fed. 857.

5. Another ground upon which the reversal of the judgment under review is asked is that the evidence fails to show that the plaintiff

in error was guilty of the act of infringement complained of, even if it should be conceded that the Kerby device is an infringement upon the invention protected by the reissued letters patent granted to the defendant in error. In order to fully understand the point thus made, it is necessary to briefly refer to the facts upon which it is based. The cars on which the Kerby device was used, and which use the plaintiff claims to have been an infringement upon his patent rights, were owned by Armour & Co., of the city of Chicago; and the plaintiff in error was their general manager in this state, and as such conducted for them here the business of leasing such cars, furnished with the Kerby device, to shippers of fruit who desired to engage the use of cars thus equipped. The plaintiff in error had no interest in those cars, nor in the profits of the business thus conducted by him for Armour & Co. When leased, the cars were delivered by the plaintiff in error, or by his direction, to the shipper, who loaded them himself, and paid the railroad company for hauling them to their place of destination; and, while thus in possession of the shipper, neither the plaintiff in error nor his principals exercised any control over the use of such cars, or the Kerby device used in connection therewith. Upon this state of facts, it is claimed that the plaintiff in error did not, within the meaning of the law, either manufacture, use, or vend the Kerby device, and therefore was not guilty of any infringement upon plaintiff's invention; that he was only a mere agent and solicitor for Armour & Co. in the business carried on by them, and in which business the Kerby device was, in connection with these cars, let for hire; and that as such agent he is not responsible for any wrong suffered by the plaintiff by reason of such use of the Kerby device. This contention presents the most serious question in the case, and it is not to be denied that there are decided cases which support the proposition contended for by the plaintiff in error. The case of Nickel Co. v. Worthington, 13 Fed. 392, is one. That was, like this, an action at law to recover damages for the infringement of certain patents, and a corporation and some of its officers were made defendants. The court held that only the corporation was liable, although it was found that one of the other defendants solicited the business for which judgment was rendered against the corporation. In delivering the opinion in that case it was said by Lowell, Circuit Judge:

"I am of opinion that the only persons who can be held for damages ~~are~~ are those who should have taken a license, and that they are those who own, or have some interest in, the business of making, using, or selling the thing which is an infringement, and that an action at law cannot be maintained against the directors, shareholders, or workmen of a corporation which infringes a patented improvement."

We are unable to agree with the opinion thus expressed, that only those persons can be held for damages "who own, or have some interest in, the business of making, using, or selling the thing which is an infringement." It is well settled that a mere workman or servant who makes, uses, or vends for another, and under his immediate supervision, a patented article, is not liable in an action at

law for damages which may have been sustained by the patentee by reason thereof. This rule is an apparent exception to the general principle of law which makes all who participate in a tort of misfeasance principals, and liable for damages therefor; and we do not think it should be so extended as to exempt from liability the general manager of a business which infringes upon the exclusive right of a patentee to make, use, and vend the invention protected by his patent. Such an agent, to use a word sometimes employed in the discussion of the law relating to fellow servants, may be regarded as a vice principal, and he should be held responsible in damages for any action of his in the transaction of the business thus placed under his management which is in violation of the rights of another. In this case the plaintiff in error, as the general manager in this state of this particular branch of the business of Armour & Co., voluntarily entered into contracts which contemplated the use of the Kerby device; and we do not think it is at all material that he engaged in this work for a stated salary, rather than reserving to himself a share of whatever profits his principals might make by reason of such unauthorized invasion of rights secured to defendant in error by his letters patent. Upon the facts appearing here, we are clearly of the opinion that the plaintiff in error may be said to have authorized the use of the Kerby device when he entered into the contracts before referred to, and is equally answerable with his principals for damage on account of the wrong thus done to the defendant in error. This conclusion seems to be in harmony with the views of Mr. Robinson, as stated in section 912 of volume 3 of his valuable work on Patents, in which, after referring to the rule adopted by some courts, that all directors, agents, or other servants of a private corporation, who actually employ or authorize the employment of a patented invention, are guilty of an infringement, and personally answerable to the patentee, the author declares that this principle "is in harmony with other doctrines of the law, sufficiently protects the patentee, and justly punishes those whose willful acts place them on the same footing with individual infringers. Under this opinion, all agents who perform acts of infringement, and all stockholders, directors, and other officers who, in the prosecution of the business of the corporation, authorize them, participate in the infringement, and are personally responsible to the patentee." And in the case of Cramer v. Fry, 68 Fed. 201, the court gave a strong intimation of its approval of this statement of the law, although in that opinion stress seems to have been placed upon the fact that the agent making the sales of the alleged infringing machine received, in addition to his salary, a commission on sales made by him,—a fact which we would not regard as material if such commission was paid to the agent on account of his services as such. The case of Lightner v. Brooks, 2 Cliff. 287, Fed. Cas. No. 8,344, was an action on the case for the alleged infringement of a patent. The defendant therein, as chairman of the board of directors of a railroad corporation, had entered into a contract in behalf of the corporation for the construction and delivery to such corporation of cars furnished with boxes similar to those patented by the plaintiff in that action. In that case

judgment was entered for the defendant upon the ground that the contract did not necessarily contemplate that the contractor should use the patented article without license from the patentee; but the court, in the opinion, which was delivered by Mr. Justice Clifford, of the supreme court of the United States, conceded that the defendant would have been liable if the contract could have been construed as one having in view an infringement of the plaintiff's patent. This is the language of Mr. Justice Clifford upon the point we are now considering:

"The argument for the plaintiff is that the defendant is liable because it is insisted that, whenever an agent of a corporation assumes to authorize or directs the commission of a trespass, the agent assuming to confer the authority, or who gives the direction, is himself personally liable to the injured party, although he did not directly participate in the commission of the wrongful act. Undoubtedly, all persons commanding, procuring, aiding, or assisting in the commission of a trespass are principals in the transaction, and stand responsible to answer in damages to the injured party. Both the master who commands the doing and the servant who does the act of trespass may be made responsible as principals, and may be sued jointly or severally for damages, as the injured party may elect."

While what was thus said cannot be regarded as an authoritative decision upon the point we are now considering, still, as the expression of the opinion of a very learned judge upon a question naturally suggested by the argument of that case, it is entitled to very great respect, and in our opinion it is a correct statement of the law applicable to this case. Without extending this opinion by a discussion of other points urged in behalf of the plaintiff in error, it will be sufficient for us to add that we find no error in the record; and therefore the judgment sought to be reversed should be, and accordingly is, affirmed.

McCONWAY & TORLEY CO. v. SHICKLE, HARRISON & HOWARD
IRON CO.

(Circuit Court, E. D. Missouri, E. D. February 14, 1899.)

No. 3,883.

PATENTS—INVENTION—IMPROVEMENT IN CAR COUPLERS.

The Janney patent, No. 254,093, for an improvement in car couplers especially designed for use on freight cars, and applicable to the hook or Janney type of couplers, covers a meritorious and patentable device, which was not anticipated or obviously suggested by anything in the prior art.

This is a suit in equity by the McConway & Torley Company against the Shickle, Harrison & Howard Iron Company for alleged infringement of a patent.

J. Snowden Bell, Geo. H. Christy, and Henry M. Post, for complainant.

T. A. Post and Geo. H. Knight, for defendant.

ADAMS, District Judge. This is a suit to enjoin the alleged infringement of letters patent of the United States No. 254,093, granted

February 21, 1882, to E. H. Janney, assignor to the Janney Car-Coupler Company, for new and useful improvements in car couplers. The complainant's title to the patent is not disputed. The defenses are unpatentability, anticipation, and noninfringement. Before entering upon a consideration of these defenses, it is well to ascertain and state what the invention of the patent is. The patentee describes it as "an invention specially designed for use upon freight cars," and states that it "consists mainly in the combination of a specially constructed lever arm of a rotary hook nose with a specially constructed locking pin." He refers to the drawings accompanying the patent, and states that certain of them represent the coupler, "which may be of the Janney or other proper type." The claim of the patent, following these descriptions, reads as follows: "In combination with the lever arm having an inclined face, the vertically moving locking pin, provided with an inclined face." The drawings referred to show a bifurcated drawhead, the more prominent horn of which is so constructed and fitted that the hook nose, with its lever arm, may be pivoted upon it. The prior art shows that this pivoted hook nose, with its lever arm, made integral therewith, is the characteristic feature of a type of couplers invented by Janney in 1873, and which since then has been known and classified as the "hook couplers, coupling in a vertical plane," or as the "couplers of the Janney type." The several patents of Janney (No. 138,405, dated April 29, 1873; its re-issue, No. 8,153, of date April 2, 1878; No. 156,024, of date October 20, 1874; and No. 212,703, of date February 25, 1879) relate to this class of hook couplers, coupling in a vertical plane, and evince a purpose to create, improve, and perfect this particular class of couplers only. In the execution of this purpose, Janney succeeded so well as to call forth the encomiums of the court in the case of Coupler Co. v. Pratt, 70 Fed. 622, where Judge Coxe says:

"Janney was an inventor of more than ordinary genius. He struck out on entirely new lines, and produced a coupler so far superior to all that had gone before that it at once began its phenomenal progress towards popular favor. The Master Car Builders' Association adopted it as the standard, and now it is almost universally recognized as the most complete coupler used on American railroads."

The statement in the specifications that Figs. 1, 2, 3, and 11 represent the drawhead of the coupler, "which may be of the Janney or other proper type," does not, in my opinion, contemplate the use of other couplers, of distinct or different type from the Janney type. The word "proper," here used, must be construed in the light of other descriptive statements, as well as the drawings of the patent, and, so construed, clearly relates to other couplers of the general type or class known as the "hook or Janney coupler." In other words, it was to this distinctive type or class of coupler, and to none other, that the patentee was devoting his inventive skill. "The lever arm" referred to in the claim must be construed in the light of the specifications, and, so construed, means that particular lever arm found in the Janney type. The invention of the patent, therefore, is for a locking device applicable to this Janney type of coupler. By reason of the

narrow space between freight cars when coupled into a train, it was found that the horizontal, spring-actuated pin, which the prior patents employed for coupling passenger cars, was not suitable for service on freight cars. The coupling of freight cars was therefore the special problem to which the inventor gave his attention, and it resulted in the invention of the patent in suit. An inspection of the device of the patent, and observation of its action, cannot fail to impress one with its value. It is exceedingly simple in construction, works automatically and with great certainty, and accomplishes excellent results. It can be applied to any coupler of the Janney or kindred type, having a bifurcated drawhead and the hook nose, with its integral lever arm pivoted upon one of the horns of the drawhead. This lever arm and vertically moving locking pin co-operate, through the instrumentality of inclined faces at the points of contact, so as to raise the pin and permit the tail of the lever arm to pass under the shoulder of the pin upon which the inclined surface is made. Their direct operation is as follows: The hook nose of the drawhead of one car, when in the process of coupling with another car, is driven against the lever arm of the hook nose of the other car. The sudden impact forces the inclined face on the tail of the lever arm against the inclined face of the vertical locking pin, and, by means of their continuing wedge-like action, the locking pin is forced up until the tail of the lever passes under its shoulder, when the pin drops by force of gravity, and effectually locks the hook noses of the couplers. The proof shows that this invention has received much public favor. Over 600,000 couplers embodying the device of the patent are now in actual service, and they have largely superseded all other devices invented for the same purpose. Considering the character of the invention itself, and all other facts found in the proofs relating to its value and appreciation, I find no difficulty in determining the issue of patentability in favor of the complainant.

In considering the defense of anticipation, it is first to be observed that the several patents pleaded (with the exception of the prior Janney and Hein patents, to which I will presently refer) relate generally to the old loose link and pin type of coupler, and to other spring catches, as commonly found on cupboard doors or garden gates. These patents, without doubt, show that co-acting inclined faces had been employed in the locking process of the link and pin type of coupler before the application for the patent in suit was made, but I find no evidence of such use in connection with an automatic vertically locking pin, operating by gravity, and especially suitable to the necessities attending the coupling of freight cars. As already seen, the hook coupler, coupling in a vertical plane, otherwise known as the "Janney type of coupler," was a wide departure from anything shown in the prior art,—so wide as to confer upon the inventor the distinction of a pioneer; and this particular type of coupler has so commended itself to the approbation of railroad operators that it has largely superseded all others in practical use. Under such circumstances, the prior art should be carefully scrutinized, before a court should pronounce its discarded and ineffectual mechanism as the me-

chanical equivalents of a device which has brought success out of failure, and given to the world a valuable contribution to its stock of really useful and beneficial knowledge.

I have carefully considered the several patents pleaded as anticipations in this case, and, for want of time necessary to take up and explain all of them, have selected for analysis the Porter patent, No. 115,517, of date May 30, 1871, believing it to be an expression of the prior art relating to the link and pin type of couplers most favorable to the contention of the defendants. This patent shows a lever arm acting upon a vertically moving catch pin, and shows that the end of the lever and the co-acting surface of the pin have inclined faces; but the lever is pivoted horizontally, not vertically upon a horn of the drawhead, but laterally through its body. It does not operate with a wedge-like action to force up the pin, but with a clasping action, quite like the spring lock of an ordinary cupboard door. Its result is to make fast one end of a common loose pin (employed in the old type of couplers), instead of locking the abutting noses of two drawheads, as required in the Janney type. It appears to me that the action of this device is so different from the invention of the patent in suit, and the result so unsuited to the necessities of the service contemplated by the patent in suit, as to present no suggestion to the ordinary skilled mechanic of the device of the patent; and in my opinion the same may truthfully be said of all the other alleged anticipatory devices.

But counsel say that the former Janney patents, of 1873, 1874, and 1879, and the Hein patent, No. 244,895, of date July 26, 1881, disclose the invention of the patent in suit. These patents are different from the others relied upon by defendants. They relate to the Janney or hook couplers, and they provide a device for locking the pivoted noses of two abutting couplers. They well exhibit the repeated efforts which were made to secure an effective locker for this new type of coupler, but in my opinion they fail to anticipate the invention of the patent in suit. None of these Janney patents show a vertically moving locking pin, and, of course, do not show any inclined face of the lever arm adapted to engage an inclined face on such vertically moving locking pin, and none of them show a locking pin operating automatically by gravity. They each present a locking block, operate by a spring, and move horizontally rather than vertically; and the evidence shows that, while they produce fair results on passenger cars, they are, for the reasons already adverted to, ill adapted for use on freight cars. And, as for the Hein patent, it seems to me that its locking mechanism, composed of a block arrangement, or a block and dog in connection with a pivoted hook, presents no similarity, either in appearance or results, to the device of the patent in suit.

But it is contended that the prior art, as disclosed in all of the alleged anticipatory patents, was in 1882 so suggestive as to make the device of the patent in suit obvious to an intelligent and skilled mechanic; and, with a view of demonstrating such obviousness, the defendant's proof shows that in the year 1896, when the evidence in this case was taken, it submitted the Janney construction under the 1879 patent to three skilled mechanics, and, without further instruc-

tion, asked them to substitute a vertical lock in lieu of the side or laterally working lock of the patent of 1879; and it appears from the proof that these mechanics, acting separately, each for himself, were able to do so, and their results are produced as exhibits in the case. These results fairly show the device of the patent in suit, but I am unable to regard the action of these mechanics as a fair test of obviousness, for two reasons: First. They did their work in the year 1896, instead of 1882, the date of the patent. During these 14 years mechanical knowledge and skill had made great advances, and it does not follow that if a mechanic in 1896, with all the light of advanced knowledge in the art, could apply the mechanical knowledge as it existed in 1882 to a new result, such mechanic could have done so if he had made the effort in the year 1882. Second. It seems to me that the test was unfair for the reason that the question submitted to the mechanics practically stated the object to be accomplished. In other words, they were directed to reconstruct the device of the old patent of 1879 so as to convert its horizontally working locking block into an effectively working vertical pin. A part of the invention in this case was to apprehend that there could be an effectively working vertical pin. This part of the invention was imparted to these experts. Their conclusions, for both these reasons, are not persuasive. In addition to these things, the proof shows that inventive skill was specially active from and after 1873, when the hook or Janney type of coupler was invented, to so perfect it as to make it available to all the needs of actual service. Different locking devices had been suggested, but no inventor, and certainly no ordinary skilled mechanic, had discovered the applicability of the principles of any of the old devices to the new result accomplished by the patent in suit. The proof further shows that after Janney made known the invention of the patent in suit, although it was a very simple thing, it took over \$60,000 in money, and three years in time, to so exploit the invention as to attract serious attention on the part of the railroad world. In the light of these facts, it seems to me gross presumption to say that the invention of the patent was so obvious, in the light of the Porter and other similar inventions, or even in the light of the prior Janney or Hein patents, that any skilled mechanic could readily have discovered and applied it to the type of hook coupler coupling in a vertical plane. The language of Mr. Justice Bradley in the case of Loom Co. v. Higgins, 105 U. S. 580, seems to be pertinent to this case. He says as follows:

"But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not for years occur in this light even to the most skillful persons. It may have been under their very eyes; they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. * * * Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention."

On the same subject, Mr. Justice Blatchford, then circuit judge, said in the case of Wooster v. Blake, 8 Fed. 429, as follows:

"Much is said in the evidence on the part of the defendants as to the obvious character of this or that arrangement, and that any mechanic would know enough to do this or that. This is the oft-repeated story in belittling inventions. The invention consists primarily in finding out what mechanical operation is necessary to produce the practical result arrived at. When such operation is hit upon, the mechanical work is easy. It is easy, when the mechanical operation is seen, to say that it was obvious that certain mechanical arrangements would affect it; but mechanical arrangements are tried, and tried in vain, to reach a practical result, because the mechanical arrangement which is to effect such result is not yet seen. In looking at the completed thing, the mechanical operation is there; but the inventor, though he knew all about cams and levers, and other mechanical arrangements, did not have in advance before him the coveted mechanical operation."

To the same effect are the cases of Potts & Co. v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, and Mast, Foos & Co. v. Dempster Mill Mfg. Co., 49 U. S. App. 508, 27 C. C. A. 191, and 82 Fed. 327.

The facts of this case, in the light of the authorities cited, lead to the conclusion that the invention of the patent was not anticipated. The only other issue left for consideration is that of infringement. In the light of the proofs, this issue is hardly debatable. Infringement is clear. A decree will be entered for the complainant, and a reference will be made to a master for an accounting.

WILSON et al. v. McCORMICK HARVESTING MACH. CO.

(Circuit Court of Appeals, Seventh Circuit. February 16, 1899.)

No. 427.

1. PATENTS—INFRINGEMENT—CONSTRUCTION OF CLAIMS.

A feature of construction covered by one claim of a patent for a machine cannot be read into another claim, in which it is not mentioned, for the purpose of making out a case of infringement.

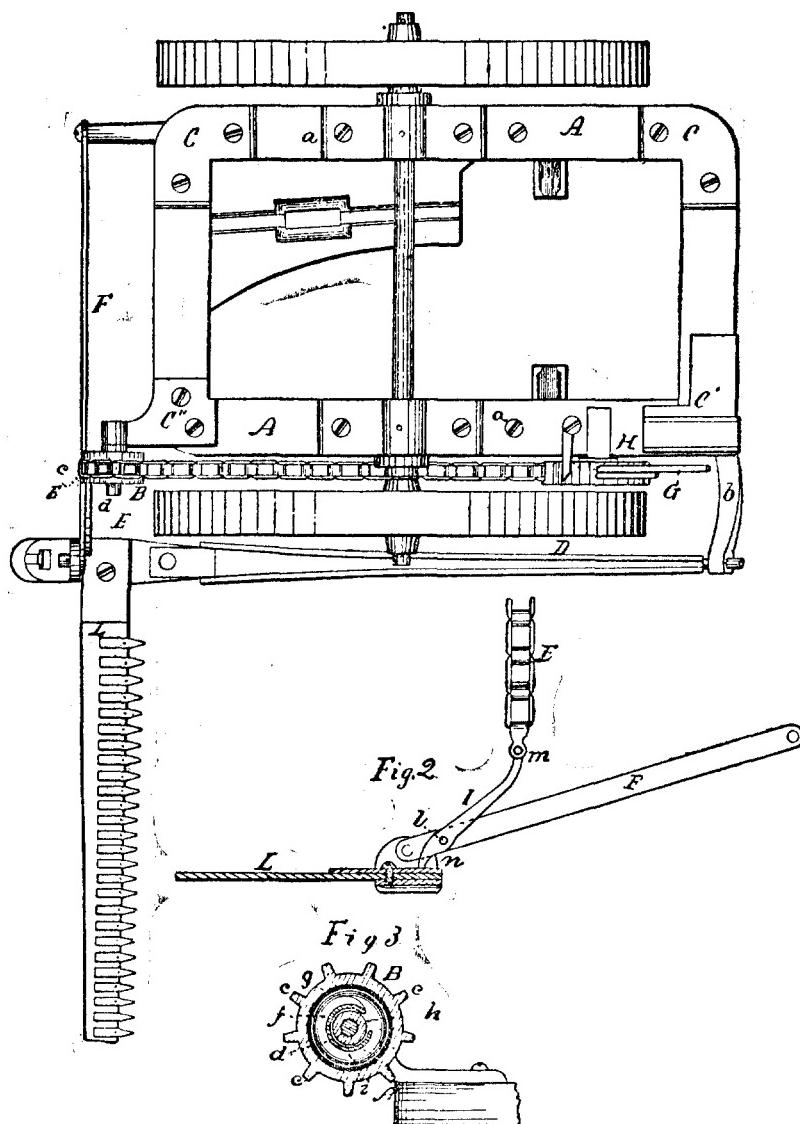
2. SAME—IMPROVEMENT IN MOWING MACHINES.

The Smith patent, No. 233,035, for an improved mowing machine, the essential feature of which is a spring so combined with other mechanism as to assist in sustaining the weight of the finger-bar throughout its length while the machine is in operation, in view of the prior art, covers a device having only a narrow range of equivalents, and which is not infringed by a machine having a spring which, to a limited extent, exercises the same function, but only so incidentally and undesignedly that, had the device preceded that of the patent, it would not have been an anticipation.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This was a suit in equity by George V. Wilson and Elmore A. Barnes, surviving co-partners trading as the Hussey Manufacturing Company, against the McCormick Harvesting Machine Company, for the alleged infringement of a patent. From a decree dismissing the bill, complainants appeal.

This appeal is from a decree dismissing for want of equity the bill brought by appellants against appellee charging infringement of letters patent of the United States No. 233,035, issued on October 5, 1880, to Ephraim Smith, assignor of appellants, for "an improved mowing machine." The diagrams accompanying the specification are shown here:

Fig. 1.

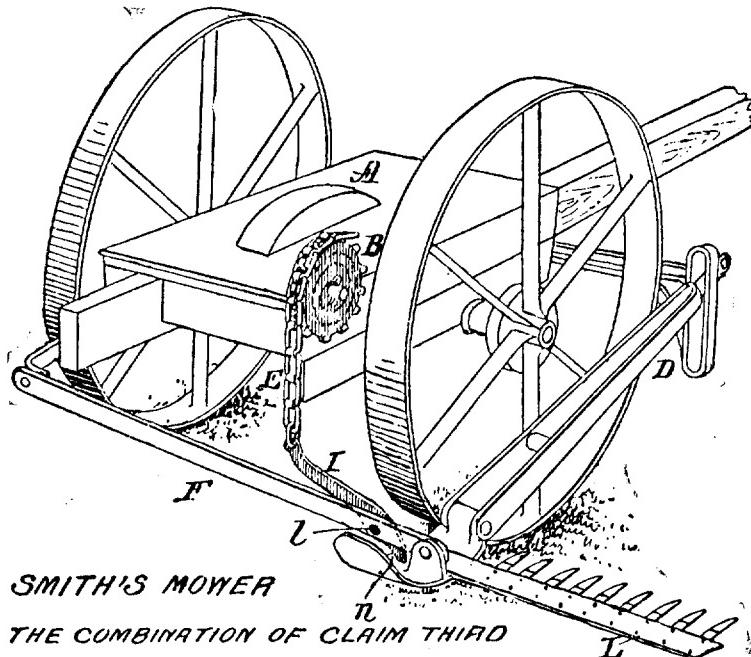
The specification says: "Fig. 1 is a top view of the principal parts of a mowing machine, showing my improvements and the mode of their application; Figs. 2 and 3, views of parts detached. Like letters designate corresponding parts in all the figures. My invention consists: First, in the arrangement of a spring-sheave, in connection with the hinge-bar, lifting chain, cord, or band, and the lifting and adjusting lever, so that it acts between the said hinge-bar and lever upon the chain without interfering with the direct action of the lever on the hinge-bar through the chain; second, in a lever mounted on the hinge-bar, arranged, in combination with the lifting-

chain and the finger-bar, so that the sustaining action of the chain is directly transmitted to the finger-bar in such a manner as to keep the outer end of the finger-bar constantly sustained thereby, both when the machine is at work and when the finger-bar is raised out of action; and, third, in the combination of this lever, thus acting on the finger-bar and acted on by the lifting-chain, with the aforesaid spring-sheave, whereby the action of the latter is constant upon the finger-bar through the said lever, substantially as hereinafter specified. In the drawings, A represents the machine-frame mounted on wheels, as usual; B, my improved spring lifting-sheave; D, the drag-bar; E, the lifting and adjusting chain; F, the hinge-bar; G, the adjusting and lifting lever; H, an arc or segment attached to the said lever, and receiving the chain, band, or cord, E, to be partially wound or taken up thereon; I, my improved finger-bar balancing-lever; and L, the finger-bar, which here is to be understood as including the cutter-bar and other parts to be lifted therewith. * * * The driver, as he sits on his seat (not here represented), moves the lever, G, to raise and adjust the finger-bar by acting on the chain, E, and through that lifting or lowering the hinge-bar, F, and with it the finger-bar hinged thereto. The spring-sheave, B, is arranged and applied to the chain, E, substantially as shown in Fig. 1. The use of this spring-sheave is to nearly counterbalance the hinge-bar, F, and finger-bar, L, and its appendages, and thereby to cause the finger-bar to run lightly over the ground, and rise easily over obstructions, and lessen side draft on the machine, and also to render the operation of raising the finger-bar easy to the driver. At the same time it does not interfere with the direct action of the lever, G, in raising and lowering the finger-bar, and in sustaining it at the proper height; for, since it is coupled to the chain, E, between the said lever and the hinge-bar, it acts freely to balance and lift on the finger-bar, thereby rendering the draft of the same light, the part of the chain between the sheave and the lever, G, allowing a slack as well as a taut chain while the machine is working; but at the same time the finger-bar is firmly sustained all the time by the lever, G, just the same as if the spring-sheave were not applied at all. This is an important feature, since the spring-sheave could not be relied on of itself to sustain the finger-bar, and prevent its plunging into the ground, on meeting an obstruction. The chain, E (having preferably the construction shown in the drawings), fits with its open links over sprocket projections, c, c, on the periphery of the sheave, B, which is mounted on a fixed pivot, d, secured to the frame of the machine. The spring, f, within the sheave, is of sufficient strength to nearly counterbalance the weight of the finger-bar and its appendages, and is adjustable in force by winding up on its pivot. This spring is peculiarly mounted in the sheave. Its outer end is coupled to the inner periphery of the sheave by a hook or bolt, g, while its inner end, in the form of a hook, holds upon the edge of a notch, h, made in a cylindrical or hollow projection, i, secured around the pivot, d, or formed therewith; all substantially as shown in Fig. 3. By this construction, not only has the spring a firm and sure hold at its inner end by the enlarged bearing on which it holds, but it is prevented from bearing on the hub of the sheave, and consequently from interfering, by friction or pressure, with the free movement of the sheave. The sheave is turned to wind up the spring to the requisite force before mounting the chain, E, over its sprockets, and when the forward end of the chain is secured to the lever, G, or its segment, the whole device is complete, and ready for operation. When the rear end of the chain, cord, or band, E, is attached directly to the hinge-bar, F, which carries the heel or inner end of the finger-bar, the lifting action of the same operates simply to lift that end of the finger bar, the outer end of the same being dependent on the rigidity of its connection with the hinge-bar to be lifted, and there is, consequently, a sagging of the said outer end, unless some provision is made to lift it properly. For this purpose I employ a balancing-lever, I, which is pivoted to the hinge-bar, F, at I, Fig. 2; the inner end, m, of the same, being connected directly with the rear end of the lifting-chain, E, which has no other connection with the hinge-bar or finger-bar, and lifts them thereby. The outer end, n, of the said lever, I, bears on the heel end of the finger-bar inside of its pivot-joint, and a little distance therefrom, as shown. The two arms of the lever are so proportioned in length—the inner arm, m, being the longer—as to obtain the desired leverage on the finger-bar to balance

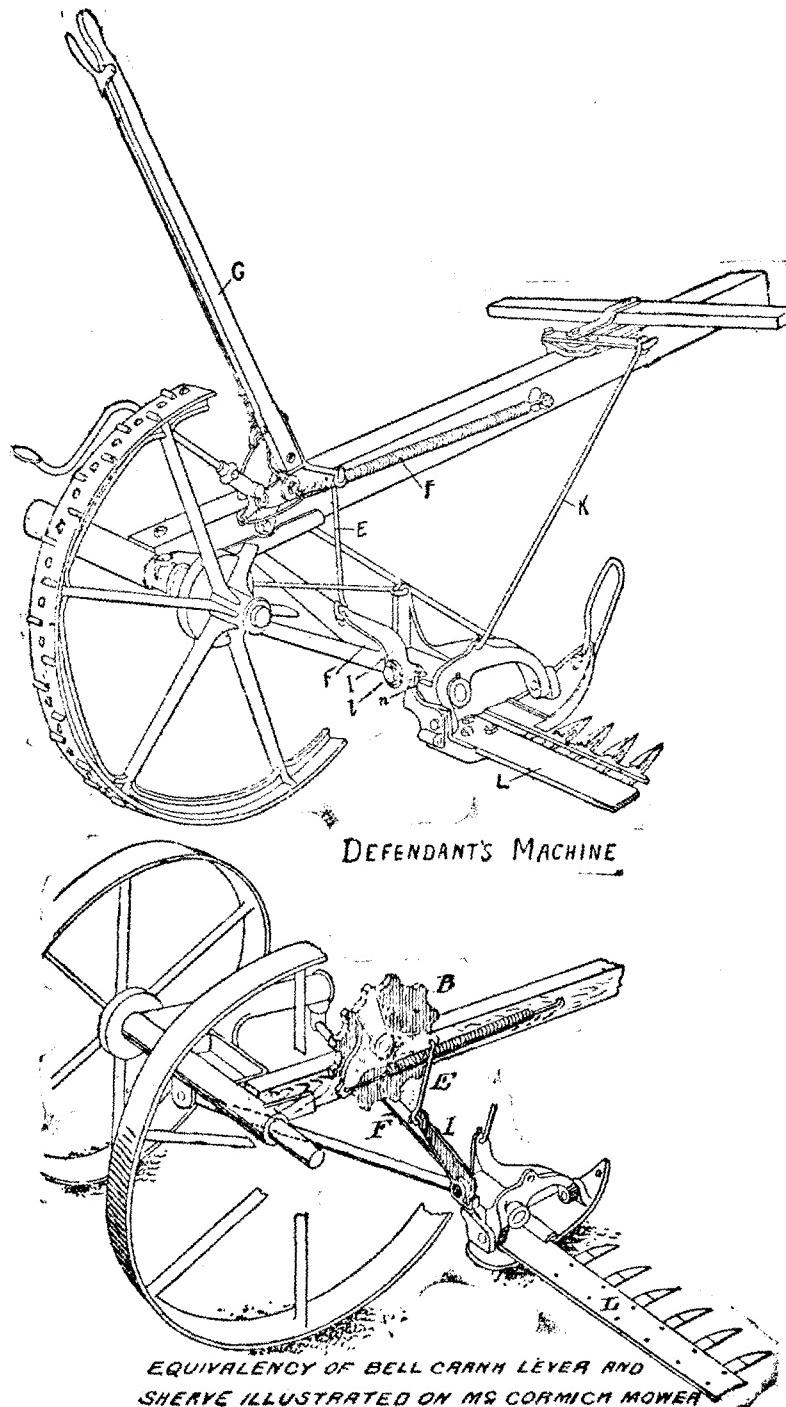
it by the lifting of the chain, E. With this construction and arrangement of the lever, I, while the mower is in operation, the constant lifting of the spring-sheave, B, on the chain, E, acts through this lever to partly sustain the weight of the finger-bar, and to keep the outer end thereof elevated, as desired, so as to run very lightly with little side draft on the machine, and to ride freely over obstructions; and the elastic movement imparted to the finger-bar by the said spring-sheave is made even more sensitive by this lever, and when the driver draws on the chain, E, by the lever, G, to raise the finger-bar, the connection of the chain being directly with the lever, I, the outer end of the finger-bar feels the lifting action as quickly as the inner end, and it is preferable to so balance the finger-bar that its outer end will rise a little quicker and more than the inner end thereof. Thus the action of the lever, I, is constantly upon the finger-bar, and controls all its movements."

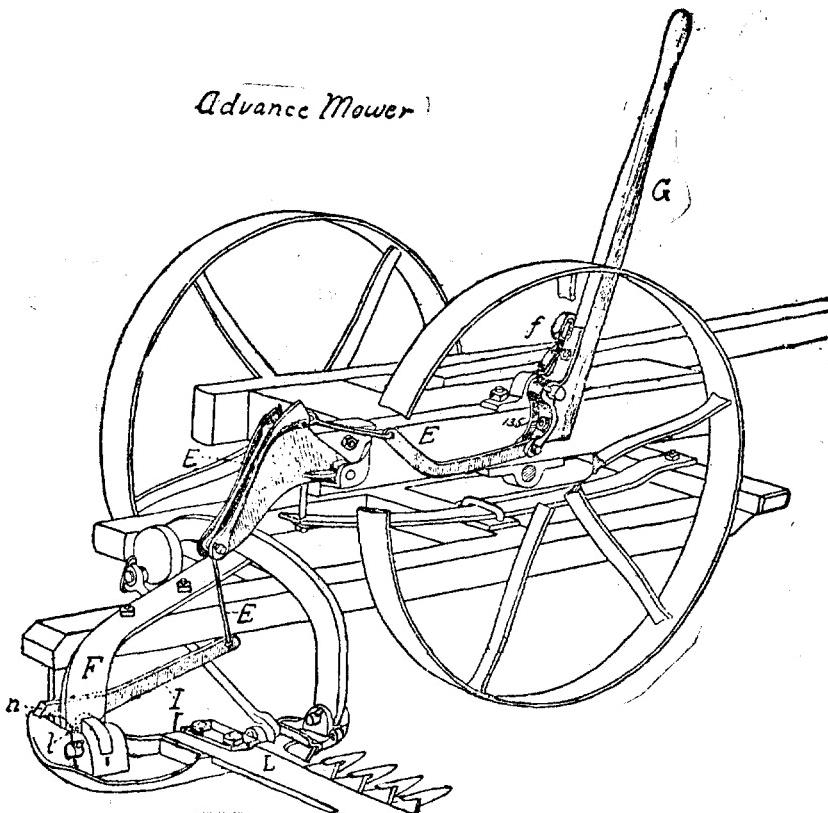
The claims are the following, infringement of the second and third only being alleged: "(1) The spring-sheave, B, in combination with the chain, E, hinge-bar, F, and lifting-lever, G, arranged to be connected with the chain between the lever and hinge-bar, and not interfere with the action of the lever on the finger-bar through the said chain, substantially as and for the purpose herein specified. (2) The lever, I, mounted on the hinge-bar, F, in combination with the finger-bar, L, lifting-chain, E, having a yielding support, and mechanism for adjusting the chain, and securing it in any desired position, whereby the weight of the finger-bar is partly sustained, and its outer end counterbalanced, when the machine is in operation, substantially as herein set forth. (3) The combination of the lifting-chain, E, spring-sheave, B, lever, I, and finger-bar, L, operating together, substantially as and for the purpose herein specified."

The following is alleged to be a faithful representation of the combination of the third claim:



The following cuts show the defendant's machine, and a perspective drawing designed to illustrate the supposed equivalency of a bell-crank lever and the spring-sheave of the Smith patent, and the Advance mower, made under the patent of April 27, 1869, to McCormick, Erpelding, and Baker, which is alleged to anticipate the Smith patent if the defendant's machine infringes it:





In this cut of the Advance, *f* is the spring applied to the heel of the lifting-lever, *G*, exerting its stress in the same direction as in defendant's machine; that is, so as to pull upward on links, *E*, which in turn lift on the long arm of supplemental lever, *I*, which has its fulcrum in the hinge-bar, *F*, and presses with its short arm, at *n*, on the spur extended inward from the shoe of the finger-bar, *L*.

Francis T. Chambers, for appellants.

Robert H. Parkinson, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

Our conclusion is that the court below was right in deciding "that, in view of such limitations as ought to be put upon the complainants' patent, the defendant's device does not infringe." It would be impossible, within the reasonable limits of an opinion, to follow counsel through hundreds of pages of brief in the discussion of the evidence found in the three large volumes which constitute the printed record. We content ourselves with a presentation of propositions which are thought to determine the merits of the appeal.

The first claim, though not in issue, it is to be observed, does not include the lever, I, and connects the spring-sheave with the chain "between the lever and the hinge-bar."

The second claim includes expressly the lever, I, and other parts, designated by letters, except the spring-sheave, B, which is included by implication only, if at all. The implication, if admissible, may arise from the requirement that the chain, E, have "a yielding support," and that there shall be a "mechanism for adjusting the chain and securing it in any desired position." "A yielding support" for the chain, it is evident, might be found in other forms than the spring-sheave described. It might be simply a wheel, or a pulley; but, in order both to support the chain and secure it in any desired position, the spring-sheave, with its sprocket projections, and the lever, G, or the full equivalents thereof, would seem to be necessary. That this claim is not infringed is clear, not only because the "mechanism for adjusting the chain and securing it in any desired position" is not to be found in the defendant's machine, but because there is nothing in that machine which can be adjusted, and so held, as to operate like the chain of the patent in suit. That chain is adjusted and held in position not solely by the lever, G, called the adjusting and lifting lever, but also by the action of the spring-sheave and its sprocket projections, the combined result of which is, as stated in the specification, that "it [the spring-sheave] does not interfere with the direct action of the lever, G, in raising and lowering the finger-bar and in sustaining it at the proper height; for, since it is coupled to the chain, E, between the said lever and the hinge-bar, it acts freely to balance and lift on the finger-bar, thereby rendering the draft of the same light, the part of the chain between the sheave and the lever, G, allowing a slack as well as a taut chain while the machine is at work; but at the same time the finger-bar is firmly sustained all the time by the lever, G, just the same as if the spring-sheave were not applied at all." There are here features of construction, adjustment, and operation which not only cannot be found in the machine of the defendant, but cannot be introduced without a reconstruction which would destroy its identity. The chain, either slack or taut, between the spring-sheave and the adjusting and lifting lever, G, with its segment, H, and the consequent effect upon the operation of the entire mechanism, are the characteristics which must have been deemed to make the combination patentable.

The third claim is a specific one for the combination of the parts designated by the letters E, B, I, and L, "operating together, substantially as and for the purpose herein described." The hinge-bar, F, is not mentioned, and can be included only by implication. Is the implication necessary or justifiable? The lever, I, to be anything more than a prolongation of the chain, must, of course, have a fulcrum; but that might be provided in many ways. It might, for instance, be a fixed pivot secured to the frame of the machine, or a pivot supported by springs or otherwise, so as not to be rigidly fixed and unyielding, and, on that account, perhaps better adapted to serve its purpose. It is therefore to be presumed that the claim was not intended to be

restricted to the hinge-bar, F, but to include any form of fulcrum which might be found available; that is to say, any form which would enable the parts mentioned to "operate together substantially as and for the purpose specified." Anything less would not meet the requirements of the claim. If a fulcrum cannot be supplied by implication, the claim is perhaps void, because it does not show an operative device; but that the hinge-bar, F, expressly included in the second claim, cannot be read into the third, where it is not mentioned, seems to be clear. In *McCarty v. Railroad Co.*, 160 U. S. 110, 116, 16 Sup. Ct. 240, 242, it was suggested that a feature of construction described in the specification should be read into the claims for the purpose of sustaining the patent, but the court said:

"While this may be done with a view of showing the connection in which a device is used, and proving that it is an operative device, we know of no principle of law which would authorize us to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement. The difficulty is that, if we once begin to include elements not mentioned in the claim, in order to limit such claim and avoid a defense of anticipation, we should never know where to stop. If, for example, a prior device were produced, exhibiting the combination of these claims plus the springs, the patentee might insist upon reading some other element into the claims—such, for instance, as the side frames, and all the other operative portions of the mechanism constituting the car truck—to prove that the prior device was not an anticipation. It might also require us to read into the fourth claim the flanges and pillars described in the third. This doctrine is too obviously untenable to require argument."

So here, if it be conceded, on grounds of necessity, that the hinge-bar, F, is to be included in the claim, it is equally necessary, in order that the parts named shall operate, together with that bar, "substantially as and for the purpose specified," that the lifting-lever, G, be also included. Indeed, that lever, as an auxiliary to the spring-sheave, is more important to the complete accomplishment of the declared purposes of the invention than is the hinge-bar, F, which, as we have seen, could be substituted by other means. "This," says the specification, "is an important feature, since the spring-sheave could not be relied on of itself to sustain the finger-bar, and prevent its plunging into the ground on meeting an obstruction. * * * When the forward end of the chain is secured to the lever, G, or its segment, the whole device is complete, and ready for operation." To demonstrate this, it is only necessary to refer to the perspective drawing intended to show equivalency between the bell-crank lever found in the defendant's machine and the spring-sheave in the Smith patent, from which, it will be observed, the lever, G, is omitted. But for the present purpose let it be assumed that the third claim does not include that lever, or its equivalent. So construed, the claim is for the combination of the lifting-chain, E, the spring-sheave, B, the lever, I (having for a fulcrum the hinge-bar, F), and the finger-bar, L, operating together substantially as and for the purpose stated, in so far (it must be further implied) as they may so operate without the aid of the lifting-lever, G. The several parts named, even if operative without the lever, are not in the appellee's machine. The parts which are found there are not approximately equivalent, nor are they combined and

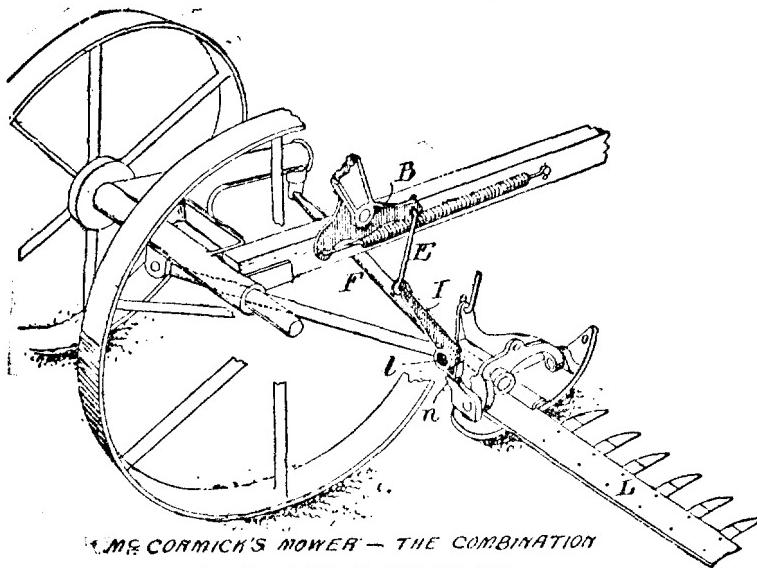
adjusted, or capable of being combined and adjusted, so as to operate substantially in the same way.

We are of opinion, further, that the reasoning by which it has been sought to show equivalency between the McCormick machine and that of the patent will establish a like equivalency for the parts and combination of the "Advance Mower"; and, that done, the patent falls by reason of anticipation. If the spring of the McCormick machine tends to support the finger-bar, there is a like tendency, perhaps not so strong, but of the same character, in the spring of the Advance machine. Neither of them, as adjusted, can be said to be "of sufficient strength to nearly counterbalance the weight of the finger-bar and its appendages." The idea of sustaining the finger-bar by means of a spring connected with the frame of a moving machine was not new or patentable in 1880. The support would necessarily be at the shoe, near the frame; and, in order at the same time to sustain the outer end of the bar, it was necessary to apply a force at the inner end or heel; but that, too, was a simple operation, and, in view of well-known devices, could not have involved invention unless in the means employed. Patentability need not be denied to Smith's mechanism, but in a field of invention so narrow a combination like that of the patent could be entitled to only a limited range of equivalents. If it be said that the Advance mower was not an anticipation because the reflex bearing of its spring on the heel of the finger-bar was trifling, and not thought of, or in contemplation by, the maker or the patentee, for the same reason the McCormick machine, if it had antedated the Smith patent, would not have been an anticipation. The spring of the Advance machine must always have had some bearing on the heel of the finger-bar (the evidence shows in one experimental instance 12 to 20 pounds); and though it is perhaps, but not certainly, true that the McCormick spring has a somewhat greater force of bearing, it is not otherwise essentially different; and if, for such reason, it would not have been an anticipation, for the same reason it is not an infringement. Excepting the spring-sheave, the entire conception of the Smith patent is embodied in the Advance machine, against which the most that can be said is that the spring there shown is weak; but plainly invention was not required to strengthen and so adjust it as to make it effective, like the McCormick spring, for instance, if that is in fact more effective.

Judge SHOWALTER sat at the hearing of this case, and, some months before his death, had prepared an opinion to the effect that the third claim of the patent is valid, and had been infringed. So much of the opinion as relates to that claim, omitting cuts which appear in the opinion of the court, is as follows:

The hinge-bar, F, is not expressly named as a factor in the third claim. A serious question arises whether, in view of cases such as *Torrant v. Lumber Co.*, 30 Fed. 830, this claim ought not to be held void as being for an inoperative combination. But the piece marked "I" in Fig. 2 cannot be the "lever, I," without a fulcrum. That ful-

crum must be supported, and the hinge-bar, F, with its pivots at either end is the support. If the parts or factors expressed in the claim are to have the quality, as also stated in the claim, of "operating together * * * as * * * specified," and "for the purpose * * * specified," then we must understand the hinge-bar, F, to be part of the combination. It is my opinion * * * that this construction may, in view of the specification and of the language last quoted from claim 3, be given to that claim. This was substantially the understanding of Judge Acheson, of the Third circuit, as expressed in a former litigation concerning this patent. Manufacturing Co. v. Deering, 40 Fed. 87. We may add that this construction is not disputed by the learned counsel for appellee, or by its accomplished expert, Mr. See,—assuming that the opinion of an expert witness is competent upon such a question. The mechanism of the third claim is the spring fastened at one end to the frame of the machine, namely, the stationary spindle upon which the sheave turns, and at the other to the periphery of the sheave; and combined with this spring by means of the sheave is the chain, secured at one end on the sprocket projections of the sheave, and at the other to the extremity of the long arm of lever, I, which lever is fulcrumed on the hinge-bar, and has its short arm bearing on the inwardly projecting end of the finger-bar. By force of the spring, the sprocket projections pull, through the chain, upward on the long arm of the lever, and thus support a portion of the weight of the hinge-bar and lever and of the finger-bar throughout its length. If, instead of the flat, coiled spring in the sheave, a helical spring be fastened at one end to a point immediately above the center, and at or near the periphery of the sheave, and at the other to a forward portion of the frame of the machine, said helical spring, being tense between said points, would obviously have the same function in pulling upward on the chain, E, as the flat, coiled spring of the patent. The combination of the third claim appears to be faithfully shown in the following diagram [supra]. If to the sprocket projection horizontally in the rear of the spindle the chain be attached, and to the one vertically above the spindle the rear end of the helical spring be attached, then the coiled spring may be taken out from the sheave, and the forward half and the lower quadrant of the remaining half of the sheave may be cut away, as may also be the portion of the upper rear quadrant between the two named sprocket projections. There will remain, in effect, two spokes,—one horizontal, the other perpendicular,—forming a bent lever fulcrumed at the angle around the spindle. The chain, as said, will be attached at the end of the rearwardly projecting horizontal arm; the spring, at the end of the perpendicular arm. With what is thus left of the sheave, and with the helical spring fastened at one end to the frame, instead of the coiled, flat spring so fastened at one end, the action of the combination in sustaining the finger-bar will be substantially the same as before. The following diagram shows, in effect, those portions of the appellee's machine alleged to infringe the claim now in question:



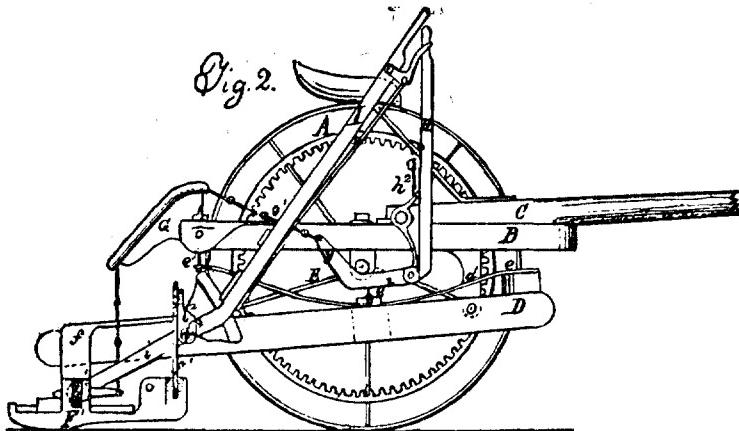
M'CORMICK'S MOWER — THE COMBINATION
OF SMITH'S THIRD CLAIM

The finger-bar, L, hinge-bar, F, and lever, I, of the patent in suit are here duplicated. The link, E, replaces the chain, E, of the patent in suit, the bell-crank lever replaces the sheave, and the helical spring —very strong in appellee's machine, and stretched about to the limit—replaces the flat, coiled spring of the patent. The spring in appellee's machine, as here illustrated, pulls from a fixed point on the tongue; the flat, coiled spring in the machine of the patent from a point on the spindle of the sheave, which, as already noted, is also fixed as a part of the frame of that machine. The combination used by appellee seems to be substantially identical in result and mode of operation with the third claim of the patent in suit, as well illustrated by the following diagram. [This reference is to the diagram designed to show "equivaleency of bell-crank lever and sheave," supra.]

It is insisted by counsel for appellee that, when the machine complained of is in operative adjustment,—as shown in the two diagrams,—the spring does not exert any substantial force to raise the forward arm of the bell crank whereby the link, E, is made to pull on the long arm of lever, I. The third or perpendicular arm of the bell crank in appellee's machine is extended upward in the form of a handle to be worked by the driver in raising the finger-bar and hinge-bar out of operative position,—a process analogous to one obvious use of the lever, G, in the machine of the patent. In the case of each machine it will be noticed that the spring strongly aids this lifting action of the hand-lever. Counsel for appellee insists that the helical spring merely sustains the handle, G, the link, E, and the lever, I, so that rattling is prevented, but without pressure on the heel of the finger-bar sufficient to affect its action to any degree; and that,

apart from this slight tension to prevent rattling, the function of the helical spring is to aid the driver in raising the finger-bar and hinge-bar from the ground, and entirely out of operative position. Touching the actual lifting effect of the helical spring, the record contains a mass of testimony more or less contradictory concerning weighing tests made when the spring was in place and when it was detached. Without analyzing this testimony and the varying conditions of these tests and of the machines subjected to the same, it would seem entirely certain, on the mechanical principles obviously involved, that the helical spring of appellee's machine is functional in sustaining to a very substantial degree the finger-bar when that machine is in operation. That spring, as already noted, is very strong, and, when the machine is working, very tense. Without going at large into the mechanical principles of the lever, the model of appellee's machine introduced in evidence shows that a straight line drawn from the center of the pivot of the bell crank at right angles to the direction of the forward arm and downward to the central longitudinal line of the stretched spring will be in length about one-third the distance from the bell-crank pivot to the point where the link is attached at the end of the forward arm. This is the position when the machine is working. The upward pull of the forward arm on link, E, ought, therefore, to be something like one-third of the force exerted horizontally by the stretched spring. In one form of machine used by appellee the forward end of the spring is held on the lower extremity of a lever bent to an angle, pivoted at the angle on the tongue, and with its upper arm bearing against an upright piece, which latter is again pivoted at its lower end on the tongue forward of the bent lever pivot, and connected at its upper end, by what is called a connecting link, with the lever, G, at a point above the pivot of said last-named lever. The continuous lifting force of the spring, since it is counterbalanced to some extent by what is called the connecting link, seems, on a casual inspection of the drawing, to be less in this machine than in those where the forward attachment of the helical spring is a fixed point on the tongue. Whether this be so or not is, however, immaterial. But we note on the machine which has the "connecting link" and "equalizing lever" a rod from the inner shoe extending diagonally upward and forward to the whiffletree attachment. This rod is pulled by its forward end to lift or ease from the ground the inner shoe as the horses draw the machine in mowing. Plainly, the helical spring is depended on to balance the outer shoe, and prevent its dragging in response to the continuous upward pull of the rod referred to on the inner shoe. Without dwelling on the matter, the better conclusion seems to be that the spring in appellee's machine operates in the same way, and substantially to the same result, as the spring in the combination of the third claim of the patent in suit.

It is insisted that the combination of the third claim is anticipated by a machine called in the record "The Advance," and made on the lines of a patent issued April 27, 1869, to McCormick, Erpelding, and Baker. Fig. 2, which accompanies the specification of that patent, is here shown:



The parts to be looked at are the lever, H, pivoted to the frame of the machine immediately below, h^2 , the crooked link, g, pivoted at its forward end to the lower end of the lever, H, and the chain, g^1 , which passes from the rear end of link, g, over the rocking segment, G, and down to the longer arm of a lever, which is not lettered, but which corresponds to the lever, I, of the patent in suit. If the lever, H, were not held approximately upright by a catch of some sort on the frame, then, when the machine is in operation, said lever would drop forward to the tongue, its lower end being pulled on by the weight of the chain and the rocking segment, G, which latter would drop down, swinging on its pivot, and be overbalanced by its own weight and that of the loosened chain. If the lever, H, were held upright by a fixed or rigid catch or notch, it would be continually rattling against its support by the varied impulses from the finger-bar—through the lever, chain, and segment—as the machine is drawn over the ground. The use of the lever, H, is to raise the finger-bar, as occasion may require, entirely out of operative position. In order to keep the handle upright, and within reach of the driver, and in order to keep the chain and segment in position, and to prevent rattling, a straight spring, h^2 , is fastened at one end by a bolt to lever H. The other end extends downward, and is caught, when the machine is in operation, against a projection of some sort from the frame. As indicating the function of spring h^2 , the specification of the patent says: "A spring, h^2 , on the lever, serves to keep it in a position convenient to the hand. A link, g, and chain, h^1 [this is a mistake; the letter is g^1], connects this lever with the finger-beam, first passing over the rocking segment, G." It will be seen that the idea of taking from the finger-bar its two shoes, lever, and hinge-bar a portion of the combined weight, so as to float the finger-bar throughout its length more lightly over the ground, is not contained in this patent. The spring h^2 is not located in the right place, and has not to any degree the function of the spring in the sheave of the patent in suit, or of the powerful helical spring of appellee's machine;

and the result of the combination is not the result of the combination specified in claim 3.

In the model of the Advance machine put in evidence the hand-lever, when the machine is in operation, inclines decidedly forward. The spring h^2 is curved in its upper part like the letter S. Its lower end, coming down nearly straight, bears against a ledge on the frame, thus preventing the lever from dropping further forward, and holding it against the slight pull on its lower end, needed to keep the chain and segment in position. It is not contended by appellee that this spring has the function of claim 3 in lifting and floating the finger-bar and its appendages. The insistence is, as already stated, that the helical spring of the machine complained of has substantially no other function than that of the spring in the Advance machine, or of the spring n^2 in the patent of April 27, 1868. It may be here added that the little spring of the Advance and of the patent last named is not secured at one end to the frame of the machine as in claim 3, or as in the machine complained of. This spring merely affords an elastic support for the hand-lever, it is carried by the hand-lever, and its lower end bears or thumps intermittently against the ledge or bearing place on the frame as the machine is drawn over the ground in mowing.

A patent to one Heston under date of February 6, 1872, is much dwelt on as going to the matter of anticipation. This patent shows a lever hinged to a drooping corner of the frame of a mowing machine, and with its shorter arm bearing on the heel of a finger-bar, also hinged at said corner. The specification contains the following statements:

"The long arm of this lever projects inwardly, or toward to rear of the machine, where its position may be controlled by any suitable device erected upon the machine for that purpose; or a weight may be attached to it, which shall counterbalance the outer end of the cutter-bar, and thus such bar be kept in its position by changing the position of this arm of the lever, the opposite or short arm of which bears upon the inner end of the cutter-bar."

The patentee goes on to say, with reference to the working of his device, that his lever "will be operated so as to cause its inner end to assume a higher or lower position with reference to the frame of the machine, which operation will cause the outer end of the finger-bar to be raised or lowered, and thus the grass may be cut of an even length, whether the machine be used upon even or uneven ground." The function of lifting on the inner shoe, and so changing its weight or bearing on the ground to correspond with the lift on the outer end of the finger-bar, is not suggested in this patent. If a weight be attached to the extremity of the long arm of the lever, the effect would be to pull up the short arm, and so drop the outer end of the finger bar, with its full weight, on the ground. If the longer arm of the lever be curved upward and backward over the shorter arm till it droops across and forward of the finger-bar or cutter-bar, a weight attached to it might "counterbalance the outer end of the cutter-bar," but the inner shoe, instead of being also eased from the ground, would be pressed down by the added weight so hung upon the forwardly bent and projecting long arm of the lever.

Now, assuming that a weight would be the same in action for the purpose of floating a finger-bar as a spring, and assuming a familiarity with the combination of the third claim of the patent in suit, or the like combination as used by appellee, one might well devise a coupling between the long arm of Heston's lever and the frame of the machine which would serve as a prototype. But this would be to construct the anticipating device, rather than to find it in the prior art.

The decree below is affirmed.

WESTERN ELECTRIC CO. v. WESTERN TEL. CONST. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. February 7, 1899.)

No. 421.

PATENTS—CONSTRUCTION OF CLAIMS—IMPROVEMENT IN TELEPHONE SWITCHES.

The Roosevelt patent, No. 215,837, for an improvement in telephone switches, is entitled to only a very narrow construction, and is limited to the mechanism described for so connecting the transmitting instrument with a spring switch that the unskilled operator, without intending or understanding the result, shall cut out and in the call bell by the act of raising and dropping the instrument in using it.

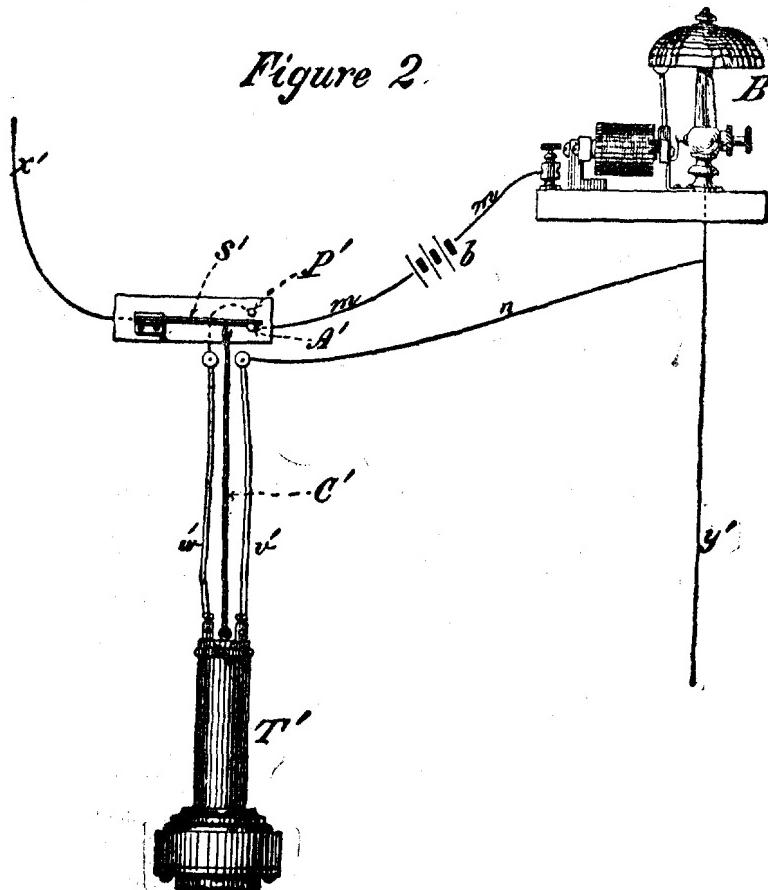
Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This was a suit in equity by the Western Electric Company against the Western Telephone Construction Company, James E. Keelyn, Madison B. Kennedy, and Isador Baumgartl, for the alleged infringement of a patent for an improved telephone switch. From a decree dismissing the bill, complainant appeals.

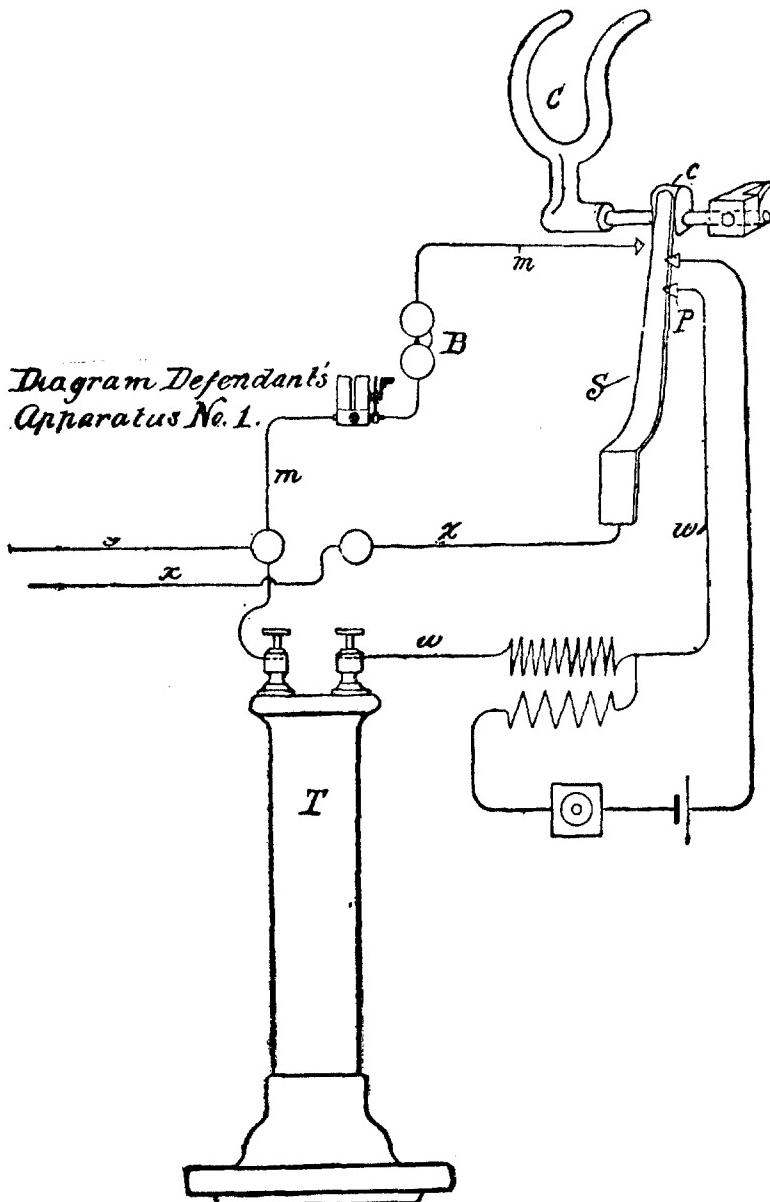
This suit was brought to obtain an accounting, and an injunction against infringement of letters patent of the United States No. 215,837, issued on May 27, 1879, to Hilborne L. Roosevelt, of New York, for an "improvement in telephone switches." The specification, excepting the technical description of the device, reads as follows: "It is a matter of considerable importance in connection with several telegraphic transmitting instruments, more especially telephones, that the operation of the transmitting instrument should automatically signal to the receiving instrument at the other end of the line the fact that a message is about to be transmitted, whereby the receiving operator is enabled to prepare himself for the reception of such messages. This is particularly true where the transmitting operator is not of necessity a skilled person in the electrical art. An instance of this can be readily given: Supposing it is desired to transmit a message to a distant point by means of a telephone or similar transmitting instrument, it is obviously desirable that the mere fact of the preparation of such transmitting instrument or telephone for sending the signal should of itself prepare the receiving operator at the other end of the line for the reception of the message. If, for instance, a telephone were hanging in a position to be raised by the transmitter, it would be very desirable that the mere fact of raising such telephone to the lips should of itself inform the receiving operator that a message was to be transmitted. My invention is designed to accomplish this result. * * * It is obvious that by this arrangement unskilled persons must, as it were, automatically make all the necessary changes and switchings from the signal battery and bell-call to the transmitting and receiving telephones, and that this is done without the possibility of mistake." The first, second, third, and seventh claims, of which infringement is alleged, read as follows: "(1) The combination, with a telephone, of a circuit closing or changing portion

and screws or points, the circuit-closing portion being arranged to be placed in contact with one screw point through the influence of the telephone when not being used, and to be placed in contact with the other screw or point when the spring is freed from the influence of the telephone, substantially as described. (2) The combination of a spring switch, connecting wire connected therewith, and a transmitting instrument suspended thereto, substantially in the manner described, whereby the raising of the transmitting instrument causes the spring switch to make or break or alter the electric current. (3) The combination of a spring switch and connecting wire connected therewith, and a transmitting instrument suspended thereto, combined and connected together, substantially as herein described, whereby a circuit is made through a signaling instrument when the weight of the transmitting instrument is on the switch, while the circuit is closed through the transmitting instrument itself when its weight is removed from the switch." "(7) The combination of a connecting wire carrying an electric circuit, and attached to the spring switch having contact points, and a transmitting instrument suspended to said spring switch, connected and combined substantially as described, whereby the weight of the transmitting instrument upon the switch causes the switch to complete a circuit through itself, and to a ground or signaling instrument, while when the transmitting instrument is raised a circuit is made through said transmitting instrument."

Fig. 1 of the patent is essentially the same as the left-hand portion of Fig. 2, here reproduced:



The appellees made and sold two forms of apparatus, of which the record contains diagrammatic illustrations, which are agreed to be correct. They both infringe, if either does, and the diagram of one only is here reproduced:



The prior art in evidence consists of letters patent No. 93,816, issued on August 17, 1869, to Eugene Fontaine, for an "improvement in electric fire and burglar alarms," and No. 103,150, granted on May 17, 1870, to Sylvanus D. Cushman, for "improvements in signal boxes for fire-alarm telegraphs."

The court below found that there had been no infringement, and in the course of its opinion said: "I feel myself compelled, in view of the then state of the art, and of the specific difficulty that the mechanism of Roosevelt was avowedly intended to circumvent, to hold that his patent is self-limited to such mechanism as automatically cuts in and out the call bell (including the ringing of the same) by the mere act of lifting and dropping the telephone. In the defendant's telephone, the call bell is in circuit before the receiver is lifted; in the complainant's, the act of lifting puts it in circuit. In the defendant's mechanism, when the connection is closed the receiver must be hung upon a fork,—a prescribed manual act on the part of the operator; in complainant's, it is dropped on its cord, thus avoiding this otherwise definite manual act. In the Roosevelt mechanism, the lifting of the telephone actuates the circuit so as to ring the bell; in the defendant's mechanism, such actuation is only obtained by the manual turning of a crank or pressing of a button. In all these respects the defendant's mechanism is clearly differentiated from Roosevelt's purpose, viz., an arrangement whereby conscious manipulation of the switches and the call bell was to have been dispensed with. I recognize that the conception of changing back and forth the switches by virtue of the resting and lifting of the telephone upon the forks is a close copy of Roosevelt's conception, and that perhaps his claims, standing apart from his description, are broad enough to cover the incidental deviations. But, after all, the main purpose of the invention must control the scope of the claims, and such purpose certainly did not include the defendant's mechanism." After a quotation of this part of the opinion, the brief for the appellant says: "Such restriction of the claims, especially those of a pioneer patent like that of Roosevelt's, we contend, is unwarranted. The defendants have added a hook to their spring switch, so that the weight of the telephone may come directly upon the switch, instead of having the cord attached to the switch, so that the weight is placed upon the switch through the medium of the cord. The actual working of the switch in each case will be found substantially identical. For example, as shown in Fig. 2 of the patent, we find the circuit of the bell, B, closed at A', and the circuit of the telephone, T, opened at P'; that is, when the weight of the telephone is on the switch, as shown in Fig. 2, the bell is in circuit; when the weight of the telephone is removed from the switch, the spring switch moves from contact A' to P', thus opening the circuit of the bell at A' and closing the circuit of the telephone at P'. In each of the defendants' devices precisely the same switching is accomplished by placing the weight of the telephone on the hook and by removing it from the same. The second sentence of the passage quoted from Judge Grosscup's opinion states, in substance, that in defendants' apparatus the call bell is in circuit before the receiver is lifted, but that in complainant's apparatus it is the act of lifting the telephone which puts the bell in circuit. It is true that in each of the forms of defendants' apparatus the call bell is in circuit before the receiver is lifted, but our consideration of the circuits of Fig. 2 of complainant's patent shows that the same statement is also true of complainant's apparatus; that is, there is no distinction in this regard between complainant's apparatus, as illustrated in Fig. 2, and defendants' apparatus, as illustrated in diagrams No. 1 and No. 2, and as shown in the models 'Wall Set' and 'Desk Set.' It is intimated that Roosevelt's claims, standing apart from his description, are broad enough to cover the incidental deviations found in defendants' apparatus. This makes clear, we think, the main question involved in this appeal. It is as to the legal construction of the claims in question, considered in connection with the descriptive portion of the specification. The record shows that this Roosevelt switch is the very first automatic switch in the art. The claims in question are not broader than the prior art warrants. Their language is broad enough to subordinate the defendants' apparatus. Must, then, details mentioned in the specification be injected into them so as to make them of no value whatsoever?" The experts have asserted their opposing views with great positiveness and zeal, one of them asserting that the patent in suit is "one of a very high order, possessing the attributes of novelty and inventive ingenuity in the highest degree," while the other concludes his review of the prior art with a declaration of belief that he had demonstrated the total lack of invention "in the

devices or the association of devices for the purpose described and claimed" at the date of the application for the patent.

Charles A. Brown and George P. Barton, for appellant.
Stanley Stout, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after stating the case, delivered the opinion of the court.

The Roosevelt patent is for a mechanism, purely. It is designed for use in connection with telephones, but its essential character is no more affected by that fact than the character of a device for opening and closing a gate in a head race would be affected by the fact of its use for turning off and on and regulating a current of water on its way to a mill wheel. Electric currents, whether carried upon the wires of a telephone or a telegraph, were not new, and by no pretense can be brought within or made to affect the scope of this patent. Switches employed in telegraphic and telephonic devices to shift the electric current from one wire to another were not new. Such a switch, connected permanently at one end with a current conducting wire (x in the patent), and capable of being shifted at its other end from one point of contact to another (as from P to A in the patent), was a matter of common knowledge, and the problem for the solution of which Roosevelt obtained a patent was to effect that shifting automatically. That problem was not a whit different mechanically because the purpose was to shift and direct the passage of electricity over wires, than it would have been if the wires had been tubes through which the passage of a liquid was to be determined by the opening and closing of valves by means of a shifting switch or lever. It was, of course, no problem at all, to mechanics of ordinary skill, after the telephone was invented, with a switch in position, to devise means of shifting the movable end from the point of normal contact to the other point prepared for it; but, if the like had never been done before, it would doubtless have been an inventive achievement to provide for an automatic movement of the switch, which should be effected by the mere use of the telephone in the ordinary way in the hand of an unskilled operator. The like had been done, however, by Cushman, when he devised a signal box for fire alarms "with a switch mechanism so constructed and arranged that the shutting of the outer door of the signal box switches the electro-magnets out of the telegraphic circuit," etc. That switch, as a mechanism, is not to be distinguished from this of the patent because the particular results to be accomplished are not the same, and are not brought about exactly in the same way. The shifting of currents by a switch is one thing. The subsequent course of the currents, and what they do or what is done with them, are different things, unaffected by, and without effect upon, the character of the switch. So, too, the idea and a form of automatic switch are illustrated in the burglar alarm of Fontaine. It is therefore impossible, even without looking for automatic switches in the mechanic arts outside of electrical devices, to concede to this patent the character of a pioneer invention. It need not be said that

there was no degree of invention in so connecting the transmitting instrument with the spring switch that the unskilled operator, without intending or understanding the result, should accomplish the necessary movement of the switch merely by lifting the instrument, and, on quitting, should involuntarily, and with equal want of understanding, restore the switch to its normal position simply by releasing his hold of the instrument. This, the specification puts beyond doubt, was what the patentee supposed he had accomplished; and, the invention being from necessity very narrow, there is no good reason for giving a wider scope to the claims of the patent, even if by their terms they are not so limited. In the second, third, and seventh claims, the transmitting instrument is described as suspended to the switch; and the same meaning is made evident in the first claim, by the terms of which the switch is "to be placed in contact with one screw point through the influence of the telephone when not being used," and "is freed from the influence of the telephone, substantially as described."

No claim of the patent can fairly be given a construction which would include either form of apparatus manufactured by the appellees. The decree below is therefore affirmed.

Judge SHOWALTER did not participate in this decision.

DEERE et al. v. ARNOLD.

(Circuit Court, N. D. New York. January 3, 1899.)

No. 6,357.

PATENTS—HARROWS.

The Barley patent, No. 256,619, for improvements in harrows, construed as to the fifth claim, which relates to a method of fastening the harrow teeth to a double-flanged beam in such a manner that they can be adjusted either vertically or at any desired inclination to the beam, and such claim held valid and infringed.

This was a suit in equity by Deere & Co. against O. M. Arnold for alleged infringement of a patent for improvements in harrows. Final hearing.

John R. Bennett, for complainants.

J. H. Whitaker and G. A. Prevost, for defendant.

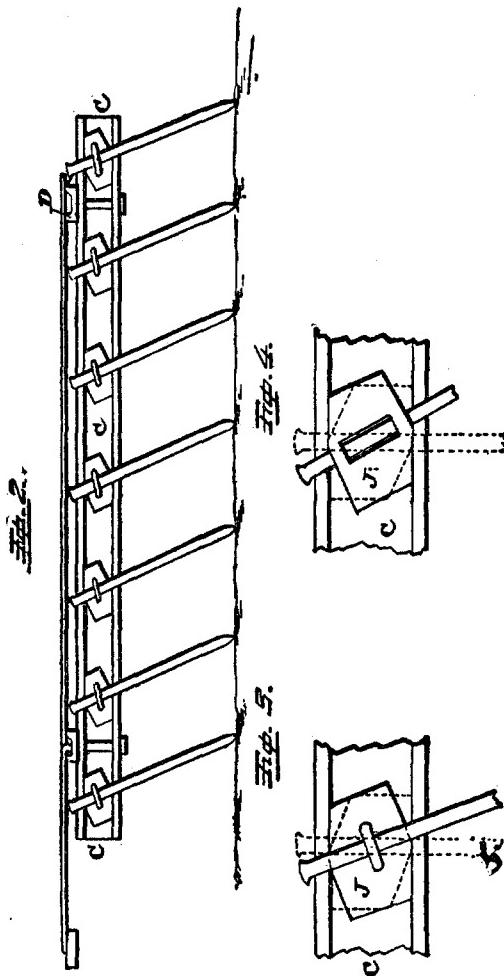
COXE, District Judge. This suit is founded upon letters patent, No. 256,619, granted to James H. Barley, April 19, 1882, for improvements in harrows. The invention, so far as it is in issue in the present controversy, relates to a new and improved method of fastening the harrow teeth to a double-flanged beam "in such a manner that they can be adjusted to stand vertically to the side of the beam, or at any desired inclination thereto." The fifth claim only is involved. It is as follows:

"In a harrow, the combination of a tooth-holder with the double-flanged beam, the plate being clamped thereto and inserted between the flanges of the beam which holds the plate and tooth in position, substantially as and for the purpose shown and described."

The defenses are defective title, lack of invention and noninfringement, if the claim be construed as the defendant contends it should be.

The elements of the fifth claim are as follows: In a harrow: First. A tooth-holder. Second. A double-flanged beam. Third. The plate of the holder clamped to the beam between its flanges. Fourth. A tooth held in position by the holder against the edges of the beam.

The construction of the holder will be made plain by the following diagrams:



Some time after the date of the patent the complainant issued an advertising circular on which appeared a diagram of the structure of the fifth claim, as well as diagrams of all its separate elements, as the complainant understood the invention and construed the claim. The defendant's structure is a servile imitation of these diagrams, but he insists that the claim cannot be interpreted to cover such

a structure. Unquestionably "one of the special features of the invention is so to connect these teeth to the sides of the beams that they can be used in two or more different positions." This adjustability is secured by making the blocks or plates polygonal in shape, the diagonally opposite corners being chamfered off to admit of the limited movement described. The defendant's tooth has no lateral movement, but stands vertically, precisely like the tooth shown in complainant's circular. The sole question upon this branch of the case is whether the fifth claim covers a structure where the corners of the plate are not beveled off and where the tooth can only have a vertical position, except as it acquires an inclined position by the oscillating of the bars. There can be no doubt that the specification refers to such a structure and that the fifth claim covers it, unless the claim is to be limited to polygonal blocks, in which event there is no patentable distinction between it and the fourth claim. The question may be stated still more succinctly as follows: Can one who drives V-shaped wedges into the spaces between the flange and the blocks of the fourth claim, so that the blocks will not turn, escape infringement? It is thought that the fallacy of the defendant's position lies in the assumption that many of the general features of the patent, which are described in the first branch of the invention and which are covered specifically by the other claims, must be imported into the fifth claim. The court is unable to see why the claim may not be construed to cover the novel device for attaching, rigidly, a spike-tooth to a U-shaped harrow bar. If so construed there can be no serious dispute as to infringement. It surely cannot be maintained that the shape of the tooth, the width of the bar or the length of the flanges are of the essence of the invention. Of course the fact that the defendant's harrow has a pivoted tooth bar instead of pivoted teeth and the fact that the bars are set at different angles to the line of draft, are immaterial in view of the suggested construction. Let it be assumed that a harrow maker takes the bars of the patent with teeth attached, precisely as shown in Fig. 2 of the drawings, except that the teeth are vertical, and the nut is screwed up so that the teeth are held rigidly against the flanges. These bars—the identical structures described in the Barley patent—are then assembled to form a lever harrow and are set at right angles to the line of draft. Can it be maintained that one who thus appropriates the exact device of the claim can escape infringement simply because he uses it in slightly differing environments? It is thought not. And yet this is precisely what the defendant has done except that his block is rectangular instead of polygonal. He might have used the latter form as well. With the bars at right angles to the line of draft the chamfered corners of the block perform no function whatever. By omitting a wholly useless function it is contended that he is able to avoid infringement. If the position be correct that the plate of the claim must be polygonal, it leads to the absurdity that the tooth and fastener now used by the defendant do not infringe, while the tooth next to it on the same bar, and which is similar in every respect, except that the diagonally opposite corners are cut away, does infringe, although the two perform the identical function in the identical way. To hold this will be to reward infringers for their ingenuity.

At the close of defendant's brief the proposition is advanced that the claim is void for want of patentability. The invention is certainly a simple one, but the record establishes beyond a doubt that the patented holder is one of the most effective and durable devices known in the art for holding a harrow tooth in position. The art abounds in similar contrivances all of them free to any one who wishes to use them, and yet the tenacity with which the defendant clings to the patented device, in the face of litigation, is of itself a persuasive tribute to the value of the invention. The complainant is entitled to the usual decree.

GEISER MFG. CO. et al. v. FRICK CO.

(Circuit Court, E. D. Pennsylvania. January 31, 1899.)

No. 58.

PATENTS—ASSIGNMENT OF FUTURE INVENTIONS—CONSTRUCTION OF GRANT.

An employé of a manufacturing company granted to it all his "patents, inventions, and improvements," now existing and used by it "in the manufacture and sale of said hereinafter mentioned machinery"; also "all inventions and improvements in said machinery hereafter made" by him; also "all new designs of such machinery hereafter made by him" "while in the employ" of the company. The machinery referred to included, among other things, the "New Peerless Threshing Machines." *Held*, that the improvements mentioned in the second clause of the grant were to pass, even if made after the grantor ceased to be in the company's employ, while the "new designs" mentioned in the third clause were only to pass if made while his employment continued, and that such "improvements" included every invention not so divergent from the existing machine as to be radically distinctive or to constitute a new type.

In Equity.

Strawbridge & Taylor and Jos. C. Fraley, for complainant.
Francis Rawle and Frank P. Fish, for respondent.

DALLAS, Circuit Judge. The Geiser Manufacturing Company is the only substantial plaintiff, Frank F. Landis having been made a party to the bill merely for conformity. The suit is brought upon letters patent No. 541,101, dated June 18, 1895, and No. 562,625, dated June 23, 1896. The single question in the case is as to the Geiser Company's title to them, which rests upon a certain contract, the material part of which is as follows:

"Agreement in duplicate, made and entered into this 5th day of April, 1893, by and between F. F. Landis, of the borough of Waynesboro, county of Franklin, state of Pennsylvania, party of the first part, and the Geiser Manufacturing Company, a corporation existing under the laws of the state of Pennsylvania, and having its principal office in said borough of Waynesboro, party of the second part, as follows: The party of the first part, for the consideration hereinafter named, doth hereby give and grant unto the party of the second part, its successors and assigns, the exclusive right, within the United States of America, to use in the manufacture of the hereinafter mentioned machinery, and parts of same, in its factory at Waynesboro aforesaid, and in such branch factory or factories as it shall establish within said United States, all the patents, inventions, and improvements of him, the party of the first part, now existing and used by the party of the second part in the manufacture and sale of said hereinafter mentioned machinery; also the exclusive

right to use, as aforesaid, all inventions and improvements in said machinery hereafter made by the party of the first part; also all new designs of such machinery hereafter made by the party of the first part while in the employ of the party of the second part; also all inventions and improvements hereafter made by the party of the first part in the machinery covered by such new designs."

This extract contains the language by which the parties intended to identify the subject-matter of the grant; and the meaning of that language must, if possible, be accurately ascertained, in order that the ownership of the patents sued on may be rightly determined. The machinery referred to as "the hereinafter mentioned machinery, and parts of same," and as "said hereinafter mentioned machinery," and also as "said machinery," is that which is afterwards specifically designated as "Peerless Portable Engines, Domestic Engines, Peerless Traction Engines, New Peerless Threshing Machines," etc.; but, as both the patents in suit relate to threshing machines, the enumeration of other and wholly distinct machines is immaterial. Upon this understanding, and in view of the fact that Landis was not in the employ of the Geiser Company when he made the inventions in controversy, that portion of the grant with which this litigation is concerned appears to be of the exclusive right to use, in the manufacture of New Peerless Threshing Machines and parts of same, all inventions and improvements in those machines made by Landis after the 5th day of April, 1893. These patents are for inventions in threshing machinery, and were made by Landis after that date. Are they for improvements in New Peerless Threshing Machines? This is the crucial question in the cause, and, that it may be rightly solved, it is necessary—First, to define what the parties meant by "improvements in New Peerless Threshing Machines"; and, second, to determine whether that phrase, as so defined, is or is not inclusive of the inventions to which this case relates.

The conclusion which I have reached upon the first of these subjects is, in my opinion, strongly supported by the extrinsic evidence; but it is unnecessary to refer to it, for, without looking beyond the contract itself, I believe the intent of the parties may be clearly discerned. It provided that Landis was to be in the employ of the Geiser Company, with general supervisory power; and it is evident to me that it was contemplated that during the continuance of that employment any inventions and improvements which he might make would, if capable of such application, be applied by him to the New Peerless Machines of that company, and that it would have the exclusive right to use them. Landis covenanted to "contribute his best skill and ability" while in the employ of the Geiser Company, "to promote its welfare"; and if, while so employed, he had assigned to a rival manufacturer any of his inventions and improvements which he might have appropriated to its New Peerless Machines, he would have rendered himself liable to the charge of having acted in fraud of his agreement, and could not have refuted that charge by invoking a narrow interpretation of his grant, for the purpose of excluding from its operation any inventions and improvements which his skill and ability had devised and which might have been so appropriated. Such was the nature and extent

of his obligation while his employment existed, and it became no less stringent and comprehensive when that employment ceased. Improvements made after its termination were granted precisely as were those previously made. When the contract was entered into, the relation of the parties, as employer and employed, was established for an indefinite period; and although, no doubt, they had the subsistence of that relation primarily in view, yet it was not proposed that its discontinuance should vary or affect the right of the Geiser Company to all improvements made by Landis. Furthermore, improvements made after the date of the contract were as broadly granted as were those which were then existing. The only restrictions were that the existing improvements should be then "used" in said machinery, and that the improvements thereafter made should be "in said machinery." Notwithstanding the variation in the language of these phrases, which resulted from the fact that in the one instance things in esse, and in the other things in posse, were referred to, it is obvious to me that they were intended to have the same significance. There is no good reason to suppose that the existent improvements were to be of one kind or class, and those thereafter to be made of another. As to both, the company was desirous of securing "all inventions and improvements" which might be used in its New Peerless Machines, and all of these Landis agreed that it should have. Capability of being "used" was the criterion which the parties had in mind, as applicable both to existing and to future improvements. As to the former, this capability was absolutely determined by actual use; and, as to the latter, it was conclusively assumed to result from their being "improvements in said machinery." As to both, I repeat, the thought was the same: Improvements which were then used in said machinery, or which, if thereafter made, could be so used, were to pass under the contract. Even "new designs," if made by Landis while employed by the company, were granted. If made after his employment ceased, they were impliedly reserved; but this reservation does not derogate from the grant of improvements. Its pertinent effect is only to show that any invention not amounting to a new design was to be regarded as an improvement "in said machinery," but that, if a wholly new type—an entirely distinct character of "such machinery"—were created, it was to belong to Landis himself, unless he had made it while in the company's service. The parties were dealing with machinery, not with patents, and the word "improvements" is not to be technically construed, but to be understood in its ordinary sense. Being so understood, it is broadly inclusive. It comprises anything and everything by which the subject to which it is related may be improved, and embraces improvements to main features as well as in minor details. It necessarily imports modification, and the alterations may consist either in omission of parts, in their readjustment, or in the substitution of new parts for old ones, or in all of these. Yet the thing altered, though it may be greatly changed, is not, in common apprehension, regarded as a different thing, and does not, in common speech, acquire a different name. Such changes, for instance, if made in the New Peerless Threshing Machine, would not be subversive of its individuality; and though, by reason of their being

made, it might come to be described as an "improved New Peerless," the entity would remain the same,—it would still be a "New Peerless Machine," and by that name it would still be designated. I am fully persuaded that this interpretation of the phrase, "all inventions and improvements in said machinery," correctly exhibits the meaning which the parties intended it to have, and that their understanding was that nothing could be a new design which that phrase, as thus interpreted, comprehended. Improvements pertain to old designs. But to constitute a new one the divergence from the old must be thoroughly typical, and the difference in plan and structure be radically distinctive; and it is only by thus restricting the scope of the term "new design" that "all improvements" can be excluded from its embrace, and the grant be given harmonious construction and consistent effect.

The views which have been expressed are decisive. The inventions in question are plainly included in the grant of "improvements in New Peerless Threshing Machines," as that phrase has now been defined. As both parties claim to own the patents, neither, of course, questions their validity, and the novelty and utility of the inventions which they cover are therefore necessarily conceded. It is true that their application to a New Peerless Threshing Machine would involve the making of very considerable and important changes in it, but they would not transform it. It would not become a new, or even a different, design. Each of them separately, or all of them at once, might be incorporated in it without destroying its identity. It may be admitted that it would be much improved, but it would, nevertheless, be an improved Peerless Machine, and nothing else.

The defense of laches or estoppel is wholly without merit. There was no unreasonable or injurious delay in filing the bill. The contract between Landis and the Geiser Company was made upon April 5, 1893. The contract between Landis and the Frick Company, the defendant, is dated March 19, 1895. That company, claiming under its later contract, but with full knowledge of the earlier one, proceeded to manufacture and sell. The complainant, neither actually nor apparently, acquiesced in this, nor did the respondent suppose that it did, but, on the contrary, relied upon the validity of its own license, and was "willing to take chances." It denied the complainant's right, and challenged an assertion of it. The bringing of this suit was a timely response to that challenge, and the defendant must abide the result of the contest it provoked. Decree for complainant.

THE J. W. TAYLOR.

(District Court, E. D. New York. February 15, 1899.)

1. SHIPPING—INJURY TO STEVEDORE—NEGLIGENCE OF VESSEL.

It is the custom to leave between-deck hatches open when a vessel is in port, of which custom a stevedore working on the ship is presumed to have knowledge.

2. SAME—DUTY TO LIGHT HATCHWAYS.

Where the charterers are charged by the charter party with the duty of discharging, reloading, and coaling a vessel while in a port, and have

contracted with a firm of stevedores to do the work, and the vessel is in their charge for that purpose, the vessel owes no duty to keep the between-deck hatches closed, or, if open, lighted, to protect a stevedore from injury in going after dark to deposit or recover his coat in a part of the vessel not connected with his work; nor is she liable for an injury received by him under such circumstances by falling through an unlighted hatchway, which had been prepared to receive coal, because of a custom of the vessel to furnish lights for the use of the contractors, which were distributed by the stevedores as required by their work, it not appearing that the hatch was opened by the vessel.

This was a libel by Cornelius Callahan against the steamship J. W. Taylor to recover damages for personal injuries.

Elliott, Jones, Breckenridge & Dater, for libelant.
Convers & Kirlin, for claimant.

THOMAS, District Judge. On the 14th day of December, 1893, the steamship J. W. Taylor was lying at the dock in the city of Brooklyn, chartered by Lampert & Holt, who had employed T. Hogan & Sons, stevedores, to unload and load her. Before this date her cargo had been discharged, and she had been sent to dry dock, from which on the day in question she was again at the dock for the purpose of loading. She had four hatches, and about 2 feet aft of hatch No. 2 was what was known as the "bunker hatch," which was 14 feet in length athwartships, and $3\frac{1}{2}$ feet in width. During the afternoon work was in progress in other parts of the ship, but the accident involves events in the neighborhood of hatch No. 2. Men were taking in cargo in the hold, to reach which a ladder was placed from hatch No. 2 on the main deck to the corresponding hatch between-decks, the coaming of which was about 20 inches wide, and from the inferior side of this coaming another ladder led into the hold. By this way the men went into the hold, and spent the afternoon, up to 6 o'clock in the evening, receiving cargo. The libelant was in the employ of the stevedores, and was called from some other part of the ship, and sent, about 5 p. m., down the ladder at hatch No. 2, to join his companions in the work there under way. On his way down, he testifies, he stopped at the bottom of the ladder, ending at hatch No. 2, between-decks, and made his way to the wing, where he left his coat, and that it was then so dark at that point that he could not see. After depositing his coat, he went down the ladder to the hold, and worked until 6 o'clock, whereupon he came up the ladder to the between-decks, and started to go to the wing for his coat, but immediately fell over, into, and through the bunker hatch, and received the injuries which are the subject of the action; the locus in quo at that time being entirely dark. During the afternoon, and probably previous to 5 o'clock, a large piece of tarpaulin had been stretched athwartships between hatch No. 2 and the bunker hatch, so as to entirely partition off the space, the purpose of which was to save the cargo forward of the tarpaulin from injury from the dust which would result from coaling the vessel through the bunker hatch, which was to commence at 7 o'clock. The tarpaulin was tied to beams beneath the floor of the upper deck, and fell to the floor of the between-

decks, and lay in a fold upon the floor, and was sufficient to prevent the dust from getting around or under it, but was not sufficient to protect a person from falling into the hatch, if he pressed against it. The tarpaulin had been furnished by the ship, and had been placed in position by the carpenter of the ship, assisted by one Fitzsimmons, who was usually employed by Hogan by the day as a stevedore, but on this occasion had been furnished to the ship, and was to be paid at its expense, and was under the direction of the ship's carpenter. It seems that T. Hogan & Sons do all the stevedore work for this line of vessels, and that, whether the vessel be under charter or otherwise, such stevedores insist that the ship shall see to it that, while the stevedores are coaling, suitable arrangements be provided to prevent the dust from injuring the cargo, and that the stevedores disclaim responsibility for damage therefrom. The practice as to lighting was as follows: The stevedores, through their foreman, made application to the ship's lamp trimmer for lights; the lamp trimmer placed the lights on the deck; and the stevedores took and placed them wherever their convenience or work required.

It is claimed that the ship is liable for some omission of duty owing by it to the stevedores. What is that duty? The ship was under charter. The charterers employed the stevedores' master, T. Hogan & Sons, to unload and load. For all such purposes the ship was in the possession and under the control of the charterers, save as they surrendered such possession and control to the stevedores for discharging and receiving cargo. The charter party imposes no obligation upon the ship to furnish lights, or to take other means for protecting the stevedores, who were removed from the ship by the intervention of the two contracts named. Reasoning from generally applicable principles and the terms of the charter party, it may be concluded readily that the ship was guilty of no fault of omission. But did the ship do any act that was a breach of a duty owing by it to the stevedores? Did it leave the hatch open? The stevedores had been in the possession of the ship to unload it. Cargo had been discharged from the bunker hatch. There is no evidence that the hatch was covered while it was upon the dry dock, or that the ship thereafter disturbed the hatch. Why should the ship disturb the hatch? She had no interest in the unloading. That matter alone concerned the charterers and their stevedores. If the hatch was left uncovered after discharging, the stevedores suffered it. If it was uncovered afterwards, and in contemplation of the coaling that was imminent, the presumption would be that the persons interested in the cargo did it. For what possible purpose should the ship open the hatch? By the terms of the charter party, it was not the duty of the ship to do the coaling. Nor did the ship do it, but T. Hogan & Sons did do it, under contract with the charterers, upon whom the contractual duty rested. But the argument of the learned advocate for the libelant is that it was the duty of the ship to place a light at the hatch. For what purpose? For taking in the cargo for which it was obviously made ready? From what did the obligation arise? Certainly not from the terms of the charter party. From her relation to the cargo? The ship had no interest in the reception of the cargo. From custom?

There is no satisfactory evidence of that. The courts take judicial notice of the fact that between-deck hatches are left off in port, and the usual holding is that stevedores working on the ship assume the risk thereof. The evidence in this case shows that the libelant knew of the bunker hatch. He should have known that it was liable to be off, (1) because it is a custom in port to leave such hatches open; (2) because it had been open to discharge cargo, and he does not show that he had reason to suppose that it was closed; (3) because within about one hour the ship was to be coaled through the hatch. It is true that in *Craig v. The Saratoga*, 87 Fed. 349, this court held that, notwithstanding the established custom of leaving hatches open, yet, when the ship laid out a way over a hatch for its servants to pass, the court would not assume, under such circumstances, in the absence of evidence to that effect, that it was the custom to leave the open chasm unlighted, and gave judgment for the libelant for divided damages. But the bunker hatch was not appropriated as a portion of a pathway over which the ship asked its servants to travel in profound darkness. It was removed sufficiently to permit a person about his business to go down the main hatch, and was divided from that hatch by a heavy tarpaulin. Why did not the libelant go on his way down to the hold, and why did he step off, and attempt to walk in the between-decks? He states that on his way down he stopped at the between-decks, and in utter darkness walked to the wing and left his coat, and that he was on his way to recover it when the accident happened; and the argument is that the ship should have lighted the bunker hatch, so that the libelant could have gone safely to his coat, which he had laid away deliberately in the wing, making his way in the dark. It is considered that if the ship was under obligation to light the hatch for any purpose, which is not shown, she was not constrained to do so to the end that the libelant might hide away his coat in the wing of the ship, or recover the same. In *Hefferin v. The Illinois*, 63 Fed. 161, and *The Protos*, 48 Fed. 919, it is held that it is the custom of workmen to leave their clothes on the deck above which they work, and that it was the duty of the steamship to keep the deck in a safe condition for that purpose. This holding was not made with reference to hatches, but trimming holes, whose open condition the stevedore had no occasion to expect. The libelant asks that the doctrine be extended to hatches, probably opened by the stevedores to whom the ship was committed. The proposition that the ship must either keep the hatches closed, or, if open, lighted, when in port, to protect stevedores, who would otherwise be injured by wandering in the dark to store their coats in parts of the ship disconnected with their work, cannot be accepted. It is peculiarly obnoxious to judicial holdings, when sought to be applied to a case where the decks and hatches are under the control of charterers, and the charterers have delegated the whole matter to stevedores, one of whom falls through a hatch opened in the course of the general employment of stevedores. But it is urged that the bunker hatch is a blind hatch, and that the custom of leaving hatches so open in port does not apply to it. The bunker hatch corresponded in size and locality to one on the main deck, and was in no sense a blind

hatch, but was a large hatch, used for the purpose of loading a division of the hold, when occasion arose.

The foregoing views find precise expression in the following findings: (1) That it was not the duty of the ship to take off the hatch covers for the purpose of the loading; (2) nor to guard the hatches when uncovered for the purpose of loading; (3) that there is no evidence that the ship uncovered the hatches; (4) that hatches in the between-decks are customarily left off when the vessel is in port, when the spaces beneath are needed for loading or unloading cargo; (5) that the libelant, from his experience, must be presumed to have known of that fact; (6) that it is not customary to light hatches in the between-decks under such circumstances, unless work be in progress at the hatch; (7) that the hatch did not expose the libelant to any danger while he was engaged in his legitimate occupation; (8) that the libelant placed his coat in the wing in profound darkness, knowing of the proximity of the bunker hatch, and that it was, or might be, open, and that he assumed the risk of doing this in safety; (9) that the ship was not under any obligation to light the place, to aid the libelant in the storing or recovering his coat; (10) that it was no part of the ship's duty to light the between-deck hatches for any purpose; (11) that even if it be granted that it was the ship's duty to hand out such lanterns as the stevedores requested, which was certainly the practice, the distribution of the lights was a matter that concerned the stevedores alone. There is nothing in this case to command the libelant to the consideration of the court, save his grievous injury, and the skillful effort of his counsel to avoid the difficulties that beset his case. But the magnitude of the injury does not tend to create liability, and the law and facts are too obstinately opposed to permit a decision favorable to him. Let there be a decree for the claimant, with costs.

THE CANADA.

(District Court, D. Alaska. January 28, 1899.)

1. DERELICT—WHAT IS.

A bark which has broken from her anchorage in an arm of the sea; drifted on a rocky beach in a heavy storm; been made fast to the trees by the captain and crew; fills with water during the night; is deserted the next day by all hands, they taking with them the ship's papers, compasses, side lights, and their personal effects; and the vessel, two days later, goes adrift again, and is found drifting before the storm, 14 miles from her anchorage, with no one on board,—*held* to be a derelict.

2. SALVAGE—AMOUNT AND APPORTIONMENT.

A vessel and cargo, of the estimated value of \$60,000, brought only \$2,000 at the marshal's sale, the great loss to vessel and cargo having been sustained prior to libelants finding her. *Held*, that a moiety of one-half of the net proceeds is a reasonable allowance as salvage money.¹

(Syllabus by the Court.)

¹ See note to The Lamington, 30 C. C. A. 280, for "Salvage Awards in Federal Courts."

This was a libel by the Alaska Steam Navigation Company and others against the bark Canada and her cargo to recover compensation for salvage services.

John G. Heid, for libelants.
H. J. Miller, for claimant.

JOHNSON, District Judge. The bark Canada was a sailing vessel of about 1,000 tons burden, the property of the Alaska Steamship Company. She was valued at about \$10,000, and her cargo, which consisted of general merchandise, lumber, and four head of horses, was of the estimated value of \$50,000. On the 19th day of February, 1898, while lying at anchor in the harbor of Skagway, Alaska, which harbor is an arm of the North Pacific Ocean, she parted her cables in a severe storm, lost both her anchors, and went adrift. A small steamer went to her, but, because of the severity of the storm, was unable to render her any assistance. There being no other steam vessel in the vicinity of sufficient size and power to save her, she drifted before the wind for about three miles, when she went ashore on a rocky beach, bow on. Her captain and crew went to her, and made her fast to a large tree on shore with several strong lines. In this condition she remained for two or three days. During all this time the weather was extremely cold and the wind terrific. On the 20th of February her captain gave orders to shoot the horses aboard, which was done, and directed the officers and crew to take with them such personal effects as they could carry. The captain took the ship's papers, compasses, side lights, stove, and other articles, and all hands left the ship, and went to Skagway to live. In speaking of the condition of the Canada at this time, her captain says: "The bow was on the beach, and when the tide went out, or at low water, the ship lay in that position, at an angle of about 45 degrees from forward aft. When the tide flowed, the vessel's stern didn't rise as fast as the water did, and as a consequence the water flooded the ship to her cabins." On the night of February 23d the vessel parted all her fastenings, and again went adrift. On the morning of the 24th the steamer Colman found her, about 14 miles from Skagway, and drifting on shore. Her hold was then filled with water, the seas were breaking over her, she was a mass of ice, a hole was found in her port bow, and her rigging was largely carried away. The weather was still very severe and the sea rough. The crew of the Colman boarded her, and made fast a line, but, because of the heavy weather, were unable to tow her to the best harbor in the vicinity. They then took her to a sand spit near Haine's Mission, where they beached her, she having no anchors with which she could be made fast in the harbor. There she remained till March 9th, when she was gotten off, and towed to Skagway by the Colman. In the meantime many efforts had been made by the Colman, and one or more efforts were made by the claimant, to get the Canada off the beach. Such vessels as were available were used for that purpose, but, the tide not serving sufficiently high, all such efforts were unavailing. On March 7th the libelants

herein filed their libel, and, by agreement of parties, an order was made directing the marshal to sell the vessel and cargo. This he did on May 14th, and paid to the clerk of this court \$1,874.37 as the net proceeds of said sale.

The claimant, defendant herein, denies that libelants are entitled to anything as salvors, but, on the contrary, says they did not save the vessel; that she was not a derelict; and that because of libelants' inability to save the vessel, and their refusal to allow claimant to assist them, claimant has suffered almost the total loss of the vessel and cargo, and he asks judgment against the libelants for damages. We cannot concur in this contention. The evidence fully satisfies us that, at the time the Colman took the Canada in tow, the latter had been wholly abandoned by her officers and crew, that she was a derelict, and was in imminent danger of destruction and total loss. It also satisfactorily appears that the value of the vessel and cargo must have been practically destroyed while she lay on the rocky beach, from the 19th till the 23d day of February, and the depreciation in the value of the lumber aboard will account for the remainder of the loss.

While the conduct of the libelants, after the vessel was placed on the sand spit, cannot be commended for any great display of business sagacity, yet the owners could at any time have filed in this court their stipulation, conditioned for the payment to libelants of any salvage money which might be found due them, and thereby have obtained possession of the vessel and her cargo. This they did not do, though there is some claim that they offered to secure libelants if they would surrender possession of the vessel. Whatever loss may have been sustained to the vessel and cargo after being beached on the sand spit, it is clear from the evidence that both claimant and libelants are equally responsible. The libelants might, with perfect safety, have accepted the assistance of claimant, and the claimant could with equal safety have secured libelants against all loss, and thereby have compelled a surrender of the possession of the vessel.

The Colman suffered some injury and loss of time while undergoing repairs for these injuries, which ordinarily, under the law, would be allowed to her in addition to any salvage money found to be due her; but, in view of all the facts surrounding this case, we are not disposed to make any special allowance for these damages or loss of time.

It is our judgment that a fair allowance for salvage would be, after deducting all costs, including the statutory fee of \$20 for proctor for libelants, to divide what remains in the hands of the court from the sale of said vessel and cargo into equal parts, giving the libelants one half and the claimant the other half of said proceeds. Of the one half going to libelants, one half should be given to the steamer Colman, and the remaining half should be divided between the officers and crew of the Colman, in proportion to the wages being paid them at the time the Canada was salved, and a decree may be entered in conformity to this opinion and the findings herein contained.

SAMUELS v. REVIER et al.

(Circuit Court of Appeals, Fifth Circuit. February 7, 1899.)

No. 697.

1. ATTACHMENT—LEVY OF WRIT—TEXAS PROCEDURE.

Under the procedure in Texas it is not necessary for the sheriff in attachment cases to require an agent of the attachment defendant, where the latter is a nonresident, to point out property to be levied on, nor to levy first on personal property.

2. EXECUTION SALE—GROUNDS FOR SETTING ASIDE IN EQUITY—INADEQUACY OF PRICE.

Inadequacy of price alone will not authorize a court of equity to set aside a sale of land on execution, where such inadequacy was caused by the action of the execution defendant or his agent in deterring persons from bidding by making unwarranted statements at the sale as to the invalidity of the judgment.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

This is an appeal by the defendant below from a decree rendered by the United States circuit court for the Northern district of Texas in an equity cause. The suit was brought on May 8, 1896, by W. J. Revier, Jr., and J. M. Revier against S. L. Samuels, to cancel a certain sheriff's deed which conveyed to Samuels 200 acres of land in Hill county, Tex.; and also to enjoin Samuels from the further prosecution of an action of trespass to try title,—which is a statutory action of ejectment in Texas,—which had been brought by Samuels against W. J. Revier, Jr., in the same court, for the recovery of the tract of land just mentioned. The bill of complaint avers that the action at law was commenced on December 6, 1893. The ground on which the complainants rely in their bill for the relief they seek is the inadequacy of the price paid for said land at a sheriff's sale of the same,—the land having been bought in by Samuels, who was the attaching creditor under whose attachment the same had been seized, and under whose execution it had been sold. The bill alleges that Samuels sued the complainant J. M. Revier to recover a debt of \$70, which the bill substantially admits was due Samuels, in a justice of the peace court in McLennan county, Tex., on January 9, 1892, and that in that action Samuels caused a writ of attachment to be issued upon the ground that J. M. Revier was a nonresident of the state, and that the writ of attachment was levied upon the land above mentioned, which was subsequently sold under execution in the suit brought in the justice of the peace court on January 13, 1893; that the land was bid in by Samuels, the attaching creditor; and that after the levy of the attachment, but before the judgment and sale, J. M. Revier conveyed the land to W. J. Revier, Jr., his co-complainant. The complainants claim that there was an irregularity in the sheriff's sale, in this: that at the time the attachment issued J. M. Revier was the owner of sufficient personal property in Hill county to satisfy Samuels' debt, and that W. J. Revier, Jr., was the agent of J. M. Revier, and that the sheriff did not require this agent to point out property on which the attachment could be levied, nor did the sheriff levy first on personal property, as is required by the statutes of Texas with reference to execution; and that this irregularity, coupled with the inadequacy of the price bid at the judicial sale, to wit, \$85, was sufficient cause to set aside the sheriff's deed. The complainants averred that at the time the land was sold and bought in by Samuels, it was, and still is, worth the sum of \$5,000.

Samuels filed his answer, in which he alleged in defense, among other matters, that the inadequacy of the price was caused by the acts, conduct, and statements, at the execution sale, of the complainant W. J. Revier, Jr., the agent of J. M. Revier, in publicly stating, in the presence of the sheriff and bidders at the sale, that J. M. Revier was not indebted to Samuels, and that,

consequently, the judgment of the latter was invalid; that the land was the homestead of J. M. Revier, and therefore, under the laws of Texas, was not subject to attachment, and that the man who bought the land would buy a lawsuit,—all of which deferred bidders, of whom several were present, from bidding a fair price, and prevented the land from bringing its full value at the sale; and that he (Samuels) did not bid more because he knew nothing about the land, and did not know whether the statement as to its being a homestead was true or not. Samuels further denied in his answer that he had any knowledge at the time of the issuance of his attachment that J. M. Revier had any personal property in Hill county, or had an agent there, and he affirmed the validity of the title acquired by him under the sheriff's deed. Samuels also set up his judgment, and set forth the costs and expenses which he had been put to in connection with the levying of his attachment, the sale under the judgment, and the bringing of the action at law for the recovery of the land, and he prayed that complainants repay him those sums of money as a condition of the relief sought for by them in the event that the court should hold that the complainants were entitled to the relief they prayed for.

On the hearing the court entered a decree canceling the sheriff's deed, and enjoining the prosecution of the action at law, upon the condition that the complainants should, within a time stated, pay into court for the defendant, Samuels, the sum of \$127.58, being the amount of his judgment, with interest and costs, and also the sum of \$264 on account of expenses incurred by him in connection with the sale; and the complainants were condemned to pay the costs. From this decree, Samuels has appealed.

The assignment of errors assails the validity of the decree substantially on the following grounds: (1) Because the evidence shows that there was no such irregularity in the proceedings by which Samuels acquired the land as would justify the decree setting aside the sale for inadequacy of price; (2) because, if the land brought less than its value, the evidence shows that the inadequacy of price was caused by the acts and conduct of the complainants, and not by any alleged irregularity in the proceedings, or by any act of the defendant, Samuels; (3) because the evidence shows that the land was legally attached and condemned by judgment of the justice's court, and no fact was alleged or proven by the complainants showing that the judgment was invalid, and the judgment is conclusive of the regularity of the levy of the attachment.

It appears from the evidence that Samuels, being an attorney at law, was employed by J. M. Revier to defend him in certain criminal prosecutions for selling liquor in violation of the local option law, on the first of which Revier was found guilty by the jury. Samuels succeeded in having the indictment upon which the first prosecution was tried quashed, and Revier discharged from custody. Revier then paid Samuels \$30 in cash, and made him his duebill for \$70. The interest of Samuels' law partner in this duebill was subsequently transferred to Samuels. Thereafter, J. M. Revier seems to have disappeared. When the duebill fell due, Samuels wrote to J. M. Revier, addressing him at Hillsboro, Tex., where he had friends, requesting him to pay the duebill. The letter was never answered, nor was it returned to the writer, although his name was upon it. Subsequently, Samuels brought suit in the justice of the peace court above mentioned, and therein sued out a writ of attachment, which was sent to Hill county, and levied on lands of J. M. Revier which were there situated. Judgment having been rendered against J. M. Revier, the land was sold by the sheriff of Hill county on January 13, 1893, as already stated. Samuels went to Hill county, and was present at the sale. Before bids were called for, W. J. Revier, Jr., was sent for. He is the brother of J. M. Revier, and the person who, in the bill of complaint, avers, together with his co-complainant, J. M. Revier, that he was the agent of J. M. Revier. It appears that at the sale, and in the presence of the bystanders, W. J. Revier, Jr., stated that J. M. Revier owed nothing to Samuels, that the land was the homestead of J. M. Revier, and therefore could not be sold, and that whoever bought the land would buy a lawsuit. It was shown that J. M. Revier left the state of Texas in November, 1891, just after Samuels succeeded in quashing the indictment against him, as above stated, and

that since then he has been residing in the Indian Territory. W. J. Revier, Jr., claimed to have bought the land from his brother in September, 1892, agreeing to give him \$4,000 for it,—\$1,000 in cash, and the balance in three notes, payable in one, two, and three years. W. J. Revier, Jr., testified that, after his brother had left the state, he still had certain property, consisting of mules, oxen, and cattle, on the land in dispute.

W. M. Sleeper, for appellant.

John L. Dyer, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge (after stating the facts). The land brought far less than its value. But the inadequacy of the price cannot be attributed in any way to Samuels. It is directly traceable to W. J. Revier, Jr., the agent and brother of J. M. Revier, the present complainant, and clearly resulted from his conduct and statements at the sale. The public assertion by W. J. Revier, Jr., at the sale, that the debt for which the land was being sold was not due, and that the land was the homestead of J. M. Revier,—all of which was unfounded in fact,—could have had no other effect than that which was produced; that is, to deter bidders, and to cause the land to be sold for an inadequate price. We have examined the matter of the alleged irregularity of the proceedings under the attachment. In our opinion, it was not necessary, under the procedure of the state of Texas in cases of attachment, for the sheriff to require W. J. Revier, Jr., as the agent of his brother, to point out property upon which the attachment could be levied; nor was it necessary for the sheriff to levy first on personal property.

The question next occurs whether, when the proceedings leading to a judicial sale are regular, the sale will be set aside for mere inadequacy of price. Cases have been cited in behalf of the appellees in which, irregularity having been found in the proceedings, and the price being inadequate, judicial sales have been set aside. Cases may, perhaps, be found where the inadequacy of the price was so gross that the courts, in setting aside the sales, contented themselves with proof of very slight irregularity in the proceedings. But in all of the cases of this character we find that, as plain reason required, the irregularity or the fault involved was not chargeable to the defendant in execution. It would require no authorities to persuade a court to set aside a judicial sale for inadequacy of price, if the court became satisfied that the inadequacy of price was the result of the misdoings of the plaintiff in execution. We have been cited to no case in which a judicial sale has been set aside for inadequacy of price, caused, as in the case at bar, by the misdoings of the representative of the defendant in execution. The sale took place in January, 1893. Samuels filed his action of trespass to try title in December, 1893. That action is still pending. This equity cause was commenced in May, 1896. The laches of the appellees in allowing such a lapse of time before the bringing of this suit is an additional circumstance against them. We are of opinion that the appellees are not entitled to the relief they pray for in their bill of

complaint. The decree of the lower court is therefore reversed, and this cause is remanded to that court with the instruction to dismiss the bill, with costs.

THE EDWARD H. BLAKE.

(Circuit Court of Appeals, Fifth Circuit. January 31, 1899.)

No. 753.

1. APPEALS IN ADMIRALTY—RECORD—TRANSCRIPT OF EVIDENCE.

A transcript of appeal in admiralty should contain all the evidence adduced on both sides. When such evidence is not reduced to writing in the lower court, and there is no rule of that court requiring it to be reduced to writing, it would seem that an appeal can only be heard on the merits, where the evidence adduced appears by an agreed statement of facts, or where a statement is made by the court of the evidence adduced, or of the facts proved.¹

2. SHIPPING—CONSTRUCTION OF CHARTER PARTY—AUTHORITY OF MASTER.

While a master has no power to set aside the contract made by the charter party, yet where, at the time of loading, questions arise between the ship and the charterer as to the proper construction of minor clauses in the contract, in the absence of the owners, the master, as their agent, must necessarily deal with the same, and his construction and agreements in relation thereto are binding on the owners.

Appeal from the District Court of the United States for the Eastern District of Texas.

This is an appeal from a final decree of the district court for the Eastern district of Texas, entered June 9, 1897, adjudging that the libelant (appellee herein) is not entitled to recover as prayed for, and that its libel be dismissed; and, further, that respondents (appellants herein) are not entitled to recover upon their cross libel, and each party should pay all costs herein. The libel was filed May 7, 1897, by the Reliance Lumber Company. It alleged that on the 1st day of April, 1897, it chartered the schooner Edward H. Blake to carry a cargo of "resawed yellow pine lumber and boards and ties, and a small quantity of oak ties (it is understood that the oak ties are white oak, and weigh about the same as pine)," and transport the same from Sabine Pass, Tex., to Vera Cruz, Mexico; freight to be \$5.50 per 1,000 feet for pine lumber and oak ties, and \$5.25 per 1,000 feet for pine ties. The charter party or contract of affreightment further provided that libelant (charterer) would not be obliged to commence loading the vessel before April 15, 1897,—lay days for loading and discharging to commence from the time the vessel is ready to receive or discharge cargo, at least 25,000 feet per running day, Sundays and legal holidays excepted; that for each and every day detention by default of charterer or agent it should pay the owners of said schooner or their agents \$50 per day, from day to day; that said cargo should be delivered by libelant and received by libeeles within the reach of vessel's tackle; that, in pursuance of the charter, said schooner was at Sabine Pass, Tex., and ready to receive cargo, on the morning of April 15, 1897, and that libelant then proceeded to furnish cargo in strict compliance of the charter party; that on or about the 1st day of May, 1897, James H. Smith, the master, refused to receive or load the lumber tendered to said vessel by libelant, and protested against receiving the lumber tendered, because the oak ties furnished were of weight more than 40,000 pounds in excess of what would have been the weight of a like number of pine ties; that the oak ties were of weight one ton to the 1,000 feet in excess of pine, and that said vessel's carrying capacity would, by reason thereof, be 40,000 feet less than that of pine ties; that there-

¹ As to admiralty appeals in general, see note to *The Venezuela*, 3 C. C. A. 322.

after, by way of compromise, the parties then agreed with each other that the term "small quantity of oak ties," as used in said charter party, should mean 50,000 feet of oak ties, and that libelant should be permitted to load on said vessel any amount of oak ties in excess of the 50,000 feet that it desired by paying additional freight of 50 cents per 1,000 feet; that said schooner continued to receive and load such lumber and oak ties as were furnished by libelant until about the 6th day of May, 1897, when libelant tendered three cars of white oak ties, aggregating about 25,000 feet; that libelant then and there ignored said charter contract and agreement, and, in gross violation thereof, again presented protests, and refused to load said three cars of white oak ties, aggregating 25,000 feet; that libelant well and truly performed and kept all the covenants, etc., on its part in said charter party to be performed, but that neither the said James H. Smith, nor said vessel or owners, have performed therein their covenants in said charter party by them to be performed and kept, but have failed and refused to keep the same in the receiving and loading said three cars of oak ties; that libelant is damaged \$2,000, and prays for admiralty process against the vessel, and that the court construe the charter party. On June 7, 1898, libelant filed its amended libel, setting up same facts as original libel, and attached thereto copy of charter party, and copies of three protests served upon it by respondents; one executed on May 1, 1897, and served upon it, wherein the master protested that he was not being loaded as per charter party, and that he would not receive said three cars of oak ties unless allowed extra freight to cover differences in weight between it and pine. Another protest, executed on the 8th day of May, 1897, wherein the master protested at the way his vessel was being loaded, as being not in compliance with the terms of the charter party, and affirming that, if forced to receive said oak after this, his solemn protest, he would hold the Reliance Lumber Company bound to pay all shortage in freight, which affiant alleged would be at least \$275, as well as all demurrage and other damages in addition thereto. On May 14, 1897, respondents executed and filed another protest, affirming to hold libelant responsible for all shortage in freight by reason of not being loaded as per charter party, and also for demurrage.

Respondents (appellants herein) on May 20, 1897, filed a paper denominated "exception, answer, and cross libel," admitting the execution of the charter party, and alleging, as per terms of same: That the schooner Edward H. Blake reported at Sabine Pass at 7 a. m., April 15, 1897, in writing, that she was ready to receive cargo as per charter party. That thereupon the charterers and the agents began loading said vessel, but, instead of loading "re-sawed yellow pine lumber and boards and ties, and a small quantity of oak ties, about the same weight as pine," as was stipulated for in the charter party, libelant, over respondents' solemn protest, loaded upon said schooner large quantities of green oak ties and oak lumber, to wit, more than 75,000 feet, which weighed more than one-half more than the same number of feet of pine, by reason of which said schooner was loaded down so that she was drawing more than 15 feet 2 inches aft and 13 feet 6 inches forward, with her holds full, which showed an increase of 80 long tons in weight over what said schooner would have had in her hold if she had been loaded as was stipulated in said charter party. Respondents attached to and make part of their answer affidavits certifying to weight of oak tendered and loaded, averaging 6 $\frac{1}{2}$ pounds to the foot, board measure. That, after loading said 75,000 feet of oak ties, libelant further tendered respondents three additional cars of oak ties and oak lumber, which respondents protested against receiving. Libelant then notified respondents that no other lumber would be furnished said schooner until said three cars were loaded. Respondents then permitted said three cars to be loaded after protest and notifying said libelant that it would be held responsible for all damages by reason of the loss of freight and demurrage sustained by said schooner by reason thereof. That, after said schooner was loaded under protest, as hereinbefore set forth, libelant failed and refused to furnish respondents invoices, so that they could clear, and go to sea, until the 15th day of May, 1897. Respondents signed the bill of lading with protest attached, to the effect that the invoices which respondents were required to sign, and which they did sign under protest,

did not reflect the kind and quality of lumber composing the cargo of said schooner Edward H. Blake. That by reason of the premises, respondents were damaged in the sum of \$1,300, for which they ask judgment, as well as for such other and further relief as they may be entitled to in the premises. On June 7, 1898, respondents filed a so-called amended cross libel in answer to libelant's amended libel, and specially deny the allegation contained in paragraph 4 in libelant's amendment to its libel, and allege the facts to be as follows: That, as a result of the protest made by Capt. Smith, of the schooner Edward H. Blake, about receiving the oak lumber that was being tendered to him under the charter party, W. A. Priddie, agent of libelant, on or about April 20, 1897, came on board the schooner Edward H. Blake, and alleged that he only had about 65,000 feet of oak to ship, and that, if respondents would take said amount, libelant would send down to said vessel at once 80,000 feet of kiln-dried and dressed lumber, which would more than counterbalance the extra weight of oak; that said dried pine lumber would be delivered at once; that the Blake would then have quick dispatch, and get to sea in five or six days from date of said agreement. And that, relying upon said promise of libelant, and in consideration of the shipment of said dried pine as promised, said Smith, as master, agreed to take the 65,000 feet of oak as offered, but that, notwithstanding said promise on the part of libelant, it wholly failed and refused to comply with the same, or any part thereof. That it did not ship, or tender to respondents for shipment, any dried pine lumber; and that, instead of said schooner being given quick dispatch five or six days from said agreement, respondents did not get to sea until the 14th day of May, 1897, which was 24 days thereafter. That, by reason of the failure of the libelant to comply with the charter party, respondents received less freight by \$550 for said trip than they would have received had the terms of said charter party been complied with by said libelant; and, further, that by reason of delay in getting to sea, respondents are entitled to 9½ days of demurrage under the terms of said charter party at \$50 per day, or \$487.50. That by reason of the breach of said charter party by libelant respondents were put to great expense in employing attorneys, having protests prepared, etc., to the amount of \$700. Wherefore respondents prayed for judgment for said amounts aforesaid, for interest and costs, and for such further relief as they may be entitled to in the premises.

W. B. Denson and F. W. Fickett, for appellants.

Harry H. Hall and Geo. C. O'Brien, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). This case being regularly called, the appellee submitted a motion to dismiss the appeal on the following grounds:

"That a material part of the evidence adduced by the claimant in the district court was not reduced to writing; that none of the testimony of appellee's witnesses heard by the district judge was reduced to writing; that none of this testimony is included in the transcript of appeal herein; that no notes of the same were taken; that no stipulation was made by the respective proctors to omit or dispense with said testimony; that the issue involved in this cause is one of fact, which was determined in the district court solely upon this omitted oral testimony, and could not be determined by this court without the same; that there is no rule of the said district court making it indispensable to reduce such to writing; and that there is no issue of law raised herein which is independent of the facts established by said omitted testimony, and which could be passed upon by the court without first determining said facts."

The proctors for the appellants, not disputing the facts contained in the motion, contended it should not be granted, because the real facts in the case, as shown by the testimony of the appellants' wit-

nesses, were embodied in the transcript. The proctors further contended that the questions they desired to have considered upon this appeal were wholly questions of law, not dependent in any respect upon the evidence adduced in the court below; and thereupon admitted and consented that, for the purposes of this appeal, the facts in the case might be taken to be as set forth and declared in the libel, the amended libel, and the answer to the cross libel.

A transcript of appeal in admiralty should contain all the evidence adduced upon both sides. See Admiralty Rules Sup. Ct. No. 52; Rule 14 of this court (31 C. C. A. xci.). When such evidence is not reduced to writing in the lower court, and there is no rule of the lower court requiring it to be reduced to writing, it would seem that an appeal can only be heard upon the merits, where the evidence adduced appears by an agreed statement of facts, or where a statement is made by the court of the evidence adduced or of the facts proved. A similar question was passed upon in *The Glide*, 18 C. C. A. 504, 72 Fed. 200, decided in the Fourth circuit. The court said:

"The next ground for the motion is that the record does not contain any of the evidence taken at the trial in the district court. This is strictly correct. The affidavits taken by the respondent, after the trial, of what the witnesses say they testified at the trial, are in no sense evidence taken at the trial. We fully concur with the district judge that there is no law or practice which would justify him in granting the certificate asked by proctors for the claimant. The rule 14 of this court [31 C. C. A. xci.] (clause 6) requires that the record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court. This rule No. 52 requires that the record shall contain the testimony upon the part of the libellant and the testimony on the part of the defendant, unless the parties agree, by their proctors, by written stipulation, that it may be omitted. There is no such stipulation here. Clearly, the record is incomplete. This court cannot pass on the merits of the case. Nor, in the absence of a stipulation by counsel, is it possible to supply the omission. We must have the evidence taken at the trial. It is impossible to obtain this. The judge who tried the case cannot recall it. The proctor for claimant is unable to furnish it in such shape as will meet the approval of the other side. Nor can it be imputed as a fault to any one that this evidence is not forthcoming. There is no rule or practice in this district court requiring the reduction to writing of evidence used at the trial. Yet, without such evidence, great injustice may be done. If the appeal be dismissed on this ground, then the claimant will bear all the results of an omission for which he is not responsible. If we go on, and hear the appeal, the appellee will be put at a great disadvantage, guiltless as he is of any default. This is an anomalous condition of things. But in a court of justice there should be no default of justice if it can by any possibility be prevented. It has been suggested that the case should be tried here *de novo*. We concur with the court of appeals in the Second circuit in *The Havilah*, 1 C. C. A. 77, 48 Fed. 684, and 1 U. S. App. 17, and with the circuit court of appeals of the First circuit in *The Philadelphian*, 9 C. C. A. 54, 60 Fed. 424, that this court can, by the practice in admiralty, hear this case *de novo*. But this practice is one to be used cautiously, and in cases of extreme necessity. Besides this, there is much force in the objection taken in *The Philadelphian*, supra: 'In any case in which all the proofs are not reduced to writing in the district court, and no equivalent is found in the record, we have no power except to decline to try the facts anew.'"

The counsel for appellants contend that the real questions involved in this case are questions of law only, to wit, what is the construction of the clause of the charter party which provides, as a part of the cargo, for "a small quantity of oak ties"? and that the compromise

referred to in the libel as made between the captain of the Edward H. Blake and the Reliance Lumber Company to the effect that the term "small quantity of oak ties," as used in the charter party, should mean 50,000 feet of oak ties, and that the libelant should be permitted to load on said vessel oak ties in excess of 50,000 feet by paying an additional freight of 50 cents per 1,000 feet, was absolutely null and void, because beyond the power of the master. It may well be that the construction of the provision that part of the cargo may be "a small quantity of oak ties" is a legal question, which, under proper circumstances, should be decided by the court, in connection with other provisions of the charter party; but if there was a valid compromise made in regard to the matter, by which the parties themselves construed the provision and determined its meaning, there would be no occasion for the court to pass upon the matter beyond the proof as to what was compromised. It may be conceded, as a general proposition, that the master of a vessel has no right to set aside, annul, or supersede the specific contracts made by the owner. At the same time it is clear that where, in the absence of the owners in the execution of a charter party, questions are raised between the ship and the charterers as to the proper construction of minor clauses in the charter party, the master, as agent of the owners, necessarily must deal with the same, and his construction and agreements in relation thereto must be binding upon the owner. And this seems to be the case presented here. In executing the charter party, the shippers and the captain were at loggerheads as to the exact quantity of oak ties the ship was to receive under the indefinite and ambiguous expression, "a small quantity of oak ties." The loading of the ship was delayed; both parties had interests at risk; and we are clear it was in the power of the captain, acting in good faith, and without fraud, to settle and adjust the matter. On the facts of this case, taken to be as averred in the libel and amendment thereto, it is clear that the Reliance Lumber Company was without any fault which made it liable for demurrage, or for loss of freight.

The case proceeded in the court below, and this appeal has been sued out, upon the theory that the appellants had instituted and prosecuted a cross libel. The rule is well settled that in admiralty the respondent may set up and prove and recoup for matters growing out of the same cause of action as is set up in the libel, and by averments in the answer may avail himself of all such matters to the extent of defeating the libelant's demands; but it is also well settled that, if the respondent desires affirmative relief beyond defeating the libel, and a decree over against the libelant, he must, besides answering the case made by the libel, file a cross libel, by which we understand an independent proceeding with the formalities attendant upon an original libel. See authorities cited in 1 Enc. Pl. & Prac. pp. 272, 273. We notice the matter here, not because it affects the decision of this appeal, but to avoid the citing of our decision as an admission that a prayer for decree at the end of an answer to a libel can be considered under any circumstances as the bringing of a cross libel. From the record before us we are of opinion that the district court properly decided the issues presented, and the decree appealed from is affirmed.

THE CITY OF MACON.

THE EVA WALL.

(Circuit Court of Appeals, Third Circuit. January 13, 1899.)

No. 28.

COLLISION—VESSELS MEETING—UNWARRANTED CHANGE OF COURSE.

Where two meeting vessels, by keeping their courses, would pass to the left of each other in safety, one of them, which insists on the naked right of passing to the right, and changes her course when it is attended with danger, is in fault for a collision which results.¹

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was an action by William A. McLean, master of the schooner William Jones and the tug Eva Wall, against the steamer City of Macon, to recover damages for collision. There was a decree for libelants (85 Fed. 236), and the respondent appeals.

Horace L. Cheyney, for appellant.

Edward F. Pugh, for appellee the William Jones.

Henry R. Edmunds, for appellee the Eva Wall.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

KIRKPATRICK, District Judge. This action was originally brought on to determine the liability for a collision in the Delaware river between the steamship City of Macon and the schooner William Jones, loading with coal, in tow of the tug Eva Wall. It is admitted that the schooner was faultless, and therefore the only question presented relates to the responsibility for the damage caused to her by the collision. The record shows that the schooner William Jones, in tow of the tug Eva Wall, was hauled out of the Greenwich piers on a hawser of ordinary length. There were several vessels anchored on the anchorage grounds just below the piers, and for the purpose of avoiding them as well as several small craft which were on the westward side of the river, the tow took a course first down, and then diagonally across, the river towards the eastern or Jersey shore. The tug was justified in taking this course, for the eastern side of the channel was comparatively clear. After the tow had passed under the bow of the Buchanan, one of the anchored vessels, and had nearly straightened out on her course down the river, the steamship City of Macon was sighted coming up the river, and to the westward of the course then held by the tug. A careful examination of the record leaves no doubt upon our minds that if the City of Macon and the tow had each continued upon their respective courses as laid down when they first sighted each other that there would not have been any collision. The testimony of the witnesses on that point seems conclusive. There was not any need of change.

¹ For signification of signals of meeting vessels, see note to The New York, 30 C. C. A. 630.

Both boats had plenty of room and plenty of water, and all that was necessary to avoid a collision was for each to keep its course. If a change of course had been necessary to avoid collision, then the rule required that the boats should pass to the right; but if to do so was not only to risk collision, but to render collision inevitable, we cannot resist the conclusion that this insistence upon a naked right attended with danger was a fault. The steamship was bound to avoid the risk of collision. The choice was open to her either to proceed in safety or incur the risk of changing her course. She chose the latter, and must be held answerable for the consequences. *The Lucy*, 20 C. C. A. 660, 74 Fed. 574. We find from the record that the City of Macon was also at fault in changing her course at the time she is admitted to have done so. While there is some contradiction in the testimony, in our opinion the weight of the evidence is overwhelmingly in favor of the contention of the tow that the Eva Wall first blew two whistles, showing her intention of keeping to the eastward, and that these signals were answered by the City of Macon with two whistles, signifying her acquiescence in the arrangement; that afterwards, and when it was too late for the Eva Wall to change her course, the City of Macon blew one whistle, and put her helm hard a-port. Again, the Eva Wall blew two whistles, but the City of Macon persisted in repeating one whistle, and continuing in her changed course, which resulted in the collision, and the sinking of the schooner William Jones upon the very easterly edge of the channel. For this the Eva Wall was in no way at fault. If the signals originally exchanged had been followed, no collision would have resulted. That the subsequent change of the city of Macon's course was the cause of the collision is made plain by the testimony of Capt. Keen, who was called as a witness on behalf of the steamship. He was on his barge, anchored near the channel, when the steamship passed by. He saw her course, as well as that of the tow. In his opinion, they would have passed in safety had each held her course. His attention was first attracted to the steamship when he heard the order of the captain, "Give her one whistle, and put your helm hard a-port." He heard the tug answer with two whistles, and the City of Macon rejoin with one whistle. To his companion he remarked, "He sticks to his one whistle," and in his testimony adds, "Being steamboat men, we knew what the result might be." It was as they expected. We cannot find any explanation satisfactory to us for this change of purpose on the part of the City of Macon. We are unwilling to believe that it was adopted with an intention to produce a collision, yet that was the result that a disinterested, friendly, and skillful onlooker anticipated. It is no part of the court's duty in cases of this character to find reasons for the conduct of men. We know that great chances are taken by those eager in the assertion and stubborn in the enforcement of supposed rights. On the whole case we conclude that the City of Macon was alone at fault, and are of the opinion that the decree of the district court should be affirmed.

STADLEMAN V. WHITE LINE TOWING CO.

(Circuit Court, D. Minnesota, Fifth Division. February 25, 1899.)

REMOVAL OF CAUSES—SUFFICIENCY OF PETITION—JURISDICTIONAL FACTS.

Where a petition for removal shows that the requisite amount is involved, and alleges that plaintiff and defendant are citizens of different states, it contains sufficient to give the federal court jurisdiction of the cause, and may be amended, by leave of court, by supplying more specific allegations going to establish the same jurisdictional facts, such as the citizenship of the parties.¹

On Motion to Remand, and Motion for Leave to Amend Petition for Removal.

A. A. Harris and John H. Norton, for plaintiff.

Davis, Hollister & Hicks and H. J. Grannis, for defendant.

LOCHREN, District Judge. This action was begun in the state district court of St. Louis county, Minn., and was removed to this court upon the petition of the defendant, which stated as grounds for removal that the amount in dispute in said action, exclusive of interest and costs, exceeds the sum of \$2,000, and "that the controversy in said suit is between citizens of different states, and that your petitioner, the defendant in the above-entitled suit, was at the time of the commencement of said suit, and still is, a resident and citizen of the state of Illinois, and a nonresident of the state of Minnesota." Thereupon the plaintiff moved, upon due notice, that the action be remanded to the state court, upon the ground "that, upon the pleadings and removal papers, it is not shown that this court has jurisdiction of said cause." Upon the hearing of said motion, the defendant asks leave to amend its petition for removal by adding at the end of the third ground (above quoted) the following words: "That the said plaintiff, Gustave Stadleman, was at the time of the commencement of said suit, ever since has been, and still is, a citizen of the state of Wisconsin, and resides at Sauk City, in said state of Wisconsin."

The case of *Johnson v. Manufacturing Co.*, 76 Fed. 616, and authorities there cited, seem to cover all points in the present case. If the petition had failed to contain jurisdictional averments, this court would not obtain jurisdiction, and no amendment could be allowed. But it does contain the averments that the controversy is between citizens of different states, and that the amount in controversy, exclusive of interest and costs, exceeds the sum of \$2,000. These are the facts upon which the jurisdiction of this court depends. Yet the averment that the controversy is between citizens of different states is not sufficiently specific, but should be followed by the further statement of the particular state of which each of the parties is a citizen. Such specific statement is made as to the citizenship of the defendant, but not as to the citizenship of the plaintiff; and it is to remedy this want of specific statement that the leave to amend is

¹ As to removal of causes, see note to *Robbins v. Ellenbogen*, 18 C. C. A. 86. 92 F.—14

sought. The fact, sought to be averred by the proposed amendment, that the plaintiff is a citizen of the state of Wisconsin, is an immaterial fact, except as it is a statement in detail of one of the facts necessary to complete with requisite certainty the statement of the ultimate and material fact (which is alleged) that the controversy is between citizens of different states. The proposed amendment therefore does no more than set forth in proper form, and with sufficient fullness of detail, what had originally been imperfectly stated in the petition.

Ordered, that upon payment to plaintiff's attorney of the sum of \$10, allowed as costs of motion, the defendant have leave to amend its petition as requested, within 20 days after the filing hereof, and in such case said motion to remand shall stand denied. If such costs are not paid, and amendment made within such time, the said request to amend will stand as refused, and the motion to remand granted, with judgment in plaintiff's favor for costs and disbursements.

FELCH et al. v. TRAVIS et al.

(Circuit Court, E. D. North Carolina. March 2, 1899.)

1. UNITED STATES CIRCUIT COURTS—JURISDICTION.

A United States circuit court has jurisdiction of a suit between citizens of different states to set aside a tax title to land exceeding \$2,000 in value, located within the district.

2. TAX DEED—VALIDITY.

A tax deed executed by a special township tax collector is void where no such office existed under the laws of the state at the time of his appointment.

3. TAX SALE—CERTIFICATE—OPERATION—FORECLOSURE.

Where a county purchases land at a tax sale, as authorized by Laws N. C. 1895, c. 119, § 90, it only acquires the right to foreclose the certificate by proceedings similar to the foreclosure of a mortgage, and acquires no title thereunder to the land.

4. SAME—RIGHTS OF ASSIGNEE.

An assignee of a tax certificate of sale issued to a county acquires no greater right to the land sold than the county had, and can acquire title thereto only by foreclosure of the certificate, as provided by Laws N. C. 1895, c. 119, § 90.

In Equity.

The court finds the following facts from the pleadings, depositions, and admissions of parties:

That the plaintiffs are residents and citizens of Massachusetts, and defendants are residents and citizens of North Carolina. That the matter in dispute in this action, exclusive of interest and costs, exceeds the sum of \$2,000. That on the 13th day of March, 1889, one W. B. Martin, as trustee, conveyed by deed duly executed and delivered to one J. W. Old, a citizen of Norfolk, Va., in fee, in consideration of \$6,000, the land in Brinkleyville township, Halifax county, N. C., described in the bill, which deed was duly proved and recorded in 1889. Said Old entered into possession of said land on the execution of the deed aforesaid. On the 11th day of May, 1892, said J. W. Old and wife, to secure a debt of \$5,000 due Felch Bros., executed a deed of trust to William N. Portlock, of Norfolk, Va., for the land in controversy, with a waiver of the homestead exemptions and a power of sale. That plaintiffs became the owners in fee of said land on May 9, 1895, by virtue of

a sale under the deed of trust aforesaid, the payment of \$2,500 cash, and a deed executed to them by the trustee, which was duly proved and recorded October, 22, 1895, and complainants took possession of said land on May 9, 1895, by their tenants, and have held such possession since. That in 1894 the said land was listed in Halifax county, N. C., for state and county purposes, by a list taker duly appointed by the board of commissioners of said county in the name of said J. W. Old at a tax valuation of \$2,500, and taxes imposed on it were \$15.83, of which \$10.33 was for state purposes and \$5.50 was for county purposes; and was exposed for sale on 6th day of May, 1895, by W. W. Rosser, then tax collector for said township, and was purchased by the county commissioners, for the use of said county, at the price of \$16.53, the same being the amount of said tax and expense of sale. On the 26th day of April, 1897, a deed purporting to convey said land to Jennie G. Travis, defendant, signed by W. W. Rosser, "former tax collector," and J. A. Norman, "collector," setting forth the listing, as aforesaid, in 1894, by J. W. Old, nonpayment of the taxes, failure to redeem, sale, and that the holder of the certificate of purchase of said real estate had complied with the laws of North Carolina necessary to entitle him [her] to a deed for the said real estate. Said deed was executed in the prescribed form, proved, and recorded April 20, 1897. At the November session, 1893, of the board of commissioners of Halifax county, W. W. Rosser was appointed tax collector for Brinkleyville township for a term of one year, and at October session, 1894, of said board, said Rosser was reappointed for a like term. At October session, 1895 (October 7th), of said board, said Rosser was appointed and acted as tax collector as aforesaid for a term of one year, but at the expiration of the last term J. H. Norman was appointed such tax collector (October 6, 1896). No notice of the tax sale was given to complainants, J. W. Old, or W. N. Portlock prior to such sale or after such sale, except that about six months after the sale E. L. Travis, as attorney for the board of commissioners, wrote a letter to J. W. Old, stating that the land had been sold for taxes, and purchased by the county, the amount of tax due, when the time for redemption would expire, and mailed the same directed to Old at Norfolk, Va. Said Travis did not know that Portlock or the complainants had any interest in said land, but thought said Old was the sole owner thereof, he having never examined the record as to the title. He also believed Norfolk, Va., to be the place of residence of said Old. Said letter was never received by said Old. On May 8, 1895, when W. N. Portlock sold said land to complainants, O. H. Felch, in company with another, went to the office of the register of deeds and clerk of the superior court of Halifax county, and inquired of those officers if there was any defect in the title to said land, and was told there was none. Complainants had no knowledge of the alleged tax sale until July or August, 1897. In June, 1895, and June, 1896—the time fixed by law for listing property for taxes—the said land was entered on the tax lists in the name of complainants by the list takers duly appointed, and the taxes for each of those years were paid by them; those for 1895 to W. W. Rosser, tax collector, on the 6th of January, 1896, and those for 1896 to J. H. Norman, tax collector, on June 5, 1896. The taxes for every year prior to 1894 were duly paid, and on August 11, 1897, complainants tendered defendant Jennie G. Travis the taxes, costs, interest, and penalty, which she was entitled to demand under the statute, which tender was refused. E. L. Travis is the husband of the defendant Jennie G. Travis, and has acted as her agent and attorney in all transactions in connection with said land. The land was listed for taxes in 1894, and the taxes for the year 1894 were not paid. Said land was sold for such taxes on the 6th day of May, 1895, and purchased by the county of Halifax. The same was not redeemed within 12 months, "unless the court shall hold the payment of the taxes for 1895 and 1896 operated as a redemption pro tanto." There is no record of an order by the board of commissioners placing in the hands of E. L. Travis, as attorney for said board, the certificates of tax sales of land bid in by the county, and directing him, in all cases when he could not procure the taxes either by sale of the certificates or collection from the parties, to bring action in the name of the county for the recovery of the land. On April 7, 1894, L. Vinson, W. W. Rosser, and W. P. Sledge were appointed assessors for Brinkleyville town-

ship by the board of commissioners of Halifax county. The board of county commissioners of Halifax county met on the 4th day of March, 1895, was in session but one day, and there is no record of any other meeting of said board until the first Monday in April, 1895. The April session was held on the 1st day of said month, and there was no other session during the month. No one was appointed tax collector for Brinkleyville township at the April session of the board.

Thos. N. Hill, for complainants.

Robert O. Burton, for defendants.

PURNELL, District Judge (after stating the facts as above). The facts disclose violations of several fundamental principles which would seriously affect defendants' standing in a court of equity were the positions of the parties reversed. What effect should be given these in the present status it is unnecessary to discuss or decide, especially since, with that delicacy sometimes marked in the legal profession, they were studiously avoided in the case as presented and the argument. It is only deemed necessary to incidentally mention the circumstance that it may not be supposed the court is inadvertent thereto. Without discussing either question, it is held this court has jurisdiction. Complainants are in possession under apparent title in fee, and have no adequate legal remedy in the premises. The first question discussed by counsel was the legality and authority of Rosser, as special township collector in 1894. At that time there seems to have been no such officer known to the laws of North Carolina for Halifax county, but the appointment was ratified, and attempted to be validated by the legislature of 1895, two years after. Such matters must be determined according to the decisions of the courts of the state, and the supreme court of the state in *State v. Mearns*, 116 N. C. 582, 21 S. E. 973, is decisive of this question. The election or appointment to an office which does not exist is void, and confers no authority. If the appointment of Rosser was void, he had no authority to make the sale or execute the deed; both are null. But, waiving this point,—admitting, for the purpose of discussion, that the appointment and acts of Rosser were made valid by the act of 1895,—what title did the deed executed by him as "ex-collector" and his successor, the then collector for the township, confer? This is the real question involved, and sought to have decided. Was that according to the laws of North Carolina? for this is a matter which must be determined under these laws. It is common knowledge that tax deeds for land have never been favored by the courts of North Carolina, a state whose people have always been honored for their fair dealing and honesty; and very few such deeds have availed the grasping purchasers when the courts were permitted to pass upon supposed title thus acquired. The legislature of 1893, by chapter 296, Laws N. C., undertook to remedy this, and cure what seems to have been regarded as an evil to the executive branch of the state government in collecting revenue, possibly to enterprising speculators who attend tax sales, and to spur up landowners who were delinquent in paying taxes. It is interesting, but not necessary to decide the constitutionality of the drastic provisions of the act of 1893, the provisions as to presumptive evidence and conclusive evidence discussed in the briefs, when

an attendant speculator purchases at a sale for taxes. At the sale set out and under consideration the land was bid off by or for the county, as provided in the act, and it is the effect of such sale,—the interest or lien or title acquired by the assignee of the county as a purchaser at such sale,—that in this case must be decided. This being local state law,—a matter peculiarly within the province of the state legislature under the constitution,—is one of those cases or class of cases in which the courts of the United States adopt the construction and decision of the highest court of the state.

At the October term, 1898, in *Wilcox v. Leach*, 123 N. C. 74, 31 S. E. 374, this question was before the supreme court of North Carolina,—a purchase by or for the county, a subsequent transfer of the certificate and deed, just as in the case at bar. That court held the party to whom a certificate is transferred could acquire no greater interest or higher title in the land than his assignor (the county of Halifax, as in this case) had; that the county had only such title as a mortgagee has. The only right, under section 90, c. 119, Laws N. C. 1895, conferred on the county in lands sold for taxes, when purchased by the county, is to foreclose the liens or certificate by proper proceedings in the court "in all respects as far as practicable, and in the same manner and with like effect as though the same were a mortgage executed by the owners of such real estate to the owner and holder of such certificate or liens for the amount therein expressed," etc. "A county, under such circumstances, can acquire no fee-simple interest." The defendants' counsel is confident this holding will be reversed, but such confidence cannot control the court at this time, especially as the decision of the court in the case cited has not, as appears, been attacked, and the holding in other cases is to the same effect. The law seems to be so written, both in the decision of the supreme court and in the statute law of the state. This court adopts the decisions of the state supreme court, and holds the defendant Jennie G. Travis acquired no fee-simple interest or title in or to the land described in the bill, and only such interest or lien as the county of Halifax might have claimed under the sale and the certificate, had all the proceedings been regular, and according to law; that, a tender having been made and refused of the amount paid by the said Jennie G. Travis, she is estopped from claiming any interest subsequent to such tender, and the land described in the bill is only liable for the taxes thereon for the year 1894, that of preceding and subsequent years having been regularly paid. A decree will be drawn and entered in accordance with this opinion, granting the prayers of the complainants' bill. It is so ordered by the court.

BRUNDAGE et al. v. DEARDORF et al.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 596.

1. EQUITY JURISDICTION—CHURCH PROPERTY—TITLE—REMEDY AT LAW.

Where trustees holding church property are claimed to have been illegally elected by a withdrawing faction of the church, and to be holding such property in perversion of the trust, equity has jurisdiction of a suit by trustees alleged to be the legal representatives of the church, to enjoin them from exercising further authority over the property; the remedy by injunction being peculiarly adapted, and that by ejectment inadequate.

2. TRUSTS—RELIGIOUS SOCIETIES.

While equity will not permit a perversion of trust property given to a church for the support of some particular creed or dogma so long as there are agencies within the dedication to carry out uses intended, yet where property is conveyed to a church by a sale for a valuable consideration, there is no trust for a specific form of worship to enforce, and the fact that the church subsequently changed its creed, etc., is immaterial.

3. RELIGIOUS ASSOCIATIONS—SUPREME JUDICATORY—POWERS—CONSTITUTION—AMENDMENT.

Where the constitution of a church of the associated class provided that it should not be amended except on request of two-thirds of the whole society, and that the confession of faith should not be abrogated or amended, a general conference of the society, which had adopted the constitution and confession, composed of representatives from the various churches, and constituting the supreme judicatory thereof, was authorized to determine that such constitution and confession were inadequate, and provide means for their amendment, and the submission thereof to the vote of the members of the society.

4. SAME—CONCLUSIVENESS OF DECISIONS—REVIEW IN CIVIL COURTS.

The decisions of the supreme judicatory of a religious society of the associated class having a constitution, and governed by local, state, and national bodies, of all questions of ecclesiastical cognizance, are binding and conclusive on the members, and cannot be reviewed in the civil courts.

5. SAME—DISSENTING MEMBERS—RIGHT TO CHURCH PROPERTY.

The general conference of a religious society decided that its constitution and creed, which the conference had previously adopted, and which provided that it should not be amended except on request of two-thirds of its members, etc., was inadequate, and adopted measures for its amendment. The amendments were submitted to a vote of the members, after due notice, and more than two-thirds of those voting voted in favor of the amendments, whereupon the general conference decided that they had been adopted. A portion of the dissenting members then withdrew, and claimed the property purchased by the church, on the ground that those favoring the amendments had departed from the principles and purposes of the church. Held, that the amendment to the constitution and creed were matters of ecclesiastical cognizance within the jurisdiction of the conference, that the society was bound by its decisions, and that the withdrawing members were not entitled to such property.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

George R. Young, for appellants.

John B. McMahon and Lewis B. Gunckle, for appellees.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

LURTON, Circuit Judge. This suit involves the use and control of a certain church property known as "Fairview Church," situated in Defiance county, Ohio. This property was originally conveyed, in 1874, to three persons, and "their successors in office," as trustees for the use of the Church of the United Brethren in Christ. The appellants, complainants below, claim to be trustees in succession to those named in the deed, and have been duly elected to their office by an annual conference having jurisdiction over the territory within which Fairview Church is situated, which is in fellowship with one of two distinct ecclesiastical divisions into which the original United Church of the United Brethren in Christ is now divided, each of such divisions claiming to be the true and only original church described in the deed. The contention of the complainants was and is that they hold the legal title to said Fairview Church in trust for the use of a local congregation which is in fellowship and association with the annual and general conferences under whose authority complainants hold office. Prior to May 13, 1889, the Church of the United Brethren in Christ was a united, single, ecclesiastical organization, governed by a system of judicatories consisting of an official board having authority in and over a particular congregation, quarterly and annual conferences having jurisdiction over the churches within a particular territory, and a general conference, composed of representatives elected by the annual conferences, which had jurisdiction over all. A division occurred in the general conference of 1889, and a small minority withdrew from the place in which the conference was in session, and organized themselves into a general conference, and claimed to be the true and only organization having valid succession and authority as the general conference of the church. This division extended into many of the annual conferences and congregations. Those thus withdrawing were in large part a party which, in the United Church, had been known as "Radicals"; those remaining were called "Liberals"; and for the purpose of distinguishing these distinct ecclesiastical organizations, each calling themselves the Church of the United Brethren in Christ, we shall call that branch of the church to which complainants belong "Radicals," and the branch to which defendants are attached "Liberals." The defendants, now appellees, are the pastor in charge of Fairview Church and three trustees, all of whom hold office by due appointment under the annual and general conferences to which the Liberals adhere. The complainants are all citizens of the state of Indiana, and the defendants are all citizens of the state of Ohio, and federal jurisdiction results from this diversity of citizenship.

Complainants claim that they, and they only, are entitled to the exclusive control of said church property, and to cause it to be applied to the ecclesiastical uses and purposes to which it should be devoted as a church edifice for the use of a congregation subordinate to that division of the church under which they hold office. They pray the aid of a court of equity in preventing what they call a diversion of the property from the trusts to which it is properly devoted, and ask the injunctive process of the court to prevent the appellee who claims to be the pastor in charge from officiating therein as pastor,

and to prevent the other defendants from usurping the office and functions of trustees of said church, and from interfering or intermeddling with complainants in their official duties as the only legal trustees of said property. They claim that the remedy at law by action of ejectment is inadequate, inasmuch as they, as well as the defendants, are but trustees holding for the use of beneficiaries, whose rights can only be adequately declared and enforced through the equitable remedy of injunction. A demurrer going to the jurisdiction in equity was filed by the defendants, and, after full argument, was overruled by Taft, Circuit Judge, whose opinion is reported in 55 Fed. 839. The case made is one in which trustees may rightfully apply to a court of equity for aid and assistance. The mere fact that the legal title must be determined is not enough to defeat equitable jurisdiction. Two sets of trustees, each claiming to be the exclusive legal trustees, are contending over the use and possession of property claimed under the same deed. The title depends upon the character of the trust. When that is declared, it is the peculiar province of a court of equity to prevent a diversion of the property from its lawful and proper use. The remedy by injunction to prevent a perversion of property devoted to ecclesiastical uses is peculiarly adapted to meet the necessities of the case, for trustees, whether in sympathy with the trust or adverse thereto, will be controlled and compelled to devote the property to the uses to which it was intended through the coercive power of the writ of injunction. The remedy at law, upon the facts of the case, is not adequate, and the demurrer was properly overruled.

The question at issue involves the identity of the church which is the declared beneficiary under the deed with that represented by one or the other of the contending divisions into which that church was divided in 1889. The cause of that division was the adoption and promulgation of a new constitution and confession of faith by the general conference which assembled in that year at York, in Pennsylvania. The complainants say that they, and those whom they represent, adhere to the old constitution and the old confession of faith, and thus are able to present an infallible standard by which their identity with the church as it existed at the date of the deed may be determined. They say, also, that the defendants, and that organization for which they stand, have adopted a new and fundamentally different constitution and confession of faith by revolutionary methods, and have, therefore, no rightful claim to be organically the successor of the church formerly united under the old constitution and confession of faith. Upon these premises they contend that, where property is conveyed for the uses of a congregation as a place of worship, a trust is created which will be enforced for the purpose of maintaining that form of religious worship and profession of faith to which the property was originally devoted, and that such a trust will be enforced in favor of that part of the society adhering to and maintaining the original principles upon which it was founded, without regard to whether it be a minority of the particular congregation or a minority of the larger body, of which the congregation is but a subordinate member. It may be conceded that, if property is dedicated by will or deed of the donor for the express purpose of being held and ex-

clusively used for the teaching, support, or maintenance of some specific dogma, or creed, or form of religion, and that purpose is declared by the instrument under which the property is held, a trust arises, and that a court of equity will prevent a perversion of the trust attached to its use. So long as there are persons or agencies within the meaning of the original dedication, and willing to carry out the uses intended to be maintained by the donor, a court of equity, upon their application, will extend its aid in executing the trust. But the deed under which Fairview Church is held is one of bargain and sale; the Church of the United Brethren in Christ being the vendee for a valuable consideration, paid by it. We have, therefore, no inquiry to make as to the purpose and intent of the donor, and no trust for a specific form of religious worship to enforce. The case resolves itself into an inquiry as to which of the two organizations claiming to be the organic successor of the church as it existed at the date of this deed is in fact and law entitled to be regarded as the Church of the United Brethren in Christ.

The voluntary religious society called the "Church of the United Brethren in Christ" was organized in the year 1800, or about that time. No creed or formal confession of faith was adopted until 1815, when the general conference of that year adopted and promulgated the instrument herein called the "Old Confession of Faith." No fundamental framework or organic church law was adopted until 1841, when the general conference of that year adopted an instrument for the government of the church, being the body of organic law herein called the "Old Constitution." That constitution was never submitted to the members of the society for their adoption or approval, and was the act of the general conference alone; a body then composed of a small number of clergymen, representatives of the annual conferences by whom they had been elected. There was at all times more or less question as to the binding obligation of this constitution, though it was generally acquiesced in and adhered to as the organic law of the organization. The organization thus perfected constituted one of that class of ecclesiastical organizations in which the congregations are not independent of other ecclesiastical associations, but were associated as subordinate members of a general and wider organization, and having a system of government in regular succession, consisting of the official board over the congregation, the quarterly and annual conferences over a group of congregations, and a general conference with general power and control over all the churches and membership. The constitution adopted in 1841 in an artificial way defined the powers of these several judicatories, and limited the otherwise apparently supreme authority of the general conference in certain important particulars. The limitations of chief importance imposed by that constitution upon the general conference are found in article 4, which is as follows: "There shall be no alteration of the foregoing constitution unless by request of two-thirds of the whole society," and in article 2, § 4, which is in these words: "No rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands, nor to destroy the itinerant plan." Complainants say that the constitution has not been

altered in the only way in which it could be constitutionally done, and that the confession of faith has been changed in essential particulars, in defiance of the constitutional prohibition. It cannot be successfully denied that, if the constitutional provision in respect to a change of the confession of faith was itself changed, a change in the confession, made in pursuance of the altered constitution, would not be a violation of the organic law of the society. Both the constitution and the confession of faith were, in fact, changed by an exercise of the same power at the same time and way, and must, therefore, stand or fall together. How were these changes brought about? The general conferences of the church were held every four years from 1841 up to and including 1889. These conferences were composed of the bishops of the church and elders from each annual conference district. In 1885 a regular general conference of the church was held at Fostoria, Ohio, whose members were regularly chosen according to the law and usages of the church. At that conference, and on the second day, a committee upon revision was appointed, consisting of 13 members, to whom was referred the confession of faith, the constitution, and section 3 of chapter 10 of the discipline, whereby members of secret societies were excluded from membership. At a later day that committee made the following report:

"To the General Conference: Your committee to which was referred the confession of faith, constitution, and section 3 of chapter 10 of the discipline, beg leave to report that we have given these subjects much and most prayerful attention, and now submit the result of our deliberations:

"First. We find that the present constitution of the church was never submitted to the suffrage of the members and ministry of the church for ratification, either by popular vote or by conventional approval, though it purports to be the constitution of the 'members' of the denomination.

"Second. We find, by reference to the records, that throughout most of its history it has been the subject of question and differences of opinion as to its legality and binding force as an organic law.

"Third. We find, also, that the clause found in article 2, § 4, which says, 'No rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands,' and article 4, which says, 'There shall be no alteration of the foregoing constitution unless by request of two-thirds of the whole society,' are, in their language and apparent meaning, so far-reaching as to render them extraordinary and impracticable as articles of constitutional law.

"Fourth. From the facts and reasons thus indicated, we conclude that the constitution has acquired its force only by the partial and silent assent of the church, and that the general conference has a right to institute measures looking to the amendment, modification, or change of the constitution at any time when it is believed that a majority of our people favor a modification thereof.

"Fifth. It is the sense and belief of your committee that the constitution, as it stands, is not in harmony with the present wishes of our people, as has been indicated in discussions, petitions, and elections during the past year.

"Sixth. For these reasons, and for the purpose of finally settling all questions of dispute and matters of disturbance to the peace and harmony of the church, so far as the confession of faith and constitution are concerned, your committee would recommend the adoption of the following paper, namely:

" 'Church Commission.

"Whereas, our confession of faith is silent or ambiguous upon some of the cardinal doctrines of the Bible as held and believed by our church; and whereas, it is desirable and needful to so amend and improve our present

constitution as to adapt its provisions more fully to the wants and conditions of the church in this and future time: Therefore,

"Resolved, by the delegates of the annual conferences of the church of the United Brethren in Christ in general conference assembled, that a church commission composed of twenty-seven persons, and consisting of the bishops of the church, and ministers and laymen appointed and elected by this body, an equal number from each bishop's district,—provided, that the Pacific district shall have two members besides its bishop,—be, and is hereby, authorized and established.

"The duties and powers of this commission shall be to consider our present confession of faith and constitution, and prepare such a form of belief, and such amended fundamental rules for the government of this church in the future, as will, in their judgment, be best adapted to secure its growth and efficiency in the work of evangelizing the world.

"Provided (1) that this commission shall preserve, unchanged in substance, the present confession of faith so far as it is clear; (2) that it shall also retain the present itinerant plan; (3) it shall keep sacred the general usages and distinctive principles of the church on all great moral reforms as sustained by the Word of God, in so far as the province of their work may touch them.

"Provided, further, that in the final adoption, as a whole, of a confession of faith and constitution for submission to the church by the commission, a majority vote of all the members composing the commission shall be necessary.

"Resolved, that this commission shall meet at such time and place as the board of bishops may appoint, and is expected to complete its work by January 1, 1886.

"The commission shall also adopt, and cause to be executed, a plan by which the proposed confession of faith and constitution may receive the largest possible attention and expression of approval or disapproval by our people, including all necessary regulations for taking, counting, and reporting the vote.

"Resolved, that when, according to the foregoing provisions, the result of the vote of the church shows that two-thirds of all the votes cast have been given in approval of the proposed confession of faith and constitution, it shall be the duty of the bishops to publish and proclaim said result through the official organs of the church; whereupon the confession of faith and constitution thus ratified and adopted shall become the fundamental belief and organic law of this church.

"Provided, further, that the adoption of the constitution, as aforesaid, shall in no wise affect any legislation of this general conference for the coming quadrennium.

"Resolved, that in case of any vacancy in the commission by death, resignation, or otherwise, the commission shall fill such vacancy.

"The necessary expenses of this commission shall be paid out of the funds of the printing establishment."

The same committee made, also, a supplementary report touching membership in secret societies. These reports and recommendations were signed and indorsed by eleven members of the committee. A minority report, signed by the remaining two members, was presented, which was in these words:

"We, your committee on constitution, confession of faith, and section 3 of chapter 10, would report as follows: We have deliberately considered the important interests committed to us, and have concluded as follows:

"(1) The constitution we now have in the discipline, and have had for forty-four years, is the constitution of the Church of the United Brethren in Christ, and every member legally received into the church for years has consented to be governed by the same. It was declared legal also by the general conference of 1849, and to it our legislation has conformed, and under its direction our officers have been elected, and the general conference formed according to its provisions.

"(2) This constitution makes no provision for the general conference to alter or change it without first securing the consent of the members of the church by a two-thirds vote, as required in article 4 of the constitution; and to take any other method would not be legal.

"(3) It is our view that this question as to the constitution should be determined before we revise section 3 of chapter 10."

The majority report was adopted by the conference and the members of the commission chosen in accordance therewith. Within the time prescribed, this commission reported to the church the revised confession of faith and the amended constitution, with a plan for the submission thereof to the entire membership of the church. This plan provided that a vote should be taken in all the congregations during the month of November, 1888; that the publishing agent of the church should furnish, three months before the time of voting, a sufficient number of tickets and blanks for the return of the result to the presiding elder of each district, who should distribute same to the different pastors within his jurisdiction, and that the pastors should distribute same among their members. The plan provided that the confession should be submitted to a distinct vote as an entire instrument, the ballots for that purpose having written or printed thereon the words, "Confession of Faith—Yes or No," and that the constitution should also be submitted to a separate vote as an entirety, with certain exceptions, in regard to which provision was made for a distinct expression of opinion. Provision was also made that the pastor, elders, and stewards of each society should constitute a local board of tellers, who should prescribe the particular day in November when the vote of the congregation in which they held office should be taken, enroll the voters, allowing sick, absent, and aged members to vote by signing a ballot, and sending it to such local board of tellers. The returns of such election were required to be sent to a board of tellers, to be selected by the annual conference, who were required to count and report the result to a general board of tellers named in the plan, who, in turn, were required to tabulate and report the vote of all the conferences to the board of bishops. The board of bishops were then required to prepare a letter addressed to the conference on the work of the commission. The time adopted for the taking of the vote coincided with the time for electing delegates for the general conference of 1889. This plan was submitted, accompanied by a temperate, conservative, and pious address from the bishops of the church, urging upon the people a calm and earnest consideration and a free vote upon the matters thus submitted. This plan and address were submitted in January, 1886, thus securing a period of nearly three years within which a full consideration of the proposed changes might be had. The record abundantly shows that during this period the question of the adoption or rejection of these revisions was widely discussed and debated, and no one can doubt that every member of the society had his attention directed to these matters, and had every opportunity afforded of enlightening himself and expressing his opinion through the election which followed. During the month of November, 1888, the vote was taken in accordance with the plan submitted, and this vote was counted and canvassed by the several boards of tellers provided,

and was declared by the general board on January 15, 1889, and the result published through the newspaper organs of the church. The result was as follows:

For the confession of faith.....	51,070
Against the confession.....	3,310
For the amended constitution.....	50,685
Against the constitution.....	3,659
For lay representation.....	48,825
Against lay representation.....	5,634
For section on secret societies.....	46,994
Against same.....	7,229
Total number of votes cast.....	54,369

Delegates to the general conference of 1889 were elected at the same time and places, and the total number of votes cast for delegates was 58,839. The general conference of 1889, composed of delegates elected by the United Church, met in the York Opera House, in York, Pa., May 9 (Thursday), 1889. To this conference the church commission having charge of this work of revision under appointment of the general conference of 1885 reported the constitution and confession of faith, the plan under which it had been submitted to the members of the society, and the vote which had been cast under the plan of submission. This report was referred to a special committee, with direction to report to the conference whether the commission had acted in compliance with the instructions of the former general conference, and whether the vote had been regularly and orderly taken. That committee, on May 11, 1889, submitted a report commending the work of the commission, and recommending the ratification and adoption of the changes recommended by it. A minority report was at the same time submitted, complaining of certain irregularities in the methods of the commission. The report of the majority was adopted by a vote of 110 to 20 opposed. On the 13th of May, 1889, the proclamation of the bishops announcing the adoption of the work of the church commission was read to the conference, whereupon 15 of the 20 members who had opposed the adoption of the resolutions of the committee withdrew from the opera house, and met in another place, and, after organizing, adopted a resolution in these words:

"Inasmuch as 110 of the delegates and members of this general conference did, on May 11, 1889, vote to adopt a new constitution and confession of faith, and did, on the 13th of May, 1889, through the presiding bishop, declare the same in force, thereby forming a new church, we therefore declare that they have thereby vacated their seats as members of the general conference of the Church of the United Brethren in Christ of 1889, and that the alternates present from the respective conferences are entitled to seats in this body upon presentation of proper evidence that they are the duly-elected alternates."

Annual and quarterly conferences were subsequently organized by this minority element wherever members of the society were found who were willing to assume the attitude evidenced by the resolution above set out. These Radical annual conferences proceeded to elect trustees to hold church property in sympathy with their views. Thus, we have two distinct ecclesiastical organizations, bearing the same name, each claiming to be the original Church of the United Brethren

in Christ. Many litigations have resulted from this division, which have reached the highest courts of several states, all of which have been decided adversely to the contention of the Radicals, with the exception of the litigation in the state courts of Michigan. At the date of these proceedings there was an enrolled membership of about 204,000. The total vote cast for the amended constitution was 50,658. The disparity between the total nominal membership and the vote approving the amended constitution has been made the basis for claiming that this new constitution has been imposed upon the society by less than a majority of its membership. The weight of this fact, as an element in the case, disappears in the light of the evidence that discussion preceded the election for about two years, and that the total vote against the constitution was only 3,659. That there was an indisposition upon the part of the Radicals to give any sanction to the revisory proceedings by voting at all, is clear. How strong was this nonvoting opposition? Their greatest strength was shown by petitions to the general conference opposing any recognition of the work of the church commission. Such petitions, signed by 16,882 members of the society, were presented to the general conference of 1889. If these be added to the 3,659 who voted against the new constitution, we have a total opposition of 20,541, as opposed to 50,658 in favor of that instrument. Two-thirds of a total reached by adding this outspoken opposition to those who actively announced their approval of the new constitution would be 47,466. Thus the vote cast for the alteration of the constitution was more than two-thirds of all the members of the society who in any way expressed opinions upon a subject which had been agitated for many years. The question of approving or disapproving the work of the church commission was carried into the election of delegates to the general conference of 1889. That election was held when the vote was taken upon that work. The total vote cast in the election of such delegates was 58,839, which was the largest vote ever cast in the history of the church. The delegates thus elected stood, as shown by the vote cast upon the adoption of the resolutions approving and adopting the amended constitution and revised confession of faith, 110 for the work of the church commission to 20 opposed. Of the opposition 5 yielded to the majority, and 15 withdrew. The numerical strength of the membership which have adhered to the organization of the majority appears from the evidence to be proportionately as great or greater than those who support the minority delegates. If it be assumed that at the date of the vote cast by the membership of this society the membership aggregated 204,000, as claimed, it is fairly inferable from the foregoing facts that a large majority of the whole number approve the alterations made in the constitution and the revision of the confession of faith. The same facts justify the presumption that those who neither voted nor petitioned against these revisions intended thereby to indicate their acceptance of the action of those who did vote, and of the general conference elected at the same time. But complainants say that neither the vote cast for the new constitution, nor the action of the general conference of 1889 in respect thereto, nor the general assent of the great mass of those enrolled as members who did not

vote at all, sanctions the changes which have been made in the old constitution and confession of faith. Their contention is that that constitution could not be changed except in strict pursuance of the method provided therein for an amendment or alteration thereof, and they deny that the steps taken to bring about an alteration of that constitution were such as were authorized by that instrument. Upon this premise they conclude that the majority who support the new constitution and revised confession of faith have thereby organized a new ecclesiastical organization, and have forfeited all right to the possession or control of the property owned by the original society, and that the remnant of the original organization which adheres to the old constitution and confession of faith constitute now the true organic succession to the old and original church, and are, therefore, entitled to the exclusive use of the name and exclusive possession of the church property.

It is unnecessary to consider the soundness of the deductions drawn by complainants, even if it should appear that the steps taken for the purpose of altering the organic law of the church were not in strict accord with the provisions of the constitution in respect to its own amendment. The constitution of 1841 was adopted by the general conference of that year. It was not authorized by any direct delegation of authority, nor sanctioned by any subsequent vote of the members. Nothing more clearly demonstrates the supreme authority claimed and exercised by the general conference than this fact: that it imposed a constitution and confession of faith upon the church without special authority theretofore conferred, or submitting its work for adoption or rejection by the membership. So far as the organic law thus enacted contains limitations upon the power of subsequent conferences in respect to the amendment or alteration of the constitution or creed, it is not a grant, but a limitation, of power. If it was within the constitutional power of the general conference of 1841 to enact a constitution, it was equally within the power of the general conference of 1885 or 1889 to alter or amend that constitution, unless the original power of the general conference had been limited by an instrument which was irrepealable by subsequent conferences, except in the manner and method prescribed by the limiting instrument. Why the conference of 1841 might enact a body of fundamental law which a subsequent conference could not repeal or amend was a problem which was much discussed by the membership. The membership had never ratified, or adopted, or been given any opportunity of expressing any opinion upon, the merits of that constitution. That it was generally accepted as a limitation and definition of the church fundamental law sufficiently appears. This acquiescence is relied upon as a sufficient indorsement to entitle it to be regarded as an irrepealable enactment, except by the steps provided by the instrument itself. But the provision touching its own amendment was framed in most inartificial language. It was as follows: "There shall be no alteration of the foregoing constitution unless by request of two-thirds of the whole society." Touching the confession, the constitution provided: "No rule or ordinance shall at any time be passed to change or do away with the confession of faith-

as it now stands; nor to destroy the itinerant plan." This confession of faith had been formulated by an earlier general conference. But for this limitation upon the power of subsequent general conferences, there is no reason suggested why it was not subject to revision by virtue of the same authority which sanctioned its original formulation. It seems clear that the authority which could formulate a creed could revise it, and that this constitutional provision alone stood in the way of a revision by any general conference. It also follows that the authority which could alter or amend this constitution in any respect could amend or alter it in respect to the provision which protected the confession and itinerant plan from alteration or change. The constitution did not provide that the confession should be unalterable, but that it should be unalterable by any "rule or ordinance." This is a prohibition against any legislative change of the confession, and does not operate to place the confession and "itinerant plan" upon any higher plane than the constitution itself. What were the steps appropriate to an amendment of the constitution? This was the question which confronted the general conference. The provision limiting its power in this particular was not clear nor definite. Did the conference have any right to initiate an amendment? What was meant by "request of two-thirds of the society"? The clause needed interpretation. Should it be construed narrowly, and according to its letter, or according to its spirit, and with the end of ascertaining and carrying out the objects and purposes of a constitution? When framed, the church was a small body of people, and its wishes easily ascertained. In 1885 it had become a large body of people, scattered throughout the United States. The spirit of the limiting clause was that the conference should make no alteration in the constitution except in concurrence with the opinion and wish of "two-thirds of the society." To secure concurrence in opinions as to the desirability of a constitutional change required some legislative plan by which such opinion might be formulated, considered, and authoritatively expressed. Whether lay assent should precede or follow action by the conference was not of the essence of the matter. Neither was it vital that such lay concurrence should be indicated by vote or by petition. These were matters of discretion,—matters of detail,—and clearly within the general powers of the general conference as the highest judicatory and legislative body of the church.

Preliminary to any steps looking to alterations in the constitution, the general conference of 1885—a conference representing the whole church—found it necessary to construe this provision of its organic law, and did so by adopting a report of a committee appointed for the consideration of the whole subject of amending and revising the constitution and confession, which report affirmed that "the general conference had a right to institute measures looking to the amendment, modification, or change of the constitution." The same report recommended a plan for the formulation of proposed constitutional changes, and for the revision of the confession, and for the submission of such proposed changes to a vote of the entire membership of the church. That report went further. It provided how this vote should be taken, and its result ascertained, and provided that, if "two-thirds

of all the votes cast" should be cast in approval of the proposed changes and revision, the result should be announced by the bishops, and that thereupon "the confession of faith and constitution thus ratified and adopted shall become the fundamental belief and organic law of this church." This was a clear interpretation of the meaning of article 4 of the constitution. Put in short form, that conference construed that article as meaning that the general conference might, in its own way, and through its own instrumentalities, initiate alterations in the fundamental law of the church, and might institute means for obtaining the consent of the membership in respect to proposed changes, and that such consent might be given by vote, and that the vote of two-thirds of those voting at an election held for that purpose would be regarded and held as the assent or request of two-thirds of the society. The plan adopted for formulating proposed alterations did not, in terms, require that these changes should be submitted back to the conference which appointed the commission, nor to the next succeeding general conference. Indeed, the fair inference is that that conference did not intend that the work of the commission should be subjected to any further action by either that or the succeeding conferences, but should become effective as a consequence of the approval by two-thirds of the society of the work of the commission, when the result of the election should be verified, and proclaimed through and by the bishops of the church. This action of the conference of 1885 is objected to as erroneous upon these grounds: First, it is said that the conference erred in assuming any authority over the subject unless authorized previously by the request of two-thirds of the society; second, that the conference erred in construing the constitution so as to constitute two-thirds of the vote cast at the election authorized by it as the legal consent of two-thirds of the society, unless the vote cast for such changes numerically equaled two-thirds of the whole membership of the church; third, it is urged that to validly amend the constitution required not only the consent of two-thirds of the society, but that such consent must concur with the legislative action of the general conference, and that the conference of 1885 never did, as a legislative body, make any alterations or changes in either the constitution or confession, but provided that changes proposed by a committee of its own members should become operative when adopted by a two-thirds vote, and without any action whatever by any conference thereon. The conference of 1885 assumed, and, we think, rightfully, that it had jurisdiction to determine what steps might constitutionally be taken to initiate amendments of the existing constitution and a revision of the existing confession of faith. The constitution was, as we have seen, not a grant, but a limitation upon the powers of that judiciary. Manifestly, the general powers of the conference authorized it to construe the amendatory provision, and to provide the details by which this power of amendment might be exercised. Constitutions do not go into details. They seldom define the means by which a power is to be exercised. They merely grant, limit, or qualify powers. *McCulloch v. Maryland*, 4 Wheat. 405. The duty of interpreting and applying this provision of the organic law of the church was neces-

sarily within the implied powers of the general conference as the highest judicatory and legislative body of the organization. So in respect to a revision of the confession of faith. The existing confession had been formulated by a general conference prior to the adoption of any written body of organic law. It assumed that it had authority to decide this question, and to determine how, and to what extent, there might be a revision of the statement of the faith held by the church.

In respect to the objection that neither the constitution nor confession could be amended or altered except by the concurrent action of the conference and people, and the further objection that the general conference could not delegate its legislative power to the church commission, it is only necessary to say that no such question is presented. The church commission reported the proposed amendments and alterations in both, together with the vote thereon, to the general conference of 1889, before any announcement of the adoption thereof had been made by the bishops according to the plan of revision authorized by the conference of 1885. That conference was elected by the whole church, and represented both those favoring and those opposing the work of the commission. To say that that conference did not have jurisdiction to decide as to which of two constitutions and two confessions of faith was the constitution and confession of the church, is to assume that there was no ecclesiastical tribunal existing which could determine a question so vital as this to the welfare and ecclesiastical existence of the church. The action of the preceding conference was known. The commission created by its predecessor had reported its proceedings, and the result of the plan under which its work had been submitted to the whole membership of the church. For three years the work of this commission had agitated the church. Both the merit and the legality of that work were questioned. The very foundations of the church were threatened. The commission and the bishops had postponed any announcement of the consequences of what had been done until this conference should act. The commission reported its action and the vote, and asked the action of the conference thereon. The matter was submitted to a special committee, whose report was in these words:

"To the General Conference: Your committee to whom was referred the report to your body of the commission constituted by the general conference of four years ago, and charged with the duty of considering our present confession of faith and constitution, and of preparing such form of belief, and such amended fundamental rules for the government of this church in the future, as would, in their judgment, be best adapted to secure its growth and efficiency in the work of evangelizing the world, would beg to report as follows, viz.:

"(1) We have carefully examined the records of the proceedings of the commission, and find them fully and accurately kept, and indicating a thorough consideration of all matters involved in their work, with impartial purpose to reach only right conclusions.

"(2) We have also compared the instructions and limitations by the former general conference with their work as finally adopted by said commission, and find that said instructions and limitations were obeyed and carried out with commendable accuracy.

"(3) The 'Plan of Submission' we believe to have been in accord with the best methods of accomplishing the best results. Three years were given for

discussion and reflection by our people as to the merits of the two documents submitted for their final approval or disapproval. All reasonable efforts were employed to secure the largest possible attention to all whose right and duty it was to vote on the propositions submitted.

"(4) In view of the fact that the proceedings and acts of the commission have been found to be regular, and in accord with the directions given by the highest authority known to our church, your committee would recommend the adoption of the following, viz.:

"Resolved (1) by the general conference of the Church of the United Brethren in Christ, in quadrennial session assembled in the city of York, Pa., May 9, 1889, that the recorded proceedings of the commission, including the revised confession of faith and amended constitution, as formulated and submitted to the vote of the church, together with the methods of submission and all other acts by which the will of the church was ascertained thereon, are hereby approved and confirmed.

"(2) That because of the truth that the revised confession of faith and amended constitution as a whole, and all the separate propositions thereof, submitted to the membership of our church, have been adopted by more than the required two-thirds of all the votes cast thereon, as required by the general conference of 1885, it is hereby declared and published by this conference, and for itself, that the said revised confession of faith and amended constitution, as framed and submitted by the lawfully constituted commission of the church, are become the fundamental belief and organic law of the Church of the United Brethren in Christ, and will be in full force and effect on and after the 13th day of May, A. D. 1889, upon the proclamation of the bishops, as provided and ordered in the said amended constitution."

The report and the accompanying resolution were adopted by a vote of 110 to 20. This action was both judicial and legislative. It operated to adopt the new confession and new constitution, and adjudged that the vote theretofore taken was effective, under the constitution, as a "request" from "two-thirds of the society," and was a legal compliance with the old constitution, and that each should become effective when the announcement should be made by the bishops, as required by the plan adopted by the general conference of 1885. The authority conferred upon the church commission limited their power in respect to the revision of the confession of faith by providing: (1) That the commission should preserve, unchanged in substance, the confession of faith so far as it is clear; (2) that it should preserve the itinerant plan; (3) that it should "keep sacred the general usages and distinctive principles of the church on all great moral reforms as sustained by the Word of God, in so far as the province of their work may touch them." The conference of 1889, by adopting the report of their committee, to whom was referred the report of the church commission, adjudged and decided that the church commission had obeyed the instructions and limitations in respect to the changes made by them in the confession and constitution. Shall we review this decision? The commission was instructed to make no fundamental changes in the confession. The conference decided that they had obeyed this instruction. Still complainants urge this court to compare the old confession with the new, and for ourselves decide whether or not fundamental alterations have been made. This contention is pressed, notwithstanding the fact that in the long debate which preceded the adoption of the work of the commission not one word of objection was urged upon this account.

This brings us to the controlling question upon which our decision

must turn, namely: What effect will a civil court give to the interpretation and construction by the highest judicatory of an ecclesiastical body of its own fundamental law? Is that judgment subject to review in the civil courts? Or, will the civil courts accept the interpretation placed upon the organic law of the church by its highest judicatory, and apply the law so interpreted to the settlement of property questions depending upon that law? As we have already stated, the property here involved was not devoted by the express terms of any grant, gift, will, or sale to the support of any specific religious dogma, doctrine, or belief, but is property acquired by the church for the general use of the society for religious purposes, and with no other limitation. The property here in question is held for the particular use of a congregation, which is only one of numerous others united to form a general body of churches, and subject to the ecclesiastical control of the general conference, whose jurisdiction extends to all congregations composing the general body. The question here presented is merely one of identity,—which of the two bodies claiming to be the legitimate successor of the original united organization is the legal successor of the body to which this property was conveyed? When this question is answered, the property must be awarded to that organization. The decision of this question involves the interpretation of the organic law of the church in respect to the appropriate method of altering or amending that law. But that fundamental law has been construed, interpreted, and applied by the highest judicatory of this church before its division, and the very changes in the constitution and confession now complained of as irregular and revolutionary sanctioned and approved as having been made in accordance with the method prescribed by the fundamental law of the church for its own amendment. Shall we review that decision, and overturn its conclusiveness upon questions purely relating to ecclesiastical law and government, and take from the majority the general property of the church upon some difference of opinion as to whether the highest authority within the church had not mistaken the meaning of the church organic law? The question is not an open one in courts of the United States. It is the duty of this court under the law as settled to accept that decision as final, and as binding upon it in so far as that decision has application to the case for decision. This question was most thoroughly and elaborately considered by the supreme court of the United States in the leading case of *Watson v. Jones*, 13 Wall. 679-726. That case originated in a schism which occurred in the Presbyterian Church in respect to certain declarations made by its general assembly during the late Civil War touching the subjects of slavery and secession. One faction in the general church repudiated this action of the general assembly, as imposing unauthorized tests of membership in excess of its constitutional power and authority, while the other and larger party upheld its action, as within its ecclesiastical jurisdiction. The schism extended to the congregation whose property was involved in the case cited, and the decision depended upon the validity of this objectionable action of the general assembly. The supreme court, after conceding that there were certain very clear limits to the jurisdiction

of such a church judicatory as the general assembly of the Presbyterian Church, said:

"But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction; a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required by them,—becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and in a sense often used in the courts all of those may be said to be questions of jurisdiction. But it is easy to see that, if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may and must be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts, where property rights were concerned, the decision of all ecclesiastical questions."

After stating that the case then before the court involved property not devoted by the instrument under which it was held to the teaching of any particular doctrine or dogma, but property acquired by conveyance for the general use of a religious congregation which was one of many, united with others into a larger and general organization, and subject to the rule and control and bound by the judgments of a general assembly corresponding to the general conference of the United Brethren in Christ, and after stating that the schism which divided the congregation had resulted from a refusal to accept the final action and judgment of the general assembly, concluded by saying:

"In this class of cases we think the rule of action which should govern the civil courts, founded in the broad and sound view of the relations of church and state, under our system of laws, and supported by a preponderating weight of judicial authority, is that whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them. * * * In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts, and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals

as the organism itself provides for. Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian Churches) has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would, therefore, be an appeal from the more learned tribunal in the law which should decide the case to one which is less so."

The doctrine of this case has been accepted and applied by the highest courts of many states of this Union. Among these cases may be noticed: *Nance v. Busby*, 91 Tenn. 303, 18 S. W. 874; *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136; *Connitt v. Reformed Protestant Dutch Church*, 54 N. Y. 551; *Harrison v. Hoyle*, 24 Ohio St. 254.

The same questions here presented, and upon substantially the same record, have been decided against the complainants in the courts of several states within which church property was in controversy: *Lamb v. Cain*, 129 Ind. 486, 29 N. E. 13; *Rike v. Floyd*, 6 Ohio Cir. Ct. R. 80, affirmed by supreme court, 53 Ohio St. 653, 44 N. E. 1136; *Kuns v. Robertson*, 154 Ill. 394, 40 N. E. 343; *Schlichter v. Keiter*, 156 Pa. St. 119, 27 Atl. 45; *Philomath College v. Wyatt*, 27 Or. 390, 31 Pac. 206, and 37 Pac. 1022.

The case of *Watson v. Jones* is of binding and conclusive authority upon this court. There can be no doubt that the facts of this record bring this case distinctly and unequivocally within the principles of that case. We have not, therefore, deemed it necessary to consider very fully the ruling and judgment of the conference of 1885 or 1889 upon their merits, though our silence in regard thereto is not to be taken as in any degree indicating doubt as to the intrinsic rightness of their interpretation of the constitutional law of the church. We accept, however, the judgment of the conference of 1889 as final and binding upon this court. It follows, therefore, that organic succession and order is with the majority, who accepted the new constitution, and the property here in question is properly held and controlled by trustees appointed by the ecclesiastical organization entitled to control. The decree of the circuit court must be affirmed.

DAVIDSON et al. v. CALKINS et al.

(Circuit Court, S. D. California. February 6, 1899.)

No. 852.

1. TEMPORARY INJUNCTION—JURISDICTION OF COURT TO DETERMINE CAUSE ON MERITS.

A federal court, which is without jurisdiction to determine the question as to the ownership of property, will not, at the instance of one claimant, issue an injunction to preserve and protect it pendente lite.

2. EQUITABLE JURISDICTION OF FEDERAL COURTS—ENFORCING REMEDY GIVEN BY STATE STATUTE.

Enlarged equitable remedies given by the statutes of a state may be administered by a federal court unless they conflict with the distinction, strictly observed in said courts, between law and equity; but where there is a plain, adequate, and complete remedy at law for the enforcement of the right, a federal court, under Rev. St. § 723, is without jurisdiction of a suit in equity.¹

3. SAME—ADEQUATE REMEDY AT LAW.

A federal court is without jurisdiction of a suit in equity to determine or quiet the title to real estate of which defendant is in possession, though such a suit is authorized by the statute of the state, as the effect would be to draw into a court of equity a controversy properly cognizable at law.

4. ACTION—LEGAL OR EQUITABLE—CONTROVERSY OVER MINING CLAIM.

A right of action of a claimant to a mining claim, who is out of possession, against another in possession, concerns possessory rights, the title being in the United States; and his remedy is at law.

On Application for Preliminary Injunction.

M. L. Wicks and Albert M. Stephens, for complainants.
Barclay & Camp and Mulford & Pollard, for defendants.

WELLBORN, District Judge. Suit to quiet title to and restrain the defendants from working a mining claim. The present hearing is on an application for a temporary injunction. The bill alleges that the lands in dispute are a part of the public domain of the United States, and that they are mineral lands, and on the 2d day of February, 1894, were open to exploration, location, and purchase; that on said date George E. Bowers, a citizen of the United States, over the age of 21 years, located a mining claim on said lands, and caused notice thereof to be duly recorded, and thereafter, on the 5th day of February, 1898, sold and conveyed said property to complainants for the sum of \$3,500; that all the labor which the law requires has been duly performed on said claim; that the defendants, a short while before the commencement of this suit, forcibly ejected complainants from said lands, and took possession thereof, and that defendants still hold possession, and deny complainants' rights under the laws of the United States; that said mining claim has no value whatever except for its mineral-bearing rock, which is worth \$25 per ton net, and that defendants are now extracting and removing said rock at the rate of two tons per day, and will continue to do so, unless restrained by the order of this court, and that the defendants are insolvent; that the defendants have filed a pretended location notice on said premises, claiming the right to do so under the laws of the United States, and claiming that said Bowers had forfeited his rights to said premises, and that they (the defendants) are entitled thereto under said laws and by virtue of their said location; that said mining location of the defendants is in conflict with the statutes of the United States, and void. The prayer of the bill is for an injunction pendente lite, for a final decree that complainants are the owners and entitled to the possession of the premises, and for general relief.

¹ For jurisdiction in equity, see note to Barling v. Bank, 1 C. C. A. 514, and also note to O'Connell v. Reed, 5 C. C. A. 595.

The allegations of the bill above referred to in reference to the possession of the property are as follows:

"That on or about the 6th day of October, 1898, the defendants herein, knowing full well that said mining ground had been located as hereinbefore set forth, but disregarding the rights of all parties in interest therein, and in defiance of complainants' rights, and intending to deprive these complainants of their right and title to the said mining ground, did unlawfully and wrongfully enter upon and take the same, and the whole thereof, into the possession of them, the said defendants, ousting and excluding the complainants therefrom, and from the whole thereof; and ever since the said 6th day of October, 1898, the said defendants have withheld the possession of said mining claim, and the whole thereof, from these complainants, and do still withhold the possession thereof from complainants, denying complainants' rights thereto, and to the whole thereof, under the laws of the United States, and refusing to permit the complainants to enter thereon."

One of the grounds on which defendants resist the application for an injunction is that a suit to quiet title cannot be maintained in the federal courts when the defendant is in possession of the property, and that, therefore, an injunction pendente lite will not be granted under such circumstances. If the premise above stated be true, defendants' deduction therefrom logically follows. To me it seems too plain to admit of controversy that an injunction will not be issued at the instance of one of two or more conflicting claimants merely to protect and preserve property for the party who may show himself ultimately entitled thereto, unless the question of ownership can be determined by the court whose conservative jurisdiction is invoked. It is true that, where ejectment is pending in a federal court, the court may, on its equity side, by injunction or otherwise, protect the property until the common-law action is disposed of. *Buskirk v. King*, 18 C. C. A. 418, 72 Fed. 22. It is also true that ejectment will lie for a mining claim, although paramount title be in the United States. *Rev. St. U. S. § 910*. No such situation, however, is here presented. The case at bar is not auxiliary to any action pending on the law side of the court, but is an independent suit to quiet title, in which complainants seek a temporary injunction against threatened waste by the defendants, who are in possession of the property. Unless this court can grant the ultimate relief, it will not apply a provisional remedy. That such relief cannot be administered according to the English chancery system is conceded (*Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129), but complainants contend that under the Code practice of California an action to quiet title can be maintained in the state courts, even though the defendant holds adverse possession, and that this statutory remedy will be enforced by the federal courts exercising jurisdiction in said state. There seems to be no doubt but that the state practice is as contended for by complainants. *Code Civ. Proc. Cal. § 738*; *Hyde v. Redding*, 74 Cal. 493, 16 Pac. 380; *Taylor v. Clark*, 89 Fed. 7. The other contention of complainants, however, that the remedy thus afforded by local statute will be administered in the federal courts, is not well taken. *Gordan v. Jackson*, 72 Fed. 86; *Gombert v. Lyon*, 80 Fed. 305; *Taylor v. Clark*, *supra*; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712.

The extract quoted in complainants' brief from *Smyth v. Ames*, 169 U. S. 516, 18 Sup. Ct. 418, as follows: "It is true that an enlargement of the equitable rights arising from the statutes of the state may be administered by the circuit courts of the United States,"—unquestionably states the law, but it must not be inferred from said statement that the circuit courts of the United States will always administer equitable rights arising from the statutes of a state. On the contrary, such rights will be administered in the federal courts only in so far as they do not conflict with the distinction, strictly observed in said courts, between law and equity. Section 723, Rev. St. U. S., which provides that "suits in equity shall not be sustained in either of the courts of the United States where a plain, adequate, and complete remedy may be had at law," is a limitation upon federal courts in their enforcement of equitable rights arising from local statutes, such as section 738, Code Civ. Proc. Cal. Therefore, while federal courts in California can entertain a bill to quiet title when neither complainant nor defendant is in possession, since, under such circumstances, there is no adequate remedy at law, said courts cannot entertain a bill to quiet title where defendant is in possession, for the reason that in such a case the party dispossessed has his remedy by ejectment. This subject I had occasion to review briefly in *Taylor v. Clark*, *supra*, and then said:

"There is another reason, however, why the application for an injunction must be refused. The equity jurisdiction of the federal courts is uniform throughout the Union, unaffected by state laws, and the usages of the high court of chancery in England furnish the chancery law, which is recognized by the federal courts in all the states, and under this system, where relief can be given by the English chancery courts, similar relief may be given by the courts of the Union. *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 518; *Boyle v. Zacharie*, 6 Pet. 648; U. S. v. *Howland*, 4 Wheat. 108. Under the English chancery law referred to, a suit to quiet title could not be maintained unless the plaintiff was in possession of the land when suit was brought. In California this rule has been changed by local enactment, and now such a suit can be maintained in the state courts, even though the plaintiff is out of possession, and the defendant actually holds adverse possession at the commencement of the suit. Code Civ. Proc. § 738; *Hyde v. Redding*, 74 Cal. 493, 16 Pac. 380. The supreme court of the United States, construing a statute of the state of Nebraska somewhat similar to the section of the California Code above cited, has held that a suit to quiet title can be maintained in the circuit court of the United States when neither of the parties are in possession of the property, but intimates strongly that the suit cannot be maintained if the defendant is in possession at its commencement. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495. The court says: 'It does not follow that, by allowing in the federal courts a suit for relief under the statute of Nebraska, controversies cognizable in a court of law will be drawn into a court of equity. There can be no controversy at law respecting the title or right of possession to real property when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking.' I am of the opinion that if, at the final hearing, the defendant should sustain his answer, and show that at the commencement of the suit he was in actual possession of the land in controversy, the bill would have to be dismissed. Such being the case, a

temporary injunction ought not to be granted, and the application therefor must be denied."

When I wrote the opinion from which this quotation is taken, the case of *Whitehead v. Shattuck*, *supra*, cited by the defendants on the present hearing, had not been brought to my attention, and therefore I made no reference to it. Said case, however, I find, upon careful examination, is confirmatory of my own previously expressed views, as quoted above. In that case,—*Whitehead v. Shattuck*,—which was a suit to quiet title, brought under statutory provisions of the state of Iowa similar to those of California, Justice Field says:

"The Code of Iowa enacts that 'an action to determine and quiet the title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession,' implying that the action may be brought against one in possession of the property. And such has been the construction of the provision by the courts of that state. *Lewis v. Soule*, 52 Iowa, 11, 2 N. W. 400; *Lees v. Wetmore*, 58 Iowa, 170, 12 N. W. 238. If that be its meaning, an action like the present can be maintained in the courts of that state, where equitable and legal remedies are enforced by the same system of procedure, and by the same tribunals. It thus enlarges the powers of a court of equity, as exercised in the state courts, but the law of that state cannot control the proceedings in the federal courts, so as to do away with the force of the law of congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law,' or the constitutional right of parties in actions at law to a trial by a jury."

After stating the salient points of the opinion in *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, which was also written by him, Justice Field proceeds as follows:

"All that was thus said was applied simply to the case presented where neither party was in possession of the property. No word was expressed intimating that suits of the kind could be maintained in the courts of the United States where the plaintiff had a plain, adequate, and complete remedy at law; and such inference was specially guarded against. Said the court: 'No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to possession,—the actual owner of the fee,—is helpless in the matter, unless he can resort to a court of equity. It does not follow that by allowing, in the federal courts, a suit for relief under the statute of Nebraska, controversies properly cognizable in a court of law will be drawn into a court of equity. There can be no controversy at law respecting the title to, or right of possession of, real property, when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking.' It is thus seen that the very case that is now before us is excepted from the operation of the ruling in *Holland v. Challen*, or at least was designedly left open for consideration whenever similar relief was sought where the defendant was in possession of the property."

In the same case—*Whitehead v. Shattuck*—Justice Field disposes of the cases of *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. 213, and *Frost v. Spittley*, *supra*, which are authorities relied on by complainants in the case at bar, as follows:

"Nor can the case of *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. 213, be deemed to sustain the plaintiff's contention. It was there only held that the legislation of the state may be looked to in order to ascertain what constitutes a cloud upon a title, and that such cloud could be removed by a court of the United States sitting in equity in a suit between proper parties. The question did not arise as to whether the plaintiff had a plain, adequate, and complete remedy at law, but whether a suit to remove the cloud mentioned would lie in a federal court. Nothing was intended at variance with the law of congress excluding the jurisdiction of a court of equity where there is such a full remedy at law, or in conflict with the constitutional guaranty of the right of either party to a trial by jury in such cases. In *Frost v. Spitley*, 121 U. S. 552, 557, 7 Sup. Ct. 1129, subsequently decided, the court referred to *Holland v. Challen* as authorizing a bill in equity to quiet title in the circuit court of the United States for the district of Nebraska by a person not in possession, 'if the controversy is one in which a court of equity alone can afford the relief prayed for,' recognizing that the decision in that case went only to that extent."

In *Scott v. Neely*, supra, the supreme court of the United States, Justice Field writing the opinion, again refers to *Holland v. Challen* thus:

"In the second case [*Holland v. Challen*] the suit was brought to quiet the title of the plaintiff to certain real property in Nebraska against the claim of the defendant to an adverse estate in the premises. It was founded upon a statute of that state which provided: 'That an action may be brought and prosecuted to final decree, judgment or order by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title to such real estate.' In that suit neither party was in possession, and the jurisdiction was maintained in equity, as no remedy in such case could be afforded in an action at law. As we there said, speaking of unoccupied lands: 'It is a matter of every-day observation that many lots of land in our cities remain unimproved because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements upon it, and others are unwilling to purchase it, much less to erect buildings upon it, with the certainty of litigation, and possible loss of the whole. And what is true of lots in cities, the ownership of which is in dispute, is equally true of large tracts of land in the country. The property in this case, to quiet the title to which the present suit is brought, is described in the bill as unoccupied, wild, and uncultivated land. Few persons would be willing to take possession of such land, inclose, cultivate, and improve it, in the face of a disputed claim to its ownership. The cost of such improvements would probably exceed the value of the property. An action for ejectment for it would not lie, as it has no occupant; and if, as contended by the defendant, no relief can be had in equity because the party claiming ownership is not in possession, the land must continue in its unimproved condition. It is manifestly for the interest of the community that conflicting claims to property thus situated should be settled, so that it may be subjected to use and improvement. To meet cases of this character, statutes, like the one of Nebraska, have been passed by several states, and they accomplish a most useful purpose. And there is no good reason why the right to relief against an admitted obstruction to the cultivation, use, and improvement of lands thus situated in the states should not be enforced by the federal courts, when the controversy to which it may give rise is between citizens of different states.' It was objected in that case that, if the suit was allowed under the statute in the federal courts, controversies properly cognizable in a court of law would be drawn into a court of equity; but the court said: 'There can be no controversy at law respecting the title to, or right of possession of, real property, when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal

court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law.' There is nothing in that decision that gives sanction to the enforcement in the federal courts of any rights created by state law which impair the separation there required between actions for legal demands and suits for equitable relief. In the subsequent case of *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, Holland v. Challen was referred to and explained, and it was said that a suit in equity for real property against a party in possession would not be sustained, because there would be a plain, adequate, and complete remedy at law for the plaintiff, and that it was only intended to uphold the statute so far as suits in the federal courts were concerned, in authorizing such suits against persons not in possession. It follows from the views expressed that the court below could not take jurisdiction of this suit, in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief."

From the foregoing quotations it will be seen that the supreme court of the United States has repeatedly and in unmistakable terms declared that the federal courts will not enforce any rights created by state law, which, in the language of the opinion in *Scott v. Neely*, supra, "impair the separation there required between actions for legal demands and suits for equitable relief."

All of the authorities relied on by complainant, to some of which I have adverted, are in harmony with the distinction already stated by me that federal courts, under local statutes similar to section 738 of the Code of Civil Procedure of California, will entertain suits to quiet title where neither complainants nor defendants are in possession, but will not entertain such suits where the defendants are in possession. Thus, in *Dick v. Foraker*, 155 U. S. 413, 15 Sup. Ct. 129, the court says:

"The law of Arkansas authorizes a bill to remove a cloud on a title whether or not the complainant be in possession. Acts Ark. 1891, p. 132. By reason of this statute, a bill in equity may be maintained in the circuit court of the United States by a person out of possession against another person who is also out of possession. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495."

In *Bardon v. Improvement Co.*, 157 U. S. 328, 15 Sup. Ct. 650, where complainant was in possession of the land, the court obviously had in mind and approved the distinction above stated, as appears from the first paragraph of the opinion, which is as follows:

"We remarked in *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554, that while the rule was settled that remedies in the courts of the United States at common law or in equity, according to the essential character of the case, are uncontrolled in that particular by the practice of the state courts, yet an enlargement of equitable rights by state statutes may be administered by the circuit courts of the United States as well as by the courts of the state; and when the case is one of a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction."

In *Harding v. Guice*, 25 C. C. A. 352, 80 Fed. 162, the defendant was not in possession, and therefore the suit was properly brought. In that case, the court, referring to *Holland v. Challen*, *Whitehead v. Shattuck*, and other cases, says: "But these cases all turned upon the crucial question: Is this a suit cognizable in equity, or has complainant a plain, adequate, and complete remedy at law?" This "crucial question," more specifically stated, is, as I have already shown, whether or not defendant is in possession. If he is not, there

is no adequate remedy at law, and a suit in equity will lie. If the defendant is in possession, ejectment is appropriate, and the interposition of a court of equity forbidden.

In *Rich v. Braxton*, 158 U. S. 378, 15 Sup. Ct. 1017, the equity jurisdiction of the court was sustained on the ground that the bill was brought to set aside certain tax deeds, under which defendants claimed title to lands in West Virginia, as inoperative, fraudulent, and void, and as clouds upon plaintiff's title. As stated in the opinion of the court, the principal ground upon which the contrary view was rested was that the invalidity of each of said deeds was apparent on its face, with reference to which the court said:

"In the case before us, it cannot be said that the invalidity of the deeds which the plaintiffs seek to have canceled appears on their face. It is not clear that their invalidity can be placed beyond question or doubt without evidence dehors those deeds."

The question whether or not a bill to quiet title could be maintained where the defendant was in possession of the property in dispute was not discussed by the court, and the opinion evidently assumes that the plaintiff was in possession, as shown by the last clause of the following extract therefrom:

"Upon the question of the jurisdiction of a court of equity to give the relief sought by the bill, but little need to be said. In *Simpson v. Edmiston*, 23 W. Va. 675, 678, the court said that it had been repeatedly held that a court of equity has jurisdiction to set aside an illegal tax deed; citing *Forqueran v. Donnally*, 7 W. Va. 114, *Jones v. Dils*, 18 W. Va. 759, and *Orr v. Wiley*, 19 W. Va. 150. And in *Danser v. Johnsons*, 25 W. Va. 380, 387, 'It is fully settled in this state that a court of equity has jurisdiction to set aside a void tax deed.' These authorities make it clear that, if this case had remained in the state court, no objection could have been made to the form of the suit. But as the jurisdiction of the courts of the United States sitting in equity cannot be controlled by the laws of the states or the decisions of the state courts (except that the courts of the United States sitting in equity may enforce new rights of an equitable nature created by such laws,—*Clark v. Smith*, 13 Pet. 195; *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495), it is proper to say that, according to settled principles, the plaintiffs were entitled to invoke the aid of a court of equity."

The case of *Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, does not reverse nor affect the ruling in *Whitehead v. Shattuck*, *supra*, approved in *Scott v. Neely*, *supra*. The bill in *Coal Co. v. Doran*, *supra*, was filed to establish a deed to the property in controversy, alleged to have been executed, but unrecorded and lost; to obtain the construction of another deed of the same land, and the correction of a mistake therein; to set aside certain other deeds, alleged to be clouds upon complainant's title; and to restore complainant to, and quiet him in the possession of, the property, and to enjoin and restrain a commission of waste by the defendant. Near the end of the opinion occur the following paragraphs:

"It is argued at length that a court of equity had no jurisdiction in this case. The bill alleged that complainant was 'seised in fee of the said tract of two hundred acres, more or less'; and that this is a sufficient allegation of possession of the land, has been determined by this court. *Gage v. Kaufman*, 133 U. S. 471, 10 Sup. Ct. 406.

"As heretofore stated, such possession as the land was susceptible of had been taken by Witten, and maintained by himself and his grantees down

to the time, after October, 1884, when appellant entered upon a part of complainant's land in the commission of a trespass, and commenced committing acts of waste upon the property. It cannot be held that this trespass on appellant's part constituted a possession which in itself would drive complainant to an action of ejectment."

The decision in that case proceeded upon the theory that plaintiff was in possession of the land, and all that can be fairly implied from the latter of the above-quoted paragraphs is that the trespasses shown did not oust plaintiff's possession. In the case at bar, complainants could not, of course, have any standing in this court, if they were in possession of the property, because, in that event, there would be nothing for this court to try, as the paramount title is in the United States, and the government has provided a special method of determining to which of two or more conflicting claimants for mineral lands patents shall issue. This method is succinctly stated by the supreme court of the United States as follows:

"Section 2325 of the Revised Statutes points out how patents for mineral lands may be obtained. Application is filed in the proper land office, as therein prescribed, and notice of such application published, and, if no adverse claim is filed at the expiration of sixty days of publication, it is assumed that the applicant is entitled to a patent, and that no adverse claim exists. Section 2326 provides as follows: 'Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.' It is then provided that after judgment the party shall file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general as to the requisite amount of labor and improvements, and that the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, whereupon a patent shall issue for the claim. Thus the determination of the right of possession as between the parties is referred to a court of competent jurisdiction, in aid of the land office, but the form of action is not provided for by the statute, and, apparently, an action at law or a suit in equity would lie, as either might be appropriate under the peculiar circumstances—an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession." *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971.

Again, the same authority has said:

"Generally speaking, while the legal title remains in the United States the grant is in process of administration, and the land is subject to the jurisdiction of the land department of the government. * * *" *Lumber Co. v. Rust*, 168 U. S. 592, 18 Sup. Ct. 209.

On the same subject, the supreme court of California says:

"In the briefs of appellant and respondent this is called 'an action to quiet title.' It is a suit under section 738 of the Code of Civil Procedure, and the complaint is to be treated as a bill in equity. The general verdict of the jury, therefore, is to be disregarded. If this were the only question to be considered, the cause would be remanded to the court below to find the facts. But the case made by plaintiff simply shows that he is in possession. As against a mere trespasser, one in possession of a portion of the public land

will be presumed to be the owner, notwithstanding the circumstance that the court has judicial notice that he is not the owner, but that the government is. This rule has been maintained from motives of public policy, and to secure the quiet enjoyment of possessions which are intrusions upon the United States alone. But it would be carrying a presumption against the fact to an absurdity to say that one in possession, who has not acquired the fee from the government,—the true owner,—is entitled to a decree, the practical effect of which is to prohibit a third person from obtaining title by purchase, or by appropriate proceedings under statutes of the United States. The respective claims of conflicting claimants may be asserted in the appropriate tribunals established by the government for that purpose. A decree here in favor of plaintiff would have no effect by way of inducement to the officers of the land department of the United States to issue the patent to plaintiff; and, if we had the power, it would be an illy-advised employment of equity jurisdiction to prevent the defendant from proceeding with his application, or, worse still, to decide in advance that he had no right on which to base his application." *Brandt v. Wheaton*, 52 Cal. 433.

In the case at bar the real controversy between the parties manifestly concerns possessory rights, and therefore complainants' remedy, whatever it may be, must rest upon the theory that defendants are wrongfully in possession, and on this theory complainants' remedy is an action at law, not a bill in equity. In addition to the cases already cited, see *Lacassagne v. Chapuis*, 144 U. S. 119, 12 Sup. Ct. 659.

For the reasons and upon the authorities above indicated and cited, I am of opinion that the bill now before me does not state a case for equitable relief.

Numerous other questions have been discussed by the parties in their respective briefs, but the conclusion just announced makes it unnecessary for me to pass upon any of them now. Injunction refused, and restraining order vacated.

(February 14, 1899.)

Since the filing of my opinion herein, February 6, 1899, another case—the one cited below—has been brought to my attention, which is directly in point, and supports the conclusions reached by me in said opinion. The decision was rendered by Judge McKenna, then on the circuit bench, now justice of the supreme court, and holds, quoting from the syllabus, as follows:

"In federal courts sitting in states where the local statutes have dispensed with possession by complainant as a prerequisite to maintaining the suit, a bill in equity to quiet title to land is demurrable which fails to allege affirmatively either that plaintiff is in possession, or that both complainant and defendant are out of possession." *Railroad Co. v. Goodrich*, 57 Fed. 879.

NATIONAL BANK OF BALTIMORE V. MAYOR, ETC., OF BALTIMORE
et al.

(Circuit Court, D. Maryland. March 10, 1899.)

NATIONAL BANKS—TAXATION—DISCRIMINATION.

The fact that evidences of debt and shares of stock in foreign corporations, owned by residents of Maryland, cannot be taxed for county and city purposes at a greater rate than 30 cents per \$100 of actual market value, as provided by Act Md. 1896, c. 143, § 201, does not constitute an

illegal discrimination against national banks, the shares of which might be taxed at a higher rate, within Rev. St. § 5219, prohibiting the taxation of national banks at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of a state, in the absence of proof that the securities taxed at a less rate belonged to a class of investments which directly compete with the business of national banks.

Bernard Carter, Willis & Homer, and George R. Gaither, for complainant.

John V. L. Findlay and Leon E. Greenbaum, for defendants.

MORRIS, District Judge. This is a bill in equity praying an injunction to restrain the tax collector of the city of Baltimore from collecting from the complainant, the National Bank of Baltimore, as the city tax on the shares of its stock owned by residents of Baltimore, any sum in excess of 30 cents on the \$100 of the market value, as ascertained by the state tax commissioner, which amount the complainant offers to pay. The tax demanded by the city collector is for the year 1897, and is at the rate fixed by the mayor and city council of Baltimore as the rate required for its general municipal purposes, viz. at the rate of \$2 in every \$100 of the assessed value of the shares belonging to residents of the city. This tax is assessed and demanded, in respect of shares of complainant's stock, by virtue of a portion of section 2 of chapter 120 of the Laws of Maryland of 1896, by which it is enacted:

"That all shares or interest in any joint stock company and all shares of stock in any bank incorporated under the laws of Maryland, and all shares of stock in any national bank located in Maryland, and all shares of any corporation incorporated under the laws of Maryland are to be valued and assessed for the purpose of state, county and municipal taxation to the owner thereof in the county or city in this state in which said owners may respectively reside and the taxable value of such shares is to be ascertained and determined and taxes thereon levied and collected as is now or may be hereafter provided by law."

It is not complained that there is any discrimination either in the valuation or taxation of the shares of the complainant, or of any of the national banks located in Maryland, as compared with state banks, or as compared with other corporations of any kind incorporated under the laws of Maryland; but the complainant's contention is that there is a discrimination between the rate of tax imposed upon national bank shares, as compared with the rate of tax on bonds, certificates of indebtedness, and evidences of debt, in whatsoever form, and upon all shares of stock in foreign companies owned by residents of Maryland, as to which class of property section 201 of chapter 143 of the act of 1896 provides that they shall be assessed and valued to the owners thereof at their actual market value, and that upon that valuation there shall be paid the regular rate of taxation for state purposes, but for county or city taxation there shall be paid only at the rate of 30 cents on each \$100, and no more. The contention of the complainant is that the bonds, certificates of indebtedness, and evidences of debt which are thus taxed at 30 cents on the \$100 are the securities in which it deals, and in which it invests its capital, and that there are private bankers and other citizens of Maryland who

have moneyed capital which they employ in the same general business as national banks, and who are taxed only on the securities in which their capital is invested; and that so far as their capital is invested in evidences of debt, which, under section 201, are taxed only at 30 cents on the \$100, there results a discrimination, because the shares of the capital stock of the national banks are taxed for the year 1897, in the city of Baltimore, at the rate of \$2 on each \$100 of their market value.

The act of congress which allows taxation of national bank shares is section 5219 of the Revised Statutes:

"Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

There is no contention that the Maryland act of 1896 contains any intentional discrimination against national banks, or was enacted in any spirit of hostility towards them; but it is contended that the working of the law is such that, as evidences of debt are taxed at a less rate than the shares of national bank stock, persons who are not incorporated, and therefore have no fixed and declared capital, are taxed only on the evidences of debt which they own at the time of assessment, and therefore escape at a less rate than the capital of national banks. It is not denied by the complainant that the great competitors of the banks in loaning money and dealing in evidences of debt are the trust companies, and similar corporations, which, if incorporated in Maryland, all pay the full rate on the value of their shares; but it is alleged that the capital of private and unincorporated bankers is moneyed capital sufficient in amount, in the city of Baltimore, to result in a material discrimination. The burden of supporting this contention is upon the complainant, and requires it to show, not only that the moneyed capital so competing with the capital represented by the shares of the national banks is a sum sufficient to constitute a discrimination material in its amount, but also that it is a discrimination which it is reasonably certain could be avoided by a different tax law. If the clause of section 2 of chapter 120 of the Maryland act of 1896 imposing the full rate of tax on the shares of all corporations had contained the words, "and all moneyed capital of unincorporated citizens of Maryland used by them in the same general business as that carried on by national banks in Maryland," and the tax collectors made a bona fide effort to enforce that clause of the law, there could be no ground for this bill of complaint. If a banker with \$200 of his capital buys \$10,000 worth of bonds, and carries them with the aid of loans from banks or trust companies, it is the \$200 of

moneyed capital that comes into competition with the moneyed capital represented by the shares of a national bank, and not the \$10,000 of bonds; or if a banker buys commercial paper, and with his indorsement rediscounts with a bank, it is not his moneyed capital, but the bank's capital, or its deposits, which he is using. So it may be true that the private bankers of a city are doing a large volume of business, and at the same time it may be true that the moneyed capital of their own which they are using is insignificant. There is in the testimony no evidence of the amount of capital employed by these private bankers of Maryland in their business. A witness for the complainant states that, in his judgment, it would, in the aggregate, exceed \$10,000,000; but this is confessedly only a guess, based largely upon the rating given to the banking firms of Baltimore city by the reports of the mercantile agencies. These reports, as is well known, are based upon approximations of the whole wealth of all the partners of the firm, as in law all their property is at the risk of their business. The bankers themselves who were examined by the complainant were not interrogated as to the capital invested in the banking business carried on by them. One testified that his firm returned to the tax assessors the capital used in their business, and paid the full tax rate upon it; and the tax collector testified that other banking firms did the same. One of the bankers examined by the complainant stated that his firm returned to the assessor the stocks and bonds in which their money was invested at the date of the return; that much of it was the stock of domestic corporations, on which the corporation had paid the full tax, so that it was not subject to tax in their hands, and, as to the bonds, they paid the 30-cent rate; that the stocks and bonds often amounted to many times their capital, because, as they did hardly any discount business, they invested their deposits in stocks and bonds; that the only way in which they competed with banks was by offering interest to depositors, so as to attract deposits, which they then invested in stocks and bonds; that, if the securities in which they invested their deposits were taxed at the \$2 rate, there would be nothing left for them, but that at the 30-cent rate bankers who held securities did return them to the assessor. It is to be remembered that banks do not return their deposits at all, which aggregate often two and three times the amount of the capital; so that as to deposits, so far as they are represented by 30-cent securities, on which the tax is paid by private bankers, the banks have the advantage. The proof fails to show to my mind that the capital used by private bankers is of such amount that, if returned for taxation, it would relieve the banks from any material disadvantage, or that under any law any considerable amount would ever be placed upon the tax lists. The tax collector testified that after examining several bankers, and taking their affidavits, he was satisfied that they were paying on their capital at the regular city rate, and ceased further investigation, because he was satisfied that their assessments were correct.

There are two ways in which the banks can be injured by discrimination in taxation: One is that, if other moneyed capital escapes taxation, the rate imposed upon all the assessed capital is greater; and the other is that if other moneyed capital used in busi-

ness, which competes with theirs, escapes taxation, it can make a profit, even if loaned out at a less rate than the banks can afford to loan. As to the first ground, the proof shows that when bonds, evidences of debt, and stocks in foreign corporations, under the law as it stood prior to 1896, were taxed at the full rate, there was only, in the city of Baltimore, a little over \$6,000,000 of such property on the tax lists for taxation, while under the present law, under the 30-cent rate, there was assessed for taxation nearly \$59,000,000. The collection of revenue by taxation is a practical problem, and it would be very unwise for courts to ignore practical results in the search for a theoretical uniformity. It was because of the persistent complaint, prior to 1896, that there must be a large amount of securities which the assessors had failed to get upon the tax lists, and the patent fact that, if the tax on a 4 per cent. bond amounted to more than half the interest, the capital it represented must, if ever actually taxed at the full rate, be driven from the city, to some place where the law was less exacting, that the legislature was led to the enactment of section 201 of chapter 143 of the Laws of 1896. This law was the result of years of discussion, and of most serious political struggles, and of the final acceptance by the legislature of the wise suggestions of men of the largest experience in business affairs and finance. It cannot be said, in the light of the experience of prior years, that if the full tax was imposed upon all bonds, certificates of indebtedness, or evidences of debt, the basis of assessment would be nearly as great as it is now, or that the rate of taxation would be less. Moreover, the discrimination forbidden by section 5219, as construed by the supreme court, does not have reference to the rate of taxation upon the holders of evidences of loans and securities, if these securities belong to a class of investments which does not compete with the business of national banks. First Nat. Bank of Aberdeen v. Chehalis Co., 166 U. S. 440-461, 17 Sup. Ct. 629. The bonds, certificates of indebtedness, and evidences of debt, which, under section 201 of chapter 143 of the Laws of 1896, are taxed at the 30-cent rate, if issued by corporations of Maryland, represent the debts of corporations the owners of whose shares are taxed the full rate upon the value of their shares, and so the full rate is paid upon all the property of the corporation, and, if issued by individuals, residents in Maryland, they represent the debts of persons who are taxable upon the full value of their real and personal property, without deduction for their debts; and presumably the same is true of corporations and individuals foreign to Maryland. So that all that class of property consisting of evidences of debt might be exempt from taxation upon the ground of double taxation, and upon other grounds upon which it has been held that mere evidences of debt may fairly be exempt. It is only moneyed capital, employed, by the persons to whom it belongs, in the business of discounting commercial paper, making loans on collateral security, buying and selling bills of exchange, negotiating loans, and dealing in securities, and the like operations of the business of banking, which comes in competition with the moneyed capital invested in national banks. As was said by Mr. Justice Matthews:

"Corporations and individuals carrying on these operations do come into competition with the national banks, and capital in the hands of individuals

thus employed is what is intended to be described by the act of congress." *Mercantile Bank v. City of New York*, 121 U. S. 138-156, 7 Sup. Ct. 826.

The capital so employed is shown by the defendant to have been, with respect to some of the bankers in Baltimore city, assessed and taxed at the full rate. That it is not so with all is not through a defect in the law, or intentional discrimination of the assessors or collectors, but from the inherent difficulties of ascertaining it. The final clause of section 2 of chapter 120 of the Laws of 1896, taxing "all other property of every kind, nature and description within this state," is held by the taxing officers to include the banking capital of private bankers.

In the very instructive arguments of the able counsel many points on both sides of this controversy were elaborately and learnedly presented, which it does not seem necessary should be now reviewed in this opinion. The contention that the shares of foreign state banks and other foreign corporations held by citizens of Maryland is monied capital, which comes in competition with national banks in Maryland, cannot be maintained, and it would be no illegal discrimination if the public policy of the state was to levy no tax at all upon them. Without attempting to extend this opinion to embrace all the points raised in argument or by the pleadings, I hold that the defendants' demurrer to the seventeenth paragraph of the bill must be sustained, and that the complainant is not entitled to the relief asked by its bill.

UNITED STATES v. BEEBE et al.

(Circuit Court of Appeals, Fifth Circuit. February 21, 1890.)

No. 639.

JUDGMENTS—GROUND FOR SETTING ASIDE IN EQUITY—FRAUD.

A court of equity will not set aside a judgment rendered by a court of competent jurisdiction, on the ground of fraud, because of false statements made by the defendants to the court as to their financial condition, by which the court was induced to render, and the plaintiff to accept, a judgment for less than the amount sued for or than was actually due.

Appeal from the Circuit Court of the United States for the Middle District of Alabama.

This is an appeal from a decision of the circuit court of the United States for the Middle district of Alabama, sustaining a demurrer to the bill of complainant. The bill was filed by the United States of America, by its attorney general, against Eugene Beebe and others, alleging that the said Eugene Beebe and Ferris Henshaw were sureties on the official bond of one Francis Widmer, collector of internal revenue of the Second district of Alabama, in the sum of \$50,000, conditioned that said Widmer should faithfully perform the duties of said office; that said Widmer did not faithfully perform said duties, but failed to pay over to the United States the sum of \$28,158.56, and that said sum is still due, with interest from January 6, 1874; that on the 3d day of June, 1880, separate suits at law were commenced in the circuit court of the United States for the Middle district of Alabama against said Eugene Beebe and against William T. Hatchett, administrator of the estate of said Ferris Henshaw, for the recovery of the sums for which said Widmer, as collector, was in default; that said suits were continued until February 6, 1885, when judgments were severally entered against said defendants for \$100 each and costs, and said Beebe, on the 1st day of July, 1886, paid into the treasury of the United States the sum of \$109.85, the amount of the judg-

ment and costs, but that the judgment against said Hatchett, as administrator, is due and unpaid. The bill then proceeds as follows: "That said judgments were entered under the following circumstances: That said defendants came into court, and stated and represented in open court, and they caused to be stated and represented for them, that said Beebe and said Ferris Henshaw were poor men, and that said Beebe and the estate of said Ferris Henshaw were without property out of which the said judgments could be paid and collected. That no part of said judgments could be collected by due process of law. That nothing could be made out of them, or either of them, or their estates, by execution, but that, if the court would allow a jury and verdict to be entered against them for one hundred dollars, they, and each of them, would pay said judgments and costs. That no evidence or proof was or had been introduced in said causes, or either of them, and indebtedness of said Beebe and Henshaw to the United States then being twenty-eight thousand one hundred and fifty-eight dollars and fifty-six cents (\$28,158.56), and interest, or other large sum, and the statements and representations aforesaid only were before the said circuit court at the time of the entry of said judgments, and no hearing or determination upon the law or the facts involved in said cases was ever had in said court; whereupon the court remarked that, unless the district attorney of the United States objected, the causes might be disposed of as suggested aforesaid. Said district attorney did not object, and said judgments for one hundred dollars and costs were entered in each of said causes. That said statements and representations, made as aforesaid, by and on behalf of, and for, said Beebe and said Ferris Henshaw, and the estate of said Ferris Henshaw, were wholly untrue, and were made to deceive said court and United States attorney, and for the purpose, and with the intent, to defraud the United States. That said court and United States attorney had no authority in law to accept said statements and representations, which were not made under oath, nor in the course of any judicial proceeding, and were not, and were not supported nor verified by, evidence or proofs; and that said acts of said court and United States attorney amounted, in law and in fact, to, and was, and was intended to be, a mere naked compromise of the claim and demand of the United States against said Eugene Beebe and Ferris Henshaw, and the estate of said Ferris Henshaw, which said court and United States attorney had no authority, but were inhibited by law, to make, entertain, and consummate. That said court was without jurisdiction and power to determine said causes in the manner aforesaid; and that said alleged judgments for one hundred dollars and costs are null and void ab initio, and of no effect, and should be vacated and held for naught in this court of equity."

W. S. Reese, Jr., for the United States.

W. A. Gunter, for appellees Henshaw Heirs.

H. C. Tompkins, for appellees Montgomery Light Co., Montgomery Land & Improvement Co., Southern Cotton Oil Co., Abbie F. Rice, and W. R. Waller.

Before McCORMICK, Circuit Judge, and SWAYNE and PARLANGE, District Judges.

SWAYNE, District Judge (after stating the facts as above). It is evident that this is a suit to vacate, annul, and set aside the judgment of a court, regularly entered, in a matter of which it had jurisdiction, with all the parties before it, on the ground that the said defendants Beebe and Henshaw stated to the court that "they were poor men, and were without property; that nothing could be made out of them by execution; and that these statements were wholly untrue, and were made to deceive the court and United States attorney, and with the intent to defraud the United States." In U. S. v. Throckmorton, 98 U. S. 61, Mr. Justice Miller announced the estab-

lished doctrine on this subject to be "that the acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." It is difficult to see upon what theory the judgment in this case can be set aside. The alleged false statements in the suits brought by the United States on the bond in question were not such as to deceive a person of ordinary care. They could not have deceived the district attorney, who represented the government, either as to the amount due on the bond or as to the property owned by the defendants. They did not in any way prevent the government from showing its cause of action, and taking judgment for the full amount due, if it saw fit to do so. Then, in about 15 months after the entry of said judgment, the government accepted satisfaction of the same by the officers of the treasury department, accepting the \$100, with interest, from Beebe. We think the facts of this case bring it under the well-known rule announced in U. S. v. Throckmorton, *supra*, and the cases following it, and that the judgment below should be affirmed.

FARMERS' LOAN & TRUST CO. v. STUTTGART & A. R. R. CO.
(BARSTOW'S EX'RS, Interveners).

(Circuit Court, E. D. Arkansas, W. D. February 21, 1899.)

1. RAILROADS—INSOLVENCY AND RECEIVERSHIP—PREFERRED LIENS FOR MATERIALS.

A guarantor of a debt contracted by a railroad company for rails, who pays the debt, has no greater claim in equity to a lien on the road superior to a prior mortgage than the seller of the rails would have if unpaid.

2. SAME—MATERIALS USED IN CONSTRUCTION OF ROAD.

There is no principle of equity recognized and applied in the foreclosure of railroad mortgages which entitles a debt contracted for materials used in the original construction of a railroad, which has been previously mortgaged, to preference over the mortgage as a lien on the road.

3. SAME.

A purchaser of notes executed by one railroad company cannot establish a lien therefor on the property of another, superior to that of a prior mortgage, merely because the maker used the proceeds in the construction of the second road.

4. SAME—TAXES ADVANCED BY AGENT.

One who, at the request of a railroad company, as its agent, pays taxes due on its property, is entitled to a lien thereon for the amount advanced superior to that of a mortgage.

This is a hearing on interventions by the executors of Amos C. Barstow, deceased, in a foreclosure suit against the Stuttgart & Arkansas River Railroad Company, claiming preferential liens on the property of the defendant, or the proceeds of its sale.

J. M. & J. G. Taylor, for complainant and interveners.

P. C. Dooley, for defendant.

John McClure, for receiver.

WILLIAMS, District Judge. Three interventions are presented by the executors of the estate of Amos C. Barstow, deceased, which, for the purpose of hearing, have been treated as consolidated, whereby it is sought to charge the corpus of the railroad property, or the fund arising from its sale, with the payment of certain sums of money with a lien superior and paramount to that created by mortgage described in complainants' bill, notwithstanding the fact that the mortgage was executed and recorded prior to the time of the interveners' demands.

The first claim, it is alleged, arises out of an alleged contract of guaranty in relation to four notes executed by the defendant railroad company and Francis M. Gillett to the Illinois Steel Company for \$1,650.65 each, payable, respectively, in 3, 6, 9, and 12 months from March 25, 1895. These notes were executed by the railroad company and Gillett in payment for certain steel rails and fastenings to aid in the construction of defendant's railroad. All of the notes have been protested for nonpayment, and there is nothing in the notice of protest which discloses that the steel company ever looked to any one else than the railroad company and Gillett for payment. The executors of the estate of Amos C. Barstow, deceased, claim to have paid the amount due on these notes to the steel company, and by virtue of this payment to be entitled, in equity, to a lien superior and paramount to that of the first mortgage, because the money so paid was for materials used in the construction of the defendant's railroad. The master found in favor of the interveners in the sum of \$6,602.62, with 6 per cent. interest from the 25th of March, 1895, and that they were entitled to a lien upon the property of the defendant railroad company, superior and paramount to the lien of the bondholders. To this finding exceptions have been filed, wherein it is urged, among other things, that the master erred in declaring the holder of these notes to be entitled to a lien superior to the rights of those holding bonds secured by the mortgage.

In order to show (the notes being silent on the subject) how Barstow, deceased, came to be the holder of said notes, and the right of the executors of Barstow's estate to recover thereon, testimony was taken to show these facts, and the same is reported by the master. It appears from this testimony that on the 25th of January, 1894, Amos C. Barstow, now deceased, entered into a contract with Francis M. Gillett whereby Barstow was to guaranty the payment of certain debts then contracted and thereafter to be contracted, not by the railroad company, but by Gillett, for the purchase of steel rails, fastenings, etc., to be used in the completion of the defendant and another railroad. The fifth paragraph of that contract is as follows:

"Fifth. For and in consideration of the premises hereinafter mentioned, said Amos C. Barstow hereby further agrees for and during the period of two years from the date hereof to guaranty to an amount not exceeding in the whole guaranty herein agreed upon the total sum of \$25,000, the bills contracted by said Gillett in the purchase of rails and fastenings and freight charges for carriage of the same, said guaranty being hereby made for no other purpose than on account of the purchase as aforesaid; and in consideration of this guaranty said Gillett agrees to deliver to said Barstow, as collateral security for all sums of money which said Barstow may be required to pay in consequence of said guaranty, with interest at the rate of six per

cent. per annum thereon, which said sum of money, with interest, said Gillett promises to pay to said Barstow within five years from the date hereof, twenty-five \$1,000 bonds of the Pine Bluff and Eastern Railroad Company, as soon as the same can be legally issued by said company," etc.

As will be observed, this contract nowhere discloses an intention or undertaking on the part of Barstow to become a guarantor for the railroad company, or for the payment of any debts it might contract in the construction of its line of railroad. By this contract Barstow limits his liability to \$25,000 and to "the bills contracted by the said Gillett in the purchase of steel rails, fastenings," etc. The Amos C. Barstow who made this contract of guaranty with Gillett departed this life, as the proof shows, some time in September of 1894, and therefore could not have been called upon in his lifetime to have guarantied the payment of the four notes executed to the steel company in March of 1895. It appears from the testimony of Amos C. Barstow, who is a son of Amos C. Barstow, deceased, and one of his executors, that at the time the contract was made for the purchase of the rails the steel company would not part with them unless payment of the notes was guarantied. He says:

"Before the steel company would furnish rails under said contract, they required an individual guaranty, and I offered them, personally, in Chicago, the personal guaranty of (myself) Amos C. Barstow and George E. Barstow, which offer they accepted."

In explaining why he gave the personal guaranty of himself and George E. Barstow, instead of their guaranty as executors of the estate of Amos C. Barstow, deceased, he says:

"Under the will of the late Amos C. Barstow, deceased, we could not give such a guaranty as was required, but we gave the individual guaranty, as above described, which was afterwards carried out by us as executors and trustees under the will of Amos C. Barstow, deceased, by paying the notes with the funds of the estate of said decedent."

It thus appears from the testimony of the executors of the estate of Amos C. Barstow, deceased, that under his will they could not, as executors, make such a contract of guaranty as was contemplated by the contract of January, 1894, between Amos C. Barstow and Gillett; that because they could not make a contract to bind the estate, they, as individuals, guarantied the payment of the notes, and took the money for that purpose out of the coffers of an estate they had no power to bind for the payment of these notes. Whether title to these notes could be obtained in this manner need not be discussed. It seems to me, under the testimony in relation to this claim, that, if it is to be prosecuted by any one, it should be prosecuted in the name of Amos C. Barstow and George E. Barstow as individuals, and not as executors of the estate of Amos C. Barstow, deceased. The mere fact that they took the money of their father's estate to pay an individual liability of their own, does not vest the title to these notes in the estate of Amos C. Barstow, deceased. A contract of guaranty is like every other contract in this; that there must be two or more parties to the contract, and to which the minds of the parties must assent. If the railroad company is to be held on a contract of guaranty, and the rights of parties secured under a mortgage are

to be made subservient to such contracts, then the existence of such contracts should be made to affirmatively appear. There was no testimony before the master, nor is there any before the court, tending to show that Amos C. Barstow, deceased, ever contracted with the defendant railroad company to become a guarantor for the payment of any of its debts. There is testimony showing an undertaking to guaranty the payment of certain debts that Gillett might contract for the purchase of steel rails and the like, and I am of opinion that the evidence does not disclose the existence of any other contract in relation to the payment of these notes. But, if such a guaranty had been made, I do not see that the interveners would be in any better plight than they now are. One who guarantees the payment of a note executed by a railroad company, whose property is already mortgaged, even though the note was executed in payment of steel rails, cannot, certainly, have any greater equity than he who furnishes the rails in the first instance. Let us then inquire if the Illinois Steel Company could have enforced this claim, so as to have priority over the holders of the bonds secured by the first mortgage, which the bill was filed to foreclose. It seems to me this precise question is answered in the case of *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 687, 7 Sup. Ct. 741. It appears from that case that the Bessemer Steel Company furnished steel rails for the original construction of a railroad, which had, before that time, executed a mortgage on all of its property. The Bessemer Company intervened in the subsequent foreclosure proceedings, and sought to have its claim given a preference of payment over the holders of the bonds secured by the mortgage, on the ground that the material furnished went to the completion of the railroad, and made the security of the bondholder better. The court below decreed that "the defendant [the Bessemer Company] had furnished materials which have been used in the construction and betterment of the railroad prior to the appointing of the receiver, and that such claim was superior and paramount to the lien of the mortgage and the bonds secured thereby." From that decree an appeal was prosecuted to the supreme court of the United States, and in disposing of the question thus presented the court says:

"The claim of the appellee is for the original construction of the railroad. This is not a case where the proceeds of the sale of the property of a railroad, as a completed structure, are to be applied to restore earnings, which, instead of being applied to payment of operating expenses and necessary repairs, have been diverted. The equitable principles upon which the decisions rest applying to the payment out of the proceeds of the sale of the road of such debts for operating expenses and necessary repairs, are not applicable to such claims as the present, accrued for original construction of a railroad, while there was a subsisting mortgage upon it. It was construction work, and none of it was for operating expenses or repairs. The claims accrued after the mortgage had been executed and recorded. We are not aware of any well-considered case which, in the absence of statutory provision, holds that unsecured floating debts for construction are a lien on a railroad, superior to the lien of a valid mortgage duly recorded. The authorities are all the other way."

The further citation of authority, to show the distinction between claims for original construction and those which grow out of operating the completed road and keeping the same a "going concern" is not

necessary. Where money arising from operating the road has been diverted, and applied to the payment of debts other than such as came into being from the operating of the road, the courts have, in some instances, restored the diverted fund by taking an equal amount from the funds in the hands of the receiver. But this is not an instance where a fund has been diverted; on the contrary, it is a case where the material went into the original construction of the railroad after the execution and recording of the mortgage. There are cases where, as a condition precedent to the appointment of a receiver, the courts have required the payment of debts which accrued in the course of construction, but this is not a case of that kind. No order of that kind was made. The order made at the time of the appointment of the receiver is based on sections 6251, 6252, Sand. & H. Dig. Ark. It was not contended at the argument that the sections referred to covered the case of the interveners, but that it was within the general equity powers of a court of equity to give the preference asked. It follows that under the decisions of the supreme court in the Bessemer Steel Co. Case, the Illinois Steel Company could not have obtained a preference over the lien of the mortgage, if it were present and prosecuting this claim. It was probably for this reason that the steel company demanded and obtained a guaranty of payment before parting with its rails and fastenings. This being a claim for what is called "original construction" of the railroad, I am of opinion that it ought not to be adjudged a lien superior and paramount to that created by the mortgage described in the bill of complaint, and in that respect the exceptions are sustained, in so far as they apply to giving the amount due on these notes priority over the lien created by the mortgage in favor of the bondholders.

The second intervention is founded on two notes, not of the defendant company, but of the Pine Bluff & Eastern Railroad Company, of \$2,500 each, payable six months after date to the order of Francis M. Gillett, with 6 per cent. interest. These notes are indorsed by Francis M. Gillett and Amos C. Barstow, now deceased, and Amos C. Barstow, the son of Amos C. Barstow, deceased, and George E. Barstow, and bear date July 10, 1894. Gillett, in giving a history of these notes and the various indorsements thereon, and how the same were obtained, says:

"Two notes for \$2,500 each were made by the Pine Bluff & Eastern Railroad Company payable to the order of F. M. Gillett (myself), and were offered at various banks, and refused. Finally said notes were indorsed by Amos C. Barstow, but very soon afterwards (in September) Amos C. Barstow died, and that fact made it impossible for us to find any one who would discount them. So, finally, the estate of Amos C. Barstow discounted the notes. The proceeds of said discounts were paid to me as president of the road, and were expended for rails, freight, and construction work on said extension of the road."

At the time of this transaction, the mortgage now in suit had been executed and recorded. The only thing that connects the defendant company, if that may be so called, is that Gillett says he expended the proceeds of the discount of the Pine Bluff & Eastern Railroad Company for rails, freight, and construction work on the extension of the defendant's railroad. It thus appears that the

money was expended in the work of original construction. But, whether it was or not, the transaction was a simple borrowing of money upon commercial or business paper. It at best was an unsecured debt, not of the defendant company, but of the Pine Bluff & Eastern Railroad Company. A suit at law could not have been maintained against the defendant company by the payee named in the notes, or any of the indorsers thereon. It is, therefore, difficult to see how the amount of such notes can be declared a lien superior and paramount to that created by the mortgage in favor of the bondholders. The exceptions, so far as they relate to these notes, are in all things sustained.

The third intervention is for taxes upon the railroad of the defendant for the years 1891 and 1892, amounting in the aggregate to \$3,100.82. These taxes were paid by a draft drawn by the secretary of the defendant company on George E. Barstow, who at that time was the president of said company. Shortly after the payment of these taxes, a bill was filed in this court by David Armstrong, receiver of the First National Bank of Little Rock, Ark., against the Stuttgart & Arkansas River Railroad, to enforce the payment of a judgment, and praying for the appointment of a receiver. Later on, the St. Louis National Bank filed a bill in this court against the defendant company, wherein the appointment of a receiver was also prayed; and, later on, Barstow filed a like bill, the object of which, among other things, was to have the taxes paid by him declared a lien. A receiver was appointed, and thereafter, by consent of all the parties, was discharged, with the reservation in the order discharging the same that, if the claims and demands against the defendant company were not paid off by a day certain, the court, at the instance of the holder of any of the demands presented in that suit or suits, would retake possession of the property of the defendant company. Before any attempt was made on the part of the creditors protected by the order referred to, the present suit was instituted. The taxes were a charge upon the corpus of the railroad, superior to the lien of the mortgage, and would have destroyed the security of the bondholders if the property had been allowed to go to sale. I think there is sufficient evidence in the record to show that the company made Barstow its agent for the payment of these taxes, and that he paid them, and thus preserved the interest of the bondholders.

It appears from the tax receipts that the total amount of taxes for the years 1891 and 1892 was \$3,100.82, and from the other evidence that \$250 was afterwards paid to Barstow; thus leaving due him the sum of \$2,850.82. Upon the last-named sum he is entitled to interest at the rate of 6 per cent. per annum from May 20, 1893, and the same is declared to be a lien superior and paramount to that created by the mortgage, and the same is ordered to be paid out of the proceeds of sale.

MAGANN et al. v. SEGAL et al.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1899.)

No. 683.

1. JUDICIAL SALES—RIGHTS OF PURCHASER—APPEAL.

A purchaser at a master's sale, in equity, acquires such an interest in the property, by the acceptance of his bid, as to entitle him to appeal from an order refusing to confirm the sale.

2. SAME—GROUNDS FOR SETTING ASIDE—INADEQUACY OF PRICE.

Mere inadequacy of price, unless so great as to shock the conscience, will not justify the setting aside of a sale and the reopening of biddings, but, to warrant such action, there must be additional circumstances, which render it inequitable to permit the sale to stand.

3. SAME—ACCIDENT PREVENTING BIDS.

A railroad was sold by a master for a price clearly inadequate, but not so greatly so as to justify a refusal to confirm. The sale was fairly conducted, and no fraud was practiced by the purchaser, but there was no opposing bid, because of the accidental failure of arrangements made by each of two intending bidders to make a deposit of \$25,000 required to qualify them to bid. Each of such intending bidders was interested in the property, and the amount realized therefor, aside from any interest as a purchaser, and each had made an arrangement for the deposit, such as he might reasonably rely on without being chargeable with negligence. *Held*, that their failure to bid was due to accident, such as, together with the inadequacy of the price realized, justified the court in refusing to confirm the sale and ordering a new one, on a tender of bids 25 and 30 per cent. in advance of the selling price, and on application of nearly all the creditors interested.

Appeal from the Circuit Court of the United States for the District of Kentucky.

This is an appeal from a decree refusing to confirm the sale of a certain railroad, made by a commissioner acting under the order and direction of the circuit court. The same decree ordered a resale, beginning at a price tendered under an advanced bid made after the original sale had been reported. The appeal is by the original bidder, to whom the sale was made by the commissioner. The railroad property in question consisted of 63 miles of completed railroad, extending from Versailles, in Kentucky, to Irvine, in the same state, and some 36 miles of right of way, upon which much work had been done. This railroad was incorporated under the name of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company. Against that company a bill was filed in the circuit court of the United States for the district of Kentucky, by the Central Trust Company of New York, for the purpose of foreclosing a mortgage made to secure an issue of bonds aggregating something like \$2,000,000. Numerous creditors intervened, asserting mechanics', vendors', and contractors' liens, and claiming preference over the mortgage. A receiver was appointed, who thereafter operated the railroad under directions of the court, who, by leave of the court, issued certificates of indebtedness amounting to some \$125,000, yet outstanding and unpaid. Under this bill, and the interventions mentioned, the court settled the amount of the mortgage and other debts, and determined that liens existed in favor of contractors, material men, vendors, and holders of receiver's certificates aggregating about \$500,000, which were entitled to preference over the mortgage in the sale of the property, and a sale was ordered accordingly. From this decree an appeal was taken to this court, where the decree of the circuit court was modified in some particulars, but affirmed for the greater part, and the case remanded, with directions to modify the decree and proceed with its execution. The case is reported in full in 31 U. S. App. 704, 15 C. C. A. 289, and 68 Fed. 105. An upset price of \$550,000 was fixed, and the special commissioner directed to accept no bid below that sum. The property was accord-

ingly offered, but no bids were received. The court thereupon reduced the upset price to \$250,000, and it was again exposed to sale, without any bids being received. In July, 1897, the court again reduced the upset price by fixing it at \$160,000, which was about sufficient to meet the expenses of the litigation and discharge the receiver's debt, which was a first liability. Under the sale had under this decree, the property was bid off by a committee, representing the contractors' lien claims, for the price of \$301,000, and the sale reported to D. A. Shanahan and others, representing nearly all of the lien claimants of the class mentioned. Some disagreement among this class resulted in an assignment of this bid to one Adolph Segal, who, by agreement of parties, not necessary to explain, was substituted as purchaser at the price of \$255,000, and Shanahan and associates released. Segal paid \$25,000 in cash, and executed two bonds, with security for the remainder of the purchase price, and a lien, with right to retake and resell the property in case of default in reserved payments, was retained. Segal assigned his purchase to the Louisville & Southeastern Railroad Company, a corporation organized by him to take and operate the property. Segal made default, and the security upon his bonds failed, and made an assignment. Thereupon, on July 2, 1898, a decree was entered against him and his security, and the said Louisville & Southeastern Railroad Company, ordering a resale of the property. This resale was ordered to be made at Versailles, a small town about 70 miles from Louisville, Ky. The upset price was again fixed at \$160,000. By the provisions of this decree, no one was qualified to bid without first depositing with the commissioner the sum of \$25,000 in money or a certified check for that amount satisfactory to him. Under that decree, the property was again offered for sale on October 6, 1898. The only bid made was \$160,000 by the appellants, George P. Magann and associates. On October 28, 1898, the commissioner reported this sale to the court, and on same day the purchaser moved for confirmation. This was resisted by D. Shanahan and other large creditors and holders of liens subordinate to the receiver's certificates, and by Adolph Segal, the then owner of the property, all of whom filed petitions praying the court to refuse confirmation and reopen the biddings. These petitions were accompanied by affidavits tending to support the application for a reopening of the biddings. Segal supported his petition with an offer to make an advance bid of \$200,000 if the biddings should be reopened, and presented security therefor. Shanahan presented with his petition an offer to open the biddings at \$210,000, made by John Stites, trustee, which was secured by the tender of \$100,000 in money.

The facts which seem to be established by the petition, exhibits, and affidavits as ground for reopening the biddings are that two intending bidders, who were present at the sale in person, or represented, were prevented from bidding by an accidental inability to qualify themselves as bidders by depositing with the special commissioner the amount required by the decree of sale. One of them was the appellee Adolph Segal, the owner of the property under his purchase at the former sale, who had made default in payment of the purchase price. Segal resided in the East. He was diligently endeavoring to protect himself against loss by putting himself in position by which he could bid the property up to a price which would secure himself against a deficiency. He arranged with a correspondent in Philadelphia to deposit in a Philadelphia bank \$25,000 to the credit of a bank in Louisville, and with the Louisville bank to issue its certified check to his counsel in Louisville, Mr. D. W. Fairleigh, and that the latter should attend the sale and bid the property up to \$240,000. His arrangement was that his Philadelphia correspondent should on day of sale, by 10 a. m., Philadelphia time (9 a. m., Louisville time), make the necessary deposit in the Philadelphia bank, and that the latter should then advise its Louisville correspondent by telegram to issue its check to Fairleigh. Fairleigh was advised of this plan on the afternoon of the 5th of October, the day preceding the sale. As the sale was to occur at Versailles, and not at Louisville, he arranged with the Louisville bank to issue, on the 5th, its certified check, payable to his order, and place it in the hands of Judge Alexander P. Humphrey, who was to attend the sale at Versailles, and hold the check until advised that Segal's deposit had been made in the Philadelphia bank as arranged. Judge Humphrey, with this

check, attended the sale. Upon communicating with the bank over the telephone, he was advised that the Louisville bank had not yet received the expected notice from its Philadelphia correspondent. The sale proceeded. Farleigh, though present with authority to bid for his client, Segal, could not do so, because the latter had not made the necessary deposit. Within an hour or two after the property had been knocked down to appellants, who were the only qualified bidders present, Judge Humphrey was notified by the Louisville bank to deliver its check to Fairleigh. This was too late. The sale was over. The fault lay with one of Segal's correspondents, who failed to make the deposit he had agreed to do, and failed to notify Segal's agent in time for the latter to make other arrangements promptly enough to meet the exigencies of the case.

As to the second intending bidder: Shanahan and one Walker, who together owned or controlled nearly one-half of the preferential debts, had arranged to protect their claims by bidding upon the property up to \$200,000. Walker agreed to furnish the necessary \$25,000 to qualify them as bidders, and Shanahan was to furnish the security for deferred payments. This arrangement held down to the day before the sale, on which day Walker came to Louisville from Pittsburg with the necessary certified check to carry out the plan. After reaching Louisville, his nerve seems to have failed him, and he expressed a wish to be relieved from his arrangement with Shanahan. The latter had relied upon Walker to furnish the money to make the deposit, and saw no way, in the short time remaining, to obtain so large a sum. He agreed, however, to release Walker, provided the latter would lend him this certified check, and this Walker agreed to do, and indorsed the check, and placed it in the hands of Judge Humphrey, to be deposited with the commissioner. Thus prepared, Shanahan attended the sale, accompanied, however, by Walker. While the commissioner was reading the notice of sale, Walker again underwent a change of mind, and instructed Judge Humphrey not to give the check to Shanahan. To this the latter protested, but Judge Humphrey obeyed instructions, and thus Shanahan was unable to bid, through this failure of his plan. Upon this state of facts, Judge Barr refused to confirm the sale to appellants, and ordered a resale, the biddings to commence at \$210,000, and from this decree the bidders at the sale have appealed.

Bennett H. Young, for appellants.

D. W. Fairleigh, A. P. Humphrey, and W. A. Sudduth, for appellees.

Before TAFT and LURTON, Circuit Judges.

After making the foregoing statement of facts, the opinion of the court was delivered by LURTON, Circuit Judge.

1. The objection that an appeal will not lie in favor of a purchaser at a master's sale from a decree refusing to confirm the sale and reopen the biddings is not well taken. Such a purchaser, though not entitled to be regarded as the owner of the property or to the benefit of his contract till after the master's report of the biddings has been confirmed, has nevertheless, by compliance with the terms of the sale, acquired what Chancellor Walworth called "inchoate rights" in the property, such as to entitle him to a hearing upon the question of reopening the biddings and to an appeal from any decree denying confirmation improperly. *Delaplaine v. Lawrence*, 10 Paige, 602. This question was expressly decided in *Blossom v. Railroad Co.*, 1 Wall. 655, 656, where it was said:

"A purchaser or bidder at a master's sale in chancery subjects himself quoad hoc to the jurisdiction of the court, and can be compelled to perform his agreement specifically. It would seem that he must acquire a corresponding right

to appear and claim, at the hands of the court, such relief as the rules of equity proceedings entitle him to."

In *Mining Co. v. Mason*, 145 U. S. 349-365, 12 Sup. Ct. 887, an appeal was entertained by one who interposed, after confirmation, for the purpose of setting aside the sale and opening the biddings upon an advance bid made by himself.

2. Judicial sales under the decretal orders of an equity court are usually conducted by a special master appointed by the court and subject to its guidance. Any sale which that officer may make is not final until reported and confirmed by the court. Even after confirmation, the court may, for good cause shown, set aside the confirmation and reopen the biddings. But, to justify the reopening of the biddings after confirmation, a stronger case must be made than would be necessary before, both because it is the duty of one objecting to a sale to interpose before confirmation, as well as because the purchaser's rights are thereby much strengthened. *Mining Co. v. Mason*, 145 U. S. 349-367, 12 Sup. Ct. 887; *White v. Wilson*, 14 Ves. 151; *Houston v. Aycock*, 5 Sneed, 406.

In 1 Sugd. Vend. (9th Eng. Ed. 1836) p. 76, it is said:

"The determinations on this subject assume a very different aspect when the report is absolutely confirmed. Biddings are, in general, not to be opened after confirmation of the report. Increase of price alone is not sufficient, however large, although it is a strong auxiliary argument, where there are other grounds."

In respect to the circumstances which should be regarded as sufficient to reopen a sale before confirmation, over the objection of the bidder, the equity rules promulgated by the supreme court afford no express guide. It is true that the ninetieth rule adopts the rules of equity practice as they existed in 1842, so far as found consistent "with our local circumstances and conveniences." But, if we turn to the English practice in this matter at that time, we find it in a state of transition, if, indeed, there had ever been any uniform rule upon the subject. In 1 Sugd. Vend. (9th Eng. Ed.) p. 74, the learned author states:

"Where estates are sold before a master under the decree of a court of equity, the court considers itself to have a greater power over the contract than it would have were the contract made between party and party; and, as the chief aim of the court is to obtain as great a price for the estate as can possibly be got, it is in the habit of opening the biddings after the estate is sold."

He adds:

"Mere advance of price, if the report of the purchaser being the best bidder is not absolutely confirmed, is sufficient to open the biddings, and they will be opened more than once, even on the same application of the same person. If a sufficient advance be offered; but the court will stipulate for the price, and not permit the biddings to be opened upon a small advance, and, although an advance of 10 per cent. used generally to be considered sufficient on a large sum, yet no such rule now prevails."

In *Andrews v. Emerson*, 7 Ves. 420, decided in 1802, there was a motion to open the biddings upon an offer of an advance of £80 upon the sale of a lot for £800, being precisely 10 per cent. Lord Eldon said:

"That rule of ten per cent. was not a wise rule to establish. The consequences are, you never get more. I remember the time when no such rule

prevailed, and I desire it to be observed that in future there shall be no such rule."

But the report of that case shows that, when the advance bid was increased to £100, the biddings were reopened.

In *White v. Wilson*, 14 Ves. 151, where the effort was to reopen a sale after confirmation, the same great chancellor said:

"I could not do a thing more mischievous to the suitors than relax further the binding nature of contracts in the master's office; half the estates that are sold in this court being thrown away upon the speculation that there will be an opportunity of purchasing afterwards by opening biddings."

The practice was also condemned in *Barlow v. Osborne*, 6 H. L. Cas. 556.

Though the rule of opening the biddings on an advance of 10 per cent. only had ceased to prevail when our rules of equity practice were promulgated, yet it does appear that at that date a mere advance, deemed a sufficient inducement under all the circumstances of the case, was still regarded as sufficient to justify the reopening of biddings before confirmation. The objection so strongly stated by Lord Eldon, that "the speculation that there will be an opportunity of purchasing afterwards," had resulted "in sacrificing half the estates sold in the court," resulted finally in the regulation of the subject by Act 30 & 31 Vict. c. 48, whereby it was provided that the highest bidder in sale of lands by auction under decrees should be regarded as the purchaser, unless the court, for fraud or misconduct in the management of the sale, should order the sale to be reopened. The Irish practice appears to have been always to open the biddings when it was for the benefit of the estate to do so. *Digby v. Browne*, 1 Ir. Eq. 377; *Mayne v. McCartney*, 2 Ir. Eq. 324.

The English practice, allowing a reopening upon a mere advance bid, prevails in some of the states retaining the system of equity courts, notably in Tennessee. *Atkison v. Murfree*, 1 Coop. Tenn. Ch. 51; *Click v. Burris*, 6 Heisk. 539-545. But the English rule, that a mere advance bid would suffice to reopen biddings, has not been approved by the majority of American courts.

Mr. Perkins, the American editor of the 4th American Edition of Daniell's Chancery Pleading and Practice (volume 2, pp. 1285, 1286), has collected a great many authorities to support the proposition. In *Graffam v. Burgess*, 117 U. S. 180-191, 6 Sup. Ct. 692, Justice Bradley, in the course of a discussion of the general subject of judicial sales, said as to the rule of opening biddings upon a mere advance:

"In this country, Lord Eldon's views were adopted at an early day by the courts, and the rule has become almost universal that a sale will not be set aside for inadequacy of price, unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness; being very much the rule that always prevailed in England as to setting aside sales after the master's report had been confirmed."

To sustain this, the learned justice cites a number of American cases.

In *Mining Co. v. Mason*, 145 U. S. 349-356, 12 Sup. Ct. 888, where it was sought to prevent confirmation by a number of objections, filed before confirmation, going to the practice of the court and the con-

duct of the sale, and where, also, an effort was made to set the sale aside after confirmation upon a large advance bid, the court said:

"It may be stated generally that there is a measure of discretion in a court of equity, both as to the manner and conditions of such a sale, as well as to ordering or refusing a resale. The chancellor will always make such provisions for notice and other conditions as will in his judgment best protect the rights of all interested, and make the sale most profitable to all; and, after a sale has once been made, he will, certainly before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted. Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto."

Touching the effort to open the sale after confirmation upon an advance bid exceeding 10 per cent., the court, after discussing certain circumstances implicating the good faith of this effort, said:

"It is enough that it comes too late. Surely no one would suppose that an officer, having charge of the sale of property of such value,—a sale made at the end of prolonged litigation,—should, at the last moment, in response to a dispatch from a stranger, postpone the sale. The master's action was unquestionably proper, and, if the party desired the intervention of the court, his duty was to apply at once, and not wait until after confirmation; for then the rights of the purchaser are vested, and something more than mere inadequacy of price must appear before the sale can be disturbed. Indeed, even before confirmation, the sale would not be set aside for mere inadequacy, unless so great as to shock the conscience. See *Graffam v. Burgess*, 117 U. S. 180-191, 6 Sup. Ct. 686, where the matter is discussed at some length by Mr. Justice Bradley. As the price bid by the appellees, and at which the property was struck off to them, was about \$580,000 in excess of the upset price, it is hardly necessary to say that there is no shocking inadequacy of price."

The reported circuit court cases are remarkably few, considering the frequency with which this question must have arisen. The earliest of them is *Bank v. Taylor*, Fed. Cas. No. 854, where the heirs of a mortgagor, in a case where a sale for foreclosure had occurred, objected to the confirmation upon the ground of a misapprehension at the sale, by which persons present were deterred from bidding by a statement, made within the hearing of the purchaser, and not denied by him, that the bidding was for the benefit of the mortgagor's heirs. It was shown that the property at the time was worth \$2,000, and had been sold for \$1,510. No advance bid was offered, but the biddings were reopened. In *Blackburn v. Railroad Co.*, 3 Fed. 690, the biddings were reopened upon a large advance bid, and evidence that the property had sold for a grossly inadequate price, although there was no evidence of any fraud or unfairness in the sale. Judge Hammond conceded that the English rule of reopening biddings upon a mere advance bid had been generally repudiated by the American courts, which, instead, had adopted a rule "that there must be, besides an advance of price, some circumstance of unfairness in the sale, growing out of fraud, accident, or mistake, or trust relation of the parties, sufficient to avoid a sale between private parties." "This," said the learned judge, "is the doctrine which most commends itself to my judgment as being just and fair to all concerned, but I think this court must follow the English practice, particularly as the 'local circumstances and conveniences' mentioned in

the ninetieth equity rule favor it, and we have no power to resort to the method of reserved bids established in England since the equity rules were promulgated. Perhaps the court should not lose entire control of these sales in all cases where inadequacy of price appears as the only ground of objection to its confirmation; and, until the practice is in some way satisfactorily regulated, the best solution of the subject seems to be to hold closely to the public policy which protects the sales against instability by refusing to set them aside, unless the price offered in advance is so great, in proportion to the bid already made, that it affords substantial evidence that for some, perhaps unknown, reason, the property has been greatly undersold, —so much so that the purchaser has not simply a bargain, with a fair margin for profit, but an unconscionable advantage of the parties for whose benefit the sale has been made."

In *Fidelity Trust & Safety-Vault Co. v. Mobile St. Ry. Co.*, 54 Fed. 27, Judge Toulmin refused to reopen biddings upon mere inadequacy of price. The question arose upon a motion to make absolute an order confirming the sale. The learned court said:

"The grounds of opposition to the motion, as stated, are inadequacy of price and unfairness in the sale. If the property sold at an inadequate price, the inadequacy must be so great as to shock the conscience and to excite the suspicion of the court, or there must be an inadequacy of price, with additional circumstances against the fairness of the sale, growing out of fraud, accident, or some trust relation of the parties. On the proof submitted as to the value of the property, I am not convinced that it sold at greatly less than its value; certainly the inadequacy of price is not so great as to shock the conscience and to excite the suspicion of the court. Mere inadequacy of price is not alone sufficient to set aside the sale, and the expression of opinion, however well founded, that the property on a resale would bring a much higher price, is not sufficient. *Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887; *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686. Are there, then, any additional circumstances against the fairness of the sale? Have the purchasers taken any undue advantage? If so, of whom? Has any party interested in the property been misled or surprised? There are some statements in the affidavits submitted, based on information and belief, that some of the buyers, who were bondholders, deterred other proposed buyers from bidding by creating the impression that they were going to bid \$400,000 for the property, but these statements are too vague and indefinite for the court to act on them. The proposed purchasers are not named. What sum they were willing to pay for the property is not given. They do not testify in the matter. What was said by the buyers, or any of them, to create, or that tended to create, such impression, is not shown."

In *Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co.*, 84 Fed. 752, Judge Paul adopted the rule that mere inadequacy of price was not sufficient, and held that, to justify the interference of the court, there must be some fraud, accident, or mistake by which the rights of the parties have been affected. In neither of the cases last cited was any advance bid tendered.

In *Re O'Fallon*, 2 Dill. 548, Fed. Cas. No. 10,445, and in *Re Palmer*, 13 Fed. 870, sales made by assignees in bankruptcy were set aside for inadequacy of price, but this practice was deemed authorized by the act of June 22, 1874 (18 Stat. 178), which gave power to the court "to set aside sales and order resales, so that the property sold shall realize the largest sum." The ninetieth equity rule has no such application as to make it obligatory upon a circuit court of the

United States to adopt and follow the English equity practice in force when those rules were promulgated, in respect to reopening biddings upon a mere advance bid. The English practice is only imposed by that rule "so far as consistent with our local circumstances and convenience." The English rule was merely one of expediency, adopted for the purpose of obtaining the highest possible price for estates sold under the orders and superintendence of the chancellor. After many years of experience, it was found not satisfactory upon the highest authority. Sales in the master's office were neglected upon the speculation that the biddings there were of no importance, and were subject to be reopened upon a mere advance. Thus, the advantage of an open competitive bidding was lost, with the result, said Lord Eldon, that "half the estates sold by the court were sacrificed." "Our local circumstances and convenience" do not so greatly differ from those which led the English people, through an act of parliament, to correct a practice which had been found so unsatisfactory. We are therefore absolved from any obligation to follow that unsatisfactory and abandoned practice, but can adopt one more likely to invite open competition and secure a better price. Such a course seems to have the sanction of the supreme court, so far as that court has spoken either judicially or extrajudicially. *Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887; *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686.

Upon the weight of American authority, we conclude that mere inadequacy of price, unless so great as to shock the conscience, will not justify the reopening of biddings. This rule seems to rest upon the plain necessity that it is to the interest of suitors that it shall be understood that some stability is to be given to the public sale of property by a master in equity, and that the report of sale will neither be set aside upon trivial circumstances, nor because it shall appear that the bidder has obtained a fair bargain and a reasonable profit. When it once comes to be understood that chancery sales will not be set aside upon a mere showing of inadequacy of price, and that the highest bidder at such sales may reasonably calculate that his purchase will be confirmed, unless, in addition to mere inadequacy, there shall also appear circumstances making it inequitable that he shall have the advantage of his bargain, we may hope that such sales will be attended by all intending purchasers, and such real competition will be brought about as will result in sales at the fair value of the property. On the other hand, it is not expedient that the court shall lose all control over such sales. As said by Judge Clark, in *State of Tennessee v. Quintard*, 47 U. S. App. 621, 26 C. C. A. 165, and 80 Fed. 829, the bid reported is "only an offer to take the property, and acceptance or rejection of that offer is within the sound legal discretion of the court."

A price so inadequate as to shock the conscience, or mere inadequacy, coupled with misconduct upon the part of those conducting the sale, or fraud, or conduct bordering upon fraud, upon the part of the purchaser, under the practice of both English and American courts, has always been regarded as furnishing good cause for reopening the biddings.

The difficult question arises when neither fraud nor misconduct exists in the case, but an inadequate price has been realized as a result of accidental circumstances, which have prevented a full or fair price from being realized. The case in hand is an illustration. No element of misconduct or fraud, or conduct bordering upon fraud, appears, and no criticism can be made upon the conduct of the purchaser or of those managing the sale. And yet, property which cost the company in excess of \$2,000,000 has been sold for \$160,000. It is true that the railroad was projected as a "boom" enterprise, and has never been completed. It is true that the value of such an unfinished and unneeded railroad is purely speculative. Yet 63 miles of steel-laid railway, with an equipment of rolling stock, has been sold for about \$2,500 per mile, with 36 miles of right of way, upon which much work has been done, thrown in. That an upset price of only \$160,000 was fixed by the court is little evidence of value. The practice of fixing a minimum, as is well known, is due to the desire of the court to protect minority creditors to some extent against the arbitrary power of the majority to carry out reorganization schemes for their exclusive protection and benefit, and to avoid, as far as possible, the necessity of countercombinations among the class of creditors less able to combine their interests. This modern practice of fixing an upset price differs much from the English reserve bid. Such a reserve bid was fixed confessedly upon the basis of a value ascertained upon evidence, and a report by the master, and the reserve was secret. If the highest bid did not equal this valuation, the master would, upon comparing the bid with the reserve, declare all bids rejected. 2 Daniel, Ch. Pl. & Prac. (4th Am. Ed.) pp. 1268-1271.

The fact that this property had been formerly offered upon an upset price of \$500,000, without obtaining a bid, and that this price had been reduced to \$250,000, without a sale, and finally reduced to \$160,000, does undoubtedly indicate the great difficulty of realizing anything approximating the cost of this property. Upon the other hand, the property was once bid off at \$301,000, and finally confirmed for \$255,000. But the best evidence of an inadequate price is the fact that two advance bids were tendered to the circuit court, one for \$200,000 and one for \$210,000. An advance of \$50,000 upon an original bid of \$160,000 is clear evidence of great inadequacy of price. But, looking to the character of the property sold and the history of the repeated efforts to make a more satisfactory sale, we cannot regard the bid of appellants as so grossly inadequate as in itself justifying the court in reopening the biddings. But, coupled with an inadequacy of price not in itself sufficient to shock the conscience or raise an inference of fraud or misconduct, there is evidence that the accidental inability of two intending bidders to qualify themselves as bidders, by making the large deposit required under the decree of sale, directly resulted in a sale without competition, and at a price greatly less than the property would have brought but for the circumstances mentioned. The deposit required, in view of the very low upset price, was a large one. In consideration of the history of the former sales, we are not, however, disposed to criticise the court for settling the deposit at so large a

figure. Still, the sum was a large one, and the inability of two bidders upon the ground to comply with the order has brought about a most unsatisfactory result to the creditors interested in the sale. But, if this was due to the total inability of these intending bidders to make such a deposit, there would be no ground for complaint by any one. But that was not the case with these bidders. But for purely unforeseen and unexpected circumstances, each would have been able to have qualified himself as a bidder. One was the largest mechanic's lien creditor, and had a claim of the class second next after costs, expenses, and receiver's debts. The other was the then owner of the property, and was liable for any deficiency between his former bid and that which should be realized at the pending sale. Each had, as he supposed, prepared himself to make the necessary deposit, and both were disappointed at the last moment by the failure of those upon whom they had reasonably relied for the means necessary to make the deposit. It is easy to suggest that each might have avoided such disappointment if he had done something different from that which he did do. But this demands too severe a standard, under the circumstances of this case. The facts have been stated, and need not be repeated. Our judgment is that each had, in good faith, perfected business arrangements,—arrangements so reasonable as to justify the conclusion that the fact that they fell through at the critical moment is not sufficient to convict them of culpable negligence. That each was earnestly determined to push this property much above the upset price, and that each, in good faith, supposed he had prepared himself to bid, is satisfactorily shown. The result of the curious chapter of accidents by which one found himself unable to bid but a moment before the property was cried, though he had every reason to rely upon the safety of his plans, while the other, by the default of his correspondent, was not advised of his right to use the certified check prepared for the occasion until just after the sale was closed, has been that a most unfair price has been secured, and a great loss sustained by every one interested in the property, including these intending bidders. Accident, mistake, or surprise, without fault, is a recognized ground for equitable relief in such cases. The definition of "accident" given in Smith, *Man. Eq. Jur.* p. 36 (a definition approved in *Pom. Eq. Jur.* p. 285), is this: "An unforeseen and injurious occurrence, not attributable to mistake, neglect, or misconduct." Story thus defines it: "By the term 'accident' is intended, not merely inevitable casualty, or the act of Providence, or what is called technically 'vis major,' or 'irresistible force'; but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct of the party." *Story, Eq. Jur.* § 78.

The facts bring this case under either definition. Through an unforeseen failure of arrangements, upon which these bidders could have reasonably relied, this property has been sacrificed. Relief in such cases, by reopening the biddings, is not extended because a party who desired to buy has probably lost a bargain. The ground for relief is the loss sustained by those interested in the sale of the property at its best price. All, or about all, of the creditors of this

hopelessly insolvent railway unite in asking to have the biddings reopened. The purchaser at the master's sale only objects. Under such circumstances, ought this bid to have been accepted? There is a margin within which the sound legal discretion of the circuit court will not and should not be disturbed by an appellate court in such matters. There was no abuse of the legal discretion which may be reasonably exercised where a greatly inadequate price has resulted from circumstances which could not have been reasonably foreseen. The equity of the owners and creditors, under the facts of this case, is greater than the equity of the purchasers to have this bid accepted. Neither is the stability of master's sales disturbed by reopening the biddings, where a greatly inadequate price has resulted from accident, mistake, or surprise, without fault of those applying for a resale. The supreme court seems to recognize such a rule as sound and expedient. *Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887; *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686. It has the support of the practice in the circuit courts, so far as that is ascertainable by the reported cases. *Bank v. Taylor*, Fed. Cas. No. 854; *Blackburn v. Railroad Co.*, 3 Fed. 690; *Fidelity Trust & Safety-Vault Co. v. Mobile St. Ry. Co.*, 54 Fed. 27; *Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co.*, 84 Fed. 752.

Under the English practice, no advance of price after confirmation was deemed sufficient, but such advance was deemed a strong auxiliary, if there also appeared other circumstances. 2 *Daniell, Ch. Pl. & Prac.* (4th Am. Ed.) p. 1288; 1 *Sugd. Vend.* (9th Eng. Ed.) 76, 77. Thus, biddings were opened after confirmation, upon an advance bid, upon the ground that the owner of the property, who joined in the motion, was in prison at the time of confirmation, and was told by two persons that they would direct their agent to open the biddings. *Watson v. Birch*, 2 Ves. Jr. 50. This case was criticised by Lord Eldon in *Morice v. Bishop of Durham*, 11 Ves. 57; and in *White v. Wilson*, 14 Ves. 151, the rule was laid down that no sale, after confirmation, would be disturbed, unless there was misconduct upon the part of the person obtaining confirmation. But, as an illustration of "accident, fraud, or mistake," it is of value as an authority, under a practice which allows a reopening of biddings before confirmation upon such ground. In *Williamson v. Dale*, 3 Johns. Ch. 290, Chancellor Kent, though refusing to adopt the English practice of opening biddings before confirmation, ordered a resale upon the ground of surprise; it appearing that the owner of the property was innocently misled and induced to believe that the premises would not be sold upon the day appointed. In *Roberts v. Roberts*, 13 Grat. 639, a sale was set aside upon the ground that, on account of the great inclemency of the weather, several intending bidders were kept away. The purchaser was the only bidder present, and he lived upon the premises. In *Dewey v. Linscott*, 20 Kan. 684, biddings were reopened where the mortgagee's agent had instructions to bid the property to its value and was unable to attend, being called away under judicial process, the property having sold at a greatly inadequate price. In *Littell v. Zuntz*, 2 Ala. 256, a sale after confirmation was set aside, having been made during the prevalence of a yellow

fever epidemic. In *Seaman v. Riggins*, 2 N. J. Eq. 217, a sale was set aside on application of a second mortgagee, who had been innocently misled as to the place of sale, and had, on that account, not been present. That the purchaser who stood fair before the court should be reimbursed his costs and reasonable expenses is clear. This those resisting confirmation offered to do, and this was directed by the decree reopening the biddings. The practice was right. *Williamson v. Dale*, 3 Johns. Ch. 290. The decree will in all respects be affirmed.

MILLER v. PERRIS IRRIGATION DIST. et al.

(Circuit Court, S. D. California. February 20, 1899.)

No. 752.

1. IRRIGATION BONDS—BILL TO CANCEL—SUFFICIENCY OF ALLEGATIONS.

Allegations in a bill to cancel bonds of an irrigation district, which could not legally be issued for labor, though they might have been in payment for materials, that they were issued for labor and materials, sufficiently show the invalidity of the bonds, as against a general demurrer, without specifying to what extent either labor or materials entered into the consideration.

2. IRRIGATION DISTRICT—VALIDITY OF ORGANIZATION—WHO MAY ATTACK.

Where a reputed irrigation district is acting under forms of law, unchallenged by the state, the validity of its organization cannot be attacked, either directly or collaterally, by a private individual.

3. SAME—SUIT FOR CANCELLATION OF VOID BONDS—RETURN OF CONSIDERATION.

In a suit by a landowner of an irrigation district against the district and its bondholders, to restrain the levy and collection of assessments for the payment of void bonds issued by the district, and for the cancellation of such bonds, the complainant is not required to allege or tender the restoration of the consideration received by the district therefor, which restoration would be beyond his power. While the court, in case of the cancellation of the bonds, might order the consideration restored by the district in a proper case, it is incumbent on the bondholders, if they desire such relief, to allege and prove the facts which entitle them to it.

In Equity.

Works & Lee, for complainant.

C. C. Wright, for defendants.

WELLBORN, District Judge. Suit, by an owner of certain lands in said district, for the cancellation of bonds issued by the district, and to enjoin the enforcement of any assessment against said lands for the payment of said bonds. The present submission is on a general demurrer to an amended bill. After said demurrer was submitted, and upon examination of the briefs filed pursuant to said submission, the court made an order allowing supplemental briefs, all of which have come in, and, although my conclusions on two of the questions raised in the original briefs were announced orally, when the above-mentioned order was made, I shall in this opinion review those questions, as well as the one discussed in the supplemental briefs.

The allegations of the amended bill, except as below indicated, are the same as the allegations of the original bill, for which see my opin-

ion, on demurrer to said original bill, reported in 85 Fed. 693. The only differences between the original and amended bills are that the latter omits certain references, contained in the former, to decrees of confirmation had in San Bernardino and San Diego counties, and also omits that part of the prayer of the original bill for a decree declaring illegal and void the organization of the district.

The objections urged to the amended bill are—First, that said bill fails to show that the bonds in dispute were issued contrary to law; second, that the bill shows that the defendants are bona fide purchasers, for value and without notice, and therefore the bonds in their hands are not open to the objections which complainant urges against them; third, that the bill shows that said district received valuable consideration for the bonds issued, but fails to show that such consideration has been restored or offered to the holders of the bonds.

These objections will be disposed of in the order of their statement.

1. The allegations of the amended bill material to the first objection are, substantially, that the bonds were issued for labor performed and materials furnished in the construction of the system of water-works belonging to the district. Defendants concede that the bonds could not have been lawfully issued for labor, but contend that they could have been so issued for material, and that the bill is fatally defective in not showing to what extent labor, and to what extent material, entered into the consideration for which the bonds were issued. This argument, it seems to me, is unsound. If a bond could not be legally issued for labor, but was, in fact, issued for labor and material jointly, it follows, in the absence of any showing as to how far labor and material, respectively, entered into the consideration, that the issuance was unlawful. Possibly that part of the bill which alleges unlawful issuance would, under proper objections, be held deficient in certainty. No special demurrer, however, has been interposed to that or any part of the bill, and I am of the opinion that the defect, if it be such, cannot be reached by a general demurrer to the whole bill.

2. It is unnecessary now to discuss the rights of innocent purchasers of the bonds of an irrigation district, for the reason that the amended bill does not show the defendants to be such purchasers. On the contrary, said bill, at lines 15 to 19, inclusive, on page 12, alleges "that each and all of the defendants took and now hold such of said bonds as are owned or claimed by them with full knowledge of the facts herein alleged, and that said bonds were each and all illegal."

3. To the third objection to his amended bill complainant makes several answers. He contends, in the first place, that said bill does not allege that the irrigation district received valuable consideration for its bonds. This contention, I think, cannot be maintained. The amended bill, at lines 10 to 17, inclusive, on page 8, alleges as follows:

"That said bonds were not sold for cash upon bids called for as provided by law, nor exchanged for property as provided by the statute, except as to the bonds sold to the Perris Valley Bank, as hereinafter shown, but were exchanged and bartered away to various persons, in different amounts, for labor, salaries of officers, employés, and attorneys, and for material used in the

construction of the works of said pretended district, for less than their face value, and in direct violation of law."

The amended bill then proceeds to specify the various bonds that were issued, and the considerations for which they were issued. In most instances the bonds were issued, according to the allegations of the bill, "for labor and material in construction of distributing system." The bill, at lines 27 to 32, inclusive, ending with the word "district," on page 12, further alleges "that, as to the bonds issued to the defendants the Lacy Manufacturing Company and Lung Hum & Co., they were delivered to said parties for work and labor done and materials furnished under contracts for the construction of the ditches, pipe lines, and other works of the said pretended district." The bill, at lines 1 to 7, inclusive, ending with the word "district," on page 13, further shows "that, as to the bonds issued to J. W. Nance, they were ostensibly sold for cash, upon advertisement and bid, but they were in fact fraudulently delivered to said Nance without any cash being paid therefor, and with the understanding that they should be, and they were, delivered to the defendant the Silver Gate Manufacturing Company for work done and materials furnished in the construction of the water system of said pretended district."

These allegations, I think, even without any reference to the rule that a pleading is to be taken most strongly against the pleader, fairly show that the irrigation district has a system of waterworks, and that its bonds were issued in part for labor performed and material used in the construction of said system. In view of these allegations, I can but conclude that the amended bill does show that the district received valuable consideration for said bonds.

Complainant contends, in the next place, that said bill shows that the irrigation district was not lawfully organized, and therefore there was never in existence any corporation whose duties or responsibilities could attach to the complainant. This contention raises the question of the materiality or relevancy of those parts of the amended bill which set up fraud and illegality in the organization of the district. In my former opinion, already cited, on demurrer to the original bill, I held, after a careful examination of pertinent authorities, that where individuals have organized themselves as a corporation, and are acting as such, under forms of law, the legality of their organization cannot be challenged, either directly or collaterally, at the suit of a private individual. The allegations of the original bill, assailing the organization of the Perris Irrigation District, are repeated in the amended bill, as constituting one of the grounds for the relief sought, namely, a decree restraining the enforcement of assessments against complainant's property, and canceling the bonds issued by said district. Said allegations, although not a direct, are a collateral, attack on the corporate existence of the district. *Voss v. School Dist.*, 18 Kan. 467. That such an attack cannot be made was decided in my former opinion herein. See 85 Fed. 693, already cited. *Norton v. Shelby Co.*, 118 U. S. 426, 6 Sup. Ct. 1121, which I then commented on, and have since carefully re-examined, does not antagonize the conclusion reached in said opinion. That case simply declares, in substance, that a person cannot be a de facto officer when, under the law, there can be no such

office as the one which said person claims to hold. This doctrine is unquestioned, and, following its analogy, I concede that if, under the laws of California, there could be no such thing as an irrigation district, individuals, by claiming to act as such, could not thereby create a de facto corporation, for the obvious reason that they would not be acting under "forms of law" or "color of law." I repeat here what was said by me in the opinion above mentioned:

"The rule, sustained by the overwhelming current of authorities, and based on considerations of public policy, is that where a reputed corporation is acting under forms of law, unchallenged by the state, the validity of its organization cannot be drawn in question by private parties. Corporate franchises are grants of sovereignty only, and, if the state acquiesces in their usurpation, individuals will not be heard to complain. Neither the nature nor the extent of an illegality in its organization can affect the existence of a reputed corporation, if the requisites just stated are present; that is, if such corporation be acting under color of law, and the state makes no complaint. Where these requisites concur, there is a de facto corporation."

Complainant, in his last brief, cites on this point, in addition to *Norton v. Shelby Co.*, *supra*, Beach, Pub. Corp. § 890. The first sentence of said section is as follows:

"When the attempted organization of a municipality is void, such a body may plead the invalidity of its organization in defense to a suit brought on its bonds, since it has no power to issue them."

The cases cited by the author, in support of his text, are *Ruohs v. Town of Athens* (Tenn. Sup.) 18 S. W. 400, and *Norton v. Shelby Co.*, *supra*. The former of these cases depended upon local statutes of Tennessee, and the doctrine there applied, the court itself concedes, does not prevail in some other localities, and, as shown in my former opinion herein, is notably different from the law of California. *Norton v. Shelby Co.*, *supra*, is referred to by the writer above mentioned, in another part of his work, as follows:

"Incumbent of an Unconstitutional Office. It is no impeachment of the acts of an officer, who is otherwise de facto, that his appointment or election is unconstitutional; as, for instance, where he is appointed in violation of a constitution providing for his election. But, where no office legally exists, there can be no de facto officer. This qualification of the rule was declared in an elaborate opinion by Mr. Justice Field, of the supreme court of the United States, and an unconstitutional act creating an office 'is, in legal contemplation, as inoperative as though it had never been passed.' And the same rule is applied when an office is abolished by statute; thenceforth there can be no de facto incumbent." Beach, Pub. Corp. § 184.

This last quotation from Beach on Public Corporations interprets the opinion of Justice Field in *Norton v. Shelby Co.*, conformably to the views which I have already expressed, and, if the first extract quoted above from that work be limited by said opinion thus interpreted, or, more accurately, if the municipality referred to in said extract be such a one as could not possibly have a legal or de jure existence, the extract, thus qualified, applies in California, and, doubtless, in the other states of the Union. If, however, said quotation be broadly interpreted, so as to include the doctrine in *Ruohs v. Town of Athens*, *supra*, then, while it seems to be the law of Tennessee, it is not the law of California. I am fully satisfied that the Perris Irrigation District must be deemed, in this suit, a legally

existing corporation, and that all of the allegations of the amended bill, which charge illegalities in, or assail the organization of, said district, are irrelevant.

Complainant further contends that, in a suit by a landowner of an irrigation district against the district and its bondholders to restrain the levy and collection of assessments for the payment of void bonds issued by the district, and to cancel said bonds, it is not necessary to allege or tender restoration of the consideration for which the bonds were issued. While the bill in the present suit prays for cancellation of the bonds, as well as an injunction against assessments upon complainant's property for their payment, yet, if the facts alleged entitle the complainant to the latter relief, whatever may be said of the former, the bill, of course, is good against a general demurrer.

Complainant has cited a large number of cases to show that the bonds in question were issued without authority of law and are void. It is unnecessary, however, at this time, to review said cases. The amended bill, as I have already ruled, shows that the bonds were issued for a purpose which the law prohibits, and that the holders of said bonds are not innocent purchasers; therefore said illegality is available to the complainant, whether it be considered as resulting from a total want of power or from an irregular use of power. The third objection to the amended bill, the one now being considered, concedes, for the purposes of said objection, that the bonds are void; said objection, as I understand it, being that, conceding the bonds to be void, it would be inequitable, even at the instance of a landowner, to cancel them, or enjoin any assessment for their payment, and allow the district to retain the consideration for which they were issued. That a taxpayers' bill, to cancel void bonds of a municipality, need not allege a restoration of the consideration, or even offer to restore the consideration, is shown by an authority on which defendants seem to place much reliance. *Crampton v. Zabriskie*, 101 U. S. 601. That case "was brought in the court below by the appellees, for the purpose of having certain bonds issued by the board of chosen freeholders of the county of Hudson, N. J., delivered up and canceled, and for the purpose of having the said board reconvey to Crampton, the appellant, certain lands and premises which had been purchased by the board from Crampton, and paid for by the issue of the bonds in question." The trial court granted the relief prayed for, and its decree was affirmed by the appellate court. While that case necessarily implies that, under the circumstances there existing, restoration of the consideration is an equity which the municipality owes to the bondholder, it does not support defendants' contention that such restoration is an equity for which the complaining taxpayer is responsible, and the inclination of my mind is against the contention. To uphold said contention would be practically to deny to the taxpayer any standing in court, for the obvious reason that he has no power himself to restore property held by the district. The taxpayer's right to equitable relief, to the extent, at least, of the protection of his property from sale under illegal assessment, it seems to me, is established when he shows illegality in

the assessment and that the threatened sale would cloud his title. Probably, if it be shown to the court that the district received property or other consideration for its bonds, and that such property or other consideration can be restored, the court, in canceling the bonds or enjoining the assessments, will also direct restoration of the consideration. See 1 Beach, *Pub. Corp.* § 636; *Turner v. Cruzen*, 70 Iowa, 207, 30 N. W. 483. This point, however, need not be, nor is it now, decided. All that I do decide in this connection, on the present hearing, is that, conceding the law to be as above suggested, the pleadings and proofs necessary to enforce the equity in question, or to show the impracticability of its enforcement, are not incumbent upon the complaining taxpayer, but the bondholder, if he would have the consideration restored, must allege and prove the facts which entitle him to that relief. Such was the procedure in *Turner v. Cruzen*, *supra*. The facts in the last-mentioned case, which the court held entitled the creditor to a return of the property for which the void warrants had been issued, were set forth, not in the complainant's bill, but in the creditor's answer, and the decision was, in effect, that the county, which was not an original party to the suit, should be made a defendant, as prayed in the creditor's answer, in order that the creditor might have restored to him, in that suit, the land and improvements thereon which he had conveyed to the county in exchange for said warrants. In each of the cases mainly relied on by defendants (*Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442; *Chapman v. County of Douglass*, 107 U. S. 348, 2 Sup. Ct. 62; *Louisiana v. Wood*, 102 U. S. 294; and *Willis v. Board*, 30 C. C. A. 445, 86 Fed. 872), the controversy was between a municipality and the holders of its securities. Hence the views which I have above expressed are not in conflict with any of said cases. I am of opinion, although the question is not free from difficulty, that complainant herein, by alleging facts which show that the bonds were issued contrary to law, and that the holders of them are not innocent purchasers, and that a sale and conveyance of complainant's property, under an assessment to pay said bonds, would cast a cloud upon his title, has stated a case for equitable relief. Whether that relief includes cancellation of the bonds, or should be specially confined to the protection of complainant's property against illegal assessments, is a question not raised by the present demurrer, but determinable at a later stage of the case.

The demurrer to the amended bill will be overruled, and defendants assigned to answer the same at the next rule day.

SCHOFIELD v. UTE COAL & COKE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 13, 1899.)

No. 1,073.

1. CREDITORS' SUIT—WHEN MAINTAINABLE.

Whenever a creditor has a vested right in or a lien upon property, the enforcement of which is hindered or rendered inadequate by a fraudulent conveyance or incumbrance, he may maintain a suit in equity to remove it, without exhausting his other legal remedies.

2. SAME—GROUNDS OF JURISDICTION — ISSUANCE AND RETURN OF EXECUTION.

When a creditors' bill is exhibited to reach choses in action, equitable interests, or property of a judgment debtor that have been fraudulently conveyed beyond the reach of an execution, equity has jurisdiction to grant relief on the sole ground that the remedy at law is utterly ineffectual to reach or fasten a lien upon property of the debtor; and it has been held that the return of an execution unsatisfied, as proof of this futility, is essential to the maintenance of the suit, though the better rule would seem to be that even in such cases it is not the only method of establishing such fact. But, when the creditor has obtained a judgment which is by statute a lien on real estate of the debtor that has been fraudulently incumbered, the jurisdiction of equity does not rest upon the entire want of a remedy at law, but upon its inadequacy; and the return of an execution unsatisfied is not essential, as it is neither the sole nor the best evidence of this inadequacy.

3. SAME—REMOVAL OF OBSTRUCTION TO ENFORCEMENT OF LIEN—NECESSITY OF LEVY.

Nor is it required in such case that an execution should be levied on the real estate, the statutory lien being a sufficient basis for a suit in equity to remove a fraudulent obstruction to its enforcement.

4. SAME—REMOVAL OF CLOUD ON TITLE.

When a claim to an interest in or lien upon land appears to be valid on the face of the record, and its invalidity can only be made to appear by extrinsic evidence, it constitutes a cloud upon the title, which any one who has a title to or interest in the land, including a judgment creditor having a lien thereon, may invoke the aid of a court of equity to remove.

Appeal from the Circuit Court of the United States for the District of Colorado.

This is an appeal from a decree which sustained demurrers to and dismissed the amended bill of John W. Schofield, as receiver of the Union National Bank of Denver, because the court below held that his bill did not show that the complainant was without an adequate remedy at law. These are the material facts alleged in this bill: On and prior to March 31, 1896, the appellee the Ute Coal & Coke Company, a corporation, was indebted to the receiver of the Union National Bank of Denver on its promissory notes in the sum of \$7,700, and the receiver was pressing it for payment. The only property the coal company had was certain real estate in La Plata county, in the state of Colorado, which was worth less than \$20,000. Thereupon, on March 31, 1896, the coal company and the appellee O. M. F. Boyle entered into a conspiracy to defraud the receiver out of his credit; and pursuant thereto the coal company made its several promissory notes to the aggregate amount of \$20,000, payable to the order of Boyle, and made and recorded a trust deed of all its property to the appellee J. L. Parsons for the pretended purpose of securing these notes. The company was not indebted to Boyle, and the notes and the trust deed were made without consideration, for the purpose of defrauding the receiver of the bank. After these notes to Boyle were made, he assigned one of them to each of the appellees the First National Bank of Alamosa, the First National Bank of Durango, Frank W. Stubbs and Louis C. Jackway, co-partners as Stubbs & Jackway, and Adair

Wilson and Reese McCloskey, co-partners as Wilson & McCloskey; but there was no consideration for these assignments, and each of the appellees took them with knowledge of the purpose for which the notes and deed had been made, and with intent to aid in its accomplishment. On September 4, 1896, the receiver of the Union National Bank recovered a judgment in the court below for \$8,112.73 against the coal and coke company upon its promissory notes which he held prior to March 31, 1896, issued an execution thereon, and on July 6, 1897, caused a transcript of his judgment to be properly filed with the register of deeds of La Plata county. The circuit court dismissed the bill because it failed to show that the execution issued upon this judgment had been levied or returned unsatisfied.

William A. Moore (Earl M. Cranston and Robert J. Pitkin, on the brief), for appellant.

Benjamin W. Ritter (Reese McCloskey, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Is the levy of an execution, or its return unsatisfied, indispensable to the maintenance of a suit in equity to remove a fraudulent obstruction to the enforcement of the lien of the judgment? Where the remedy at law is adequate, equity takes no jurisdiction. But there are two classes of cases in which a judgment creditor may successfully invoke the aid of a chancellor because his remedy is insufficient. One class includes the cases in which his remedy at law is utterly ineffectual to reach the property of his debtor, or to fasten any lien or claim upon it, as where a creditors' bill is exhibited to reach choses in action, equitable interests, or property of the judgment debtor that has been fraudulently conveyed beyond the reach of the judgment and execution. The other class embraces those cases in which the creditor has secured a lien or right at law, the enforcement of which is obstructed by some fraudulent conveyance or incumbrance. In the former class the utter failure of the remedy at law is the sole ground of the jurisdiction in equity, and hence it is that it has sometimes been held that the return of an execution unsatisfied, as proof of this futility, was essential to the maintenance of the suit (Scott v. Neely, 140 U. S. 106, 114, 11 Sup. Ct. 712; Cates v. Allen, 149 U. S. 451, 458, 13 Sup. Ct. 883, 977; Hollins v. Iron Co., 150 U. S. 371, 386, 14 Sup. Ct. 127), although the better rule would seem to be that this is not the only method of establishing this fact even in this class of cases (Case v. Beauregard, 101 U. S. 688, 690; Darragh v. H. Wetter Mfg. Co., 49 U. S. App. 1, 23 C. C. A. 609, 617, and 78 Fed. 7; Turner v. Adams, 46 Mo. 95; Postlewait v. Howes, 3 Iowa, 365; Bank v. Harvey, 16 Iowa, 141; Botsford v. Beers, 11 Conn. 369). In the second class of cases to which we have adverted, however, the lien or vested right in the property, and the fraudulent obstruction to the adequate enforcement of this lien or right, are the only essentials to the jurisdiction of a court of equity. Equity relieves, not, as in the former class, because the remedy at law has created no lien and has no effect, but because the enforcement of the lien secured by the legal remedy is rendered so much less efficient by the fraudulent obstruction that it is inadequate. It

is the inadequacy, and not the utter futility, of the remedy at law, which conditions the jurisdiction in this class of cases; and the return of an execution unsatisfied is neither the sole nor the best evidence of this inadequacy. In many cases this inadequacy cannot be shown at all by the return of the execution, because it is possible to levy the same upon the property upon which the lien is fastened, and to sell this property thereunder, notwithstanding the fraudulent incumbrance or conveyance. The difficulty is that the fraudulent mortgage, trust deed, or other obstruction compels the purchaser under the execution to buy a lawsuit, and so depreciates the value of the property at the sale that the creditor's remedy is rendered insufficient, and sometimes without any practical value. In such a case he is not required to proceed with this sale, and thus sacrifice both his own interest and that of his debtor, but he may successfully appeal to equity to remove the fraudulent obstruction before he proceeds to the sale. *Bank v. Newton*, 13 Colo. 249, 250, 22 Pac. 444, and cases there cited. Moreover, the inadequacy of the remedy is generally measured by the value of the property upon which the lien has attached or in which the right is vested, and the depreciation in the value of this lien or right caused by the fraudulent obstruction. The issue and return of an execution unsatisfied have no tendency to establish either of these facts. It would be a mere form, which neither law nor equity would require. Whenever a creditor has a vested right in or a lien upon property, the enforcement of which is hindered or rendered inadequate by a fraudulent conveyance or incumbrance, he may maintain a suit in equity to remove it, without showing an execution or return of it unsatisfied, or without exhausting his other legal remedies. *Case v. Beauregard*, 101 U. S. 688, 690, 691; *McCalmont v. Lawrence*, 1 Blatchf. 232, 15 Fed. Cas. 1249 (No. 8,676); *Kittel v. Railroad Co.*, 65 Fed. 862; *Tappan v. Evans*, 11 N. H. 311; *Wadsworth v. Schisselbauer*, 32 Minn. 84, 87, 19 N. W. 390; *Bank v. Newton*, 13 Colo. 245, 249, 250, 22 Pac. 444; *Loving v. Pairo*, 10 Iowa, 282, 289; *Cornell v. Radway*, 22 Wis. 260; *Beck v. Burdett*, 1 Paige, Ch. 305, 308; *Clarkson v. De Peyster*, 3 Paige, Ch. 320; *Newman v. Willetts*, 52 Ill. 98.

The case in hand falls within the latter class of cases, in which a judgment creditor may successfully invoke the aid of a court of equity. The filing of the transcript of the judgment in La Plata county fastened a lien securing its payment upon the interest of the coal and coke company in its real estate in that county, under the statutes of Colorado. Mills' Ann. St. Colo. §§ 2529, 2530, 2531, 4185 (5); *Stephens v. Clay*, 17 Colo. 489, 491, 30 Pac. 43; *Bank v. Newton*, 13 Colo. 249, 250, 22 Pac. 444. The argument that this lien was insufficient upon which to base a suit in equity to remove the fraudulent trust deed, because it was a general lien created under the statutes, and not a specific lien fixed by the levy of an execution, finds no support in the authorities, and fails to appeal to the reason with persuasive force. There are, indeed, opinions in which it is pertinently said, as in *Jones v. Green*, 1 Wall. 330, that a right of a judgment creditor rests upon the fact that the execution has been

issued; and a specific lien has been acquired upon the property of the debtor by its levy. That is a true statement where the lien which the creditor seeks to enforce is acquired by such a levy, but no case has been called to our attention in which it has been held that it was necessary to issue an execution and make a levy which would create no lien before a suit could be maintained to remove a fraudulent obstruction to the enforcement of a lien already created without the levy. Under the statutes of Colorado, and under those of many other states, the lien of a judgment attaches to the real estate of the debtor when the judgment, or a transcript of it, is recorded or filed in the proper office in the county where the land is situated. The issue, levy, and return of an execution without the collection and payment of any part of the judgment neither increase nor diminish the force and efficacy of that lien. In the case at bar all the property which the judgment debtor has is real estate in La Plata county. The judgment is a lien upon all this property. The levy of an execution upon it could not make this lien more specific or more efficient, and the conclusion is irresistible that the general lien upon real estate created by entering a judgment or filing a transcript of it in the county where the lands of the debtor are situated, in accordance with the statutes which provide therefor, is a sufficient basis for the maintenance of a suit in equity to remove a fraudulent obstruction to the enforcement of that lien. *Bump, Fraud. Conv.* 535; *Black, Judgm. § 400.*

According to the averments of the bill, the property upon which the receiver has fastened his lien is the only property of his debtor. It is not worth \$20,000, and the appellees made and recorded a trust deed upon it before the receiver obtained his lien, by which the debtor apparently incumbered his title to secure an indebtedness of \$20,000. The debtor, however, did not owe this debt, and the trust deed and the notes it apparently secured were made and taken for the purpose of hindering and defrauding the receiver in the collection of the debt evidenced by his judgment. These allegations are admitted by the demurers, and they make a perfect case for the avoidance of the deed, and the removal of the cloud which it creates upon the title. The issue and levy or the issue and return unsatisfied of an execution would have added nothing and taken nothing away from the conclusive effect of these admissions. It would not have established a stronger and more effective lien than that fixed upon the land under the statute. It would not have shown more clearly the inadequacy of the receiver's remedy at law, or the inequity of the fraudulent trust deed which he seeks to remove. It would have been nothing but an idle and meaningless ceremony, whose performance neither courts of law nor courts of equity require. When a claim to an interest in or lien upon land appears to be valid upon the face of the record, and its invalidity can only be made to appear by extrinsic evidence, it constitutes a cloud upon the title, which any one who has a title to or interest in the land may invoke the aid of a court of equity to remove. *Ormsby v. Ottman*, 56 U. S. App. 510, 29 C. C. A. 295, 302, and 85 Fed. 492, 499; *Crooke v. Andrews*, 40 N. Y. 547; *Corey v.*

Schuster, 44 Neb. 269, 273, 62 N. W. 470; Lick v. Ray, 43 Cal. 83. The decree below is reversed, and the case is remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

**CITY AND COUNTY OF SAN FRANCISCO V. CROCKER-WOOLWORTH
NAT. BANK OF SAN FRANCISCO.**

(Circuit Court, N. D. California. February 25, 1899.)

No. 12,522.

TAXATION OF NATIONAL BANKS—POWERS OF STATE.

The personal property of a national bank cannot be directly assessed for taxation by state authorities.

This is an action to recover taxes assessed against a national bank. Heard on demurrer to complaint.

Alfred Fuhrman, for plaintiff.

Lloyd & Wood, for defendant.

DE HAVEN, District Judge. The defendant is a national banking association, organized and existing under and by virtue of the laws of the United States, and having its principal place of business at the city and county of San Francisco, state of California. The action is brought to recover the sum of \$7,754.64 and interest thereon, alleged to be due from the defendant for state, city, and county taxes on personal property, consisting of fixtures and money belonging to and assessed to it under the laws of the state for the purposes of taxation for the year 1896. The defendant has demurred to the complaint, and the single question arising thereon is whether personal property belonging to a national bank is subject to taxation by the state.

Congress, in the exercise of its undoubted power, has, in section 5219, Rev. St. U. S., declared what property of national banks may be thus taxed. It is therein provided that real property of national banks shall be subject to state, county, and municipal taxes, "to the same extent, according to its value, as other real property is taxed," and that the shares in any such association shall be assessed as other personal property, to the owner or holder of such shares. The effect of this statute is to exempt personal property belonging to national banks from direct assessment and taxation by the state; that is, the personal property of such banks cannot be directly assessed to them by the state for purposes of taxation. That this is so is so well settled as not to require discussion at this time. Rosenblatt v. Johnston, 104 U. S. 462; People v. Weaver, 100 U. S. 539-543; Covington City Nat. Bank v. City of Covington, 21 Fed. 484; People v. National Bank of D. O. Mills & Co. (Sup. Ct. Cal., Dec. 19, 1898) 55 Pac. 685. The demurrer will be sustained, and judgment thereupon entered in favor of the defendant, the defendant to recover costs.

HADDEN et al. v. DOOLEY et al.

(Circuit Court of Appeals, Second Circuit. January 25, 1899.)

No. 25.

1. BANKS—OFFICERS AS AGENTS—ACTS AGAINST INTERESTS OF BANK.

A cashier of a bank, who was also a director of a manufacturing company, and as such director assisted in promulgating false statements as to the financial condition of the company, for the purpose of defrauding all of its creditors, including the bank, was not the agent of the bank in such matter so as to affect the validity of its claims against the company.

2. FRAUDULENT CONVEYANCE—BILL OF SALE AS SECURITY—CHANGE OF POSSESSION.

A bill of sale made by a debtor to a creditor, where no change of possession takes place, but the property is permitted to remain in the possession of the debtor, and to be sold by it, is void as to other creditors.

3. INSOLVENT CORPORATIONS—POWER OF OFFICERS—TRANSFER OF PROPERTY.

A general manager of a corporation, though given by its by-laws the entire charge of its business and affairs, subject to the order and approval of its board of directors, has no power, after he knows the corporation to be insolvent and about to be placed in the hands of a receiver, to transfer the bulk of its property to one of its creditors in payment of a pre-existing debt; and such a transfer, not authorized nor ratified by the directors, is void as to its other creditors.

4. ATTACHMENT—VALIDITY—ASSIGNMENT OF CLAIM FOR SUIT.

A colorable transfer of a just cause of action against a foreign corporation by a nonresident to a resident of the state of New York, for the purpose of enabling the assignee to maintain an action by attachment thereon in the courts of the state of New York for the real benefit of the assignor, does not render an attachment obtained by the assignee void, and it cannot be attacked by junior attaching creditors of the common debtor.

5. SAME—VALIDITY AS AGAINST SUBSEQUENT ATTACHING CREDITORS.

An attachment cannot be defeated by junior attaching creditors unless there has been some element of unfair dealing which entered into the conduct of the plaintiff in taking his judgment.

6. PROMISSORY NOTES—EFFECT OF RENEWAL.

The giving of a renewal note to a bank, where it retains the original, does not discharge the precedent debt for which it is given, unless such is the agreement and intention of the parties.

7. ATTACHMENT—VALIDITY—SETTING ASIDE IN EQUITY.

A corporation had been for a number of years becoming more and more heavily indebted to a bank of which one of its directors was cashier. Notes given by the company were from time to time renewed, merely as a matter of form, and without expectation of payment, as the company was hopelessly insolvent. Finally, both the company and the bank went into the hands of receivers. *Held*, that an attachment thereafter obtained on behalf of the bank against the company based on such notes would not be held invalid by a court of equity, merely because the renewal notes taken for a portion of the indebtedness lacked a few days of maturity.

8. SAME—UNFAIR PRACTICE AS BETWEEN CREDITORS.

The removal and secretion of goods of a debtor by one creditor, who had an invalid bill of sale for the same, until he could obtain and levy an attachment thereon, is an unfair attempt to gain an advantage over a second creditor, who had procured an attachment, and served it on the custodian of the goods, and was engaged in securing an indemnity bond, required by the sheriff, before levying on the goods, when they were removed by the other creditors, who knew of such attempted attachment, and, as to such goods, the attachment of the second creditor will be given preference.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decree fixing the priority of liens between certain attaching creditors of the Natchaug Silk Company. 84 Fed. 80.

James L. Bishop and Wm. B. Putney, for appellants.

Edward W. Paige, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The Natchaug Silk Company was a manufacturing corporation for the manufacture and sale of silk goods, was incorporated under the laws of the state of Connecticut, and had its principal place of business in Willimantic, in that state. Its capital of \$200,000, in August, 1888, was increased to \$250,000 in February, 1893. J. Dwight Chaffee was its president and general manager from its organization, in 1887, and managed entirely the manufacture and sales of goods, without any oversight by the directors. The by-law of the corporation, from and after February 3, 1891, was as follows:

"The board of directors shall annually elect a general manager, who shall have entire charge of the business and affairs of said company, subject to the order and approval of the board of directors."

O. H. K. Risley was cashier of the First National Bank of Willimantic, having a capital of \$100,000, was a director in the silk company, and took care of its financial business so far as the raising of money was concerned, and before 1890 the company owed the bank beyond the limit of \$10,000, allowed by law. On January 1, 1890, at the suggestion of Risley, and as security for the payment of this debt, Chaffee made an ordinary absolute bill of sale to the bank of silk goods amounting to \$26,610.24. Those goods remained, as before, in the possession of the silk company, and were sold by it to its customers in the ordinary course of business. It was a part of the verbal agreement that the silk company could sell the goods and replace them by other manufactured goods. In the spring of 1892 the silk company owed the bank about \$200,000. In January, 1894, the debt of the silk company to the bank had increased to about \$300,000, and, upon request of Risley, Chaffee executed, as security for this indebtedness, two bills of sale to the bank, of manufactured goods of about \$66,000 in value. Each bill contained the following statement:

"The goods represented by this bill are pledged to the First National Bank of Willimantic, as security for loans made by said bank to the Natchaug Silk Company.

The Natchaug Silk Co.

"J. D. Chaffee, Prest.

"Charles Fenton, Treas."

The goods represented by these bills were placed in the storeroom and vault, respectively, of the silk company. It was said that the storeroom was built especially for this purpose, and that there were two keys, one of which was kept by Risley, who also had the combination of the vault safe. The goods were stored in the rooms or

places in which the manufactured goods of the company were ordinarily deposited, and from which they were sold and delivered as the business of the company required. The storeroom was partitioned off for a stock room about this time, but not for the especial purpose of holding goods pledged to the bank. There was also a verbal agreement that if the goods were sold by the silk company they would be replaced by other goods. There was not only no change of possession, but there was no division of the stock in these rooms between pledged and unpledged goods. A small amount (the value of which did not appear) of the goods in the two bills of sale of January, 1894, remained on hand in April, 1895. Risley died on April 12, 1895. It was forthwith discovered that both bank and silk company were insolvent, and that the silk company owed or would owe the bank, in one way and another, for notes discounted, purchased, or guaranteed, about \$330,000. There is no positive evidence that this state of affairs was previously not known by the directors of the bank, but it could not have been otherwise than a complete surprise. The bank examiner, who was subsequently appointed its receiver, was summoned, and, on or about April 15th, he, with some of the directors of the bank, one of whom was Fowler, also a director of the silk company, sent for Chaffee, and told him that the company must make the bank secure at once, or complete and make safe pre-existing security. Chaffee orally agreed at the time to sell to the bank the goods in the vault and storehouse, and a certain amount out of the mill, and the goods in the offices of the company in Boston, New York, Chicago, St. Louis, and Baltimore, and to ship them to D. E. Adams & Co., 77 Greene street, New York. Adams was a silk merchant, who occupied a store or office at this number, and from him the silk company leased a part of the store, where it transacted its New York business; John H. Thompson, who was also in the employ of Adams, being its manager. On April 15th, 16th, 17th, and 19th, Fenton, the secretary of the silk company, by direction of Chaffee, sent by railroad 43 cases of silk goods directed to D. E. Adams & Co. Fenton was not then told the true object of the shipment. On Monday, April 22d, Chaffee went to Boston, and sent all the silk company's goods in the Boston office—being 18 cases and a package—to Adams & Co., at the Greene street store. There were 45 cases of the silk company's goods in this store before these April shipments from Willimantic and Boston were sent. Thompson was told by letter to insure the 43 cases for the benefit of the First National Bank of Willimantic, which he did, and was also told by Adams that the Boston shipments belonged to the bank. Chaffee returned from Boston on the evening of the 22d, went to New York, and on Tuesday, April 23d, as president of the silk company, executed two bills of sale to the bank. The first was of the 45 cases theretofore in 77 Greene street, to be held for the purpose of applying the net proceeds in payment of the indebtedness of the silk company to the bank after the payment of \$4,000 to Adams, for which he had a lien upon the goods. Enough of these goods were sold by Thompson to pay this lien. The second was of the goods shipped to Adams "in the name of the First National Bank of Willimantic," and were to be

held by said bank for the purpose specified in the first bill of sale, but were declared to be free from pre-existing liens. Lucas, Chaffee's attorney, who was also acting for the bank, took the documents, and subsequently delivered them to Dooley, who was appointed receiver of the bank on April 23d. When Chaffee left, on April 22d, he expected that a receiver would be appointed for the silk company. James E. Hayden was appointed on April 26th, on the application of its bookkeeper, whom Chaffee told to see Mr. Perkins, a lawyer of Hartford, if he wanted advice, and who advised a receivership. Chaffee went from New York to Chicago and Baltimore, and executed like bills of sale to the bank of the goods in those cities, and returned to Willimantic on April 29th. He called together his directors on that day, and endeavored to obtain a ratification of his acts in regard to these goods. Fenton, Wilson, and Fowler were present; Sumner, the only other living director, was absent from the state. The directors did not ratify, and no action was taken, principally on the ground that, as a receiver had been appointed, action was not expedient. Fenton was not told of the purpose of shipping the goods to New York, before April 29th. Sumner was absent. Chaffee unsuccessfully tried to find Wilson on the 22d, and wrote to Sumner, telling him what he was going to do in regard to the goods. On May 2, 1895, the 62 boxes of goods shipped from Willimantic and Boston to Greene street were removed by Mr. Paige, counsel for the receiver of the bank, and were stored in Paige's name in the storehouse of F. C. Linde & Co., in New York City, and on May 18, 1895, were removed by Mr. Paige to the Brooklyn Storage & Warehouse Company, in Brooklyn, and were stored also in his name. On May 18th, Mr. Paige, as attorney for Dooley, as receiver, commenced suit against the silk company in the supreme court of New York, and attached the 62 cases in the Brooklyn warehouse as the goods of the silk company. On May 25th, 45 boxes of silk were removed from Greene street, by Paige's orders, and placed, in his name, in the Brooklyn warehouse, and soon after were attached, by his direction, in the Dooley suit. On April 29, 1895, Morimura, Arai & Co., creditors of the silk company, obtained a warrant of attachment against it, which was served on Thompson, but no goods were taken. Thompson said that he had no goods of the silk company. Rice, another creditor, obtained an attachment on May 16th, and the sheriff, on May 18th, placed a keeper in charge of the goods in Greene street, but withdrew him upon the like representations by Thompson. On May 21st, Hadden & Co., the complainants, brought suit in the supreme court of New York against the silk company to recover a debt of \$22,776.59. A warrant of attachment was served on Thompson, but the sheriff refused to take the Greene street goods until a bond of indemnity was given to protect him. This was speedily furnished, but in the meantime, on May 25th, the goods went to Brooklyn. On June 6th the goods in the Brooklyn warehouse were attached by Hadden & Co., who obtained judgment against the silk company on June 26th for \$22,948.95, and execution therefor was issued, and levied on the goods in the Brooklyn warehouse. The Dooley attachment was vacated on June 27, 1895, upon the application of Hadden & Co., be-

cause the suit of a nonresident against a foreign corporation upon the cause of action set up in the complaint was not permitted by section 1780 of the Code of Civil Procedure. *Adler v. Fraternal Circle* (Sup.) 19 N. Y. Supp. 885. On May 31st, upon the application of Dooley, as receiver of the bank, the circuit court for the Southern district of New York authorized him to sell notes of the silk company, and a note indorsed by said company, amounting to \$67,595.26, and said in the application to be "doubtful debts," for the sum of \$200. Dooley thereupon, on June 1, 1895, assigned said notes to John A. Pangburn, of Schenectady. Pangburn was a carpenter, of very limited means, who had the care of 34 wooden houses in which Paige was interested. He paid no money for the notes. He authorized Paige to credit \$200 of the moneys due him for the Paige estate, and Dooley credited Paige with \$200. The assignment was solely for the purpose of enabling a suit to be brought by a resident of the state of New York against the silk company, a foreign corporation, and an attachment of the silk goods in the Brooklyn warehouse. It does not appear that anything was said between Paige, who acted for Dooley, and Pangburn, as to the ultimate disposition of the avails, if any, resulting from the assignment; but it is manifest that each party clearly understood that such avails would ultimately be for the benefit of the bank. On June 1st, suit was brought in Pangburn's name in the supreme court for the state of New York, against the silk company, upon the notes thus assigned, a warrant of attachment was issued, and on June 3d the goods in Brooklyn were attached. Judgment by default was obtained in favor of Pangburn on June 27, 1895, for \$67,116.91, and execution was issued, which was levied upon the attached property. This bill in equity was brought on July 2d, in the supreme court of New York, to restrain the sheriff from selling these goods, and praying that the bills of sale and the liens by attachment or execution in favor of Dooley or Pangburn should be declared void and set aside. Morimura, Arai & Co., Ignatius Rice, and the China & Japan Trading Company, all judgment creditors of the silk company, were also made defendants, and filed answers. They are not appellants. A temporary injunction was issued by the circuit court for the Southern district of New York, to which the suit had been removed, against a sale under the Pangburn execution, which was subsequently dissolved, and the bill was dismissed. This action was taken under the belief that the legal questions had been decided by this court in favor of the defendants, upon an appeal from the interlocutory order granting an injunction.

Testimony was given to show that, before Risley's death, he was instrumental in submitting to the creditors of the silk company, and in lodging in the public offices in which statements were required by statute to be annually lodged, false statements of the financial condition of the silk company. This testimony was offered in support of the theory that Risley was the agent of the bank, and that the bank and the silk company had conspired to lure the creditors to sell goods to an insolvent company for the purpose of securing to the bank the fruits of the fraud. We are not inclined to believe that the bank directors knew or had reason to know of the falsity of these

statements, and are strongly inclined to believe that they were made for the purpose of universal deception, and that Risley was constantly engaged in defrauding the bank, and finally ruined it, through his attempts to keep an insolvent corporation in being by enormous unsecured advances from the funds of the bank, and by guarantying the company's notes. Risley was in no sense the agent of the bank in making false statements as a director of the silk company, for the purpose of defrauding all the creditors of the company, including the bank. This general subject has been recently fully examined in *Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552. The bills of sale of 1890 and 1894 were void, as against creditors. The voluntary and unnecessary permission to a vendor of personal property to retain possession of it is conclusive evidence of a colorable sale. *Colt v. Ives*, 31 Conn. 25; *Webster v. Peck*, Id. 495. The verbal agreement of April 15th, and the bills of sale of April 23d, were not an attempt to reduce to possession goods which were theretofore pledged as security to the bank, but were in the possession of the vendor. The agreement was a new undertaking to turn over to the bank all the manufactured goods of the company, wherever situate, in part payment of, or as security for, a pre-existing debt; was made with knowledge of the insolvency of the silk company, and that it must soon be in the hands of a receiver; was made without previous authority from the directors, who, with the exception of the general manager, were ignorant of the financial situation. Upon the subject of the validity of this sale, too much stress has been given to the language of this court in affirmance of the order of the circuit court which granted an injunction pendente lite (20 C. C. A. 494, 74 Fed. 429), and too much stress was given by this court to the dicta in *Lewis v. Manufacturing Co.*, 56 Conn. 25, 12 Atl. 637, in regard to the power of an unlimited manager of a manufacturing corporation to pay its debts in goods or personal property. The Connecticut court did not intend to consider the question of the power of such a manager over the company's entire stock of goods in the circumstances now disclosed in this case. The sale or pledge to the bank by Chaffee of the bulk of the silk company's stock of goods to a creditor upon the eve of a receivership, without the previous authority or subsequent ratification of his act by his board of directors, was ultra vires, although he was the general manager, with the powers conferred upon him by the quoted by-law, and although he had been in complete control of all the company's business except the work of borrowing money. He had power to pay a debt of a going concern, but not power to prefer creditors, by extraordinary means, when the company was about to be closed. *England v. Dearborn*, 141 Mass. 590, 6 N. E. 837; *Dooley v. Pease*, 79 Fed. 860. There was no previously expressed authority, and no ratification. The knowledge of Fowler, who was a director of the bank, was not the knowledge of the directors of the silk company, and no other director had actual knowledge before the journeys of Chaffee to the various offices of the company. There was no subsequent ratification, for when the directors were called together for that purpose they declined to ratify.

Inasmuch as the bank obtained no valid title by virtue of the bills

of sale of April 23d, the question of the rightful precedence of the Pangburn attachment over the junior attachment of Hadden & Co. remains to be considered. The Pangburn suit and attachment were based upon an absolute assignment for a nominal consideration which was paid in form; the assignment being for the purpose of enabling a suit against the silk company to be brought in the name of a resident plaintiff, for the ultimate benefit of the bank. As between Pangburn and the silk company, these facts constituted no defense to the suit or the attachment. *Sheridan v. Mayor, etc.*, 68 N. Y. 30; *Meeker v. Claghorn*, 44 N. Y. 349; *McBride v. Bank*, 26 N. Y. 450. Such an assignment, if fraudulent, is open to attack by the creditors of the assignor, but the jurisdiction of the supreme court by virtue of such an assignment, and its power to direct an attachment, cannot be successfully attacked by the junior attaching creditors of the common debtor. They do, however, attack the validity of the attachment, as against themselves, who are also judgment creditors, upon the ground that the notes sued upon have never been owned by the bank, or, if owned, that the time of payment has been extended by renewals, which were not due on June 1st, when the suit was commenced. The subject of the power of a junior attaching creditor to attack the validity of a prior attachment of the same property by an alleged creditor, because the debt declared upon did not exist, or was not due, or because the suit was a collusive proceeding between the parties for the purpose of defrauding other creditors, has been often discussed in the state courts. In some of the states, the power is expressly conferred, and the practice is regulated by statute; in others, permission to the other creditors to appear and defend against the suit of the first attaching creditor is given by the practice of the court; and, in others, the attack is made, as in this case, by bill in equity, and the ordinary power of a court of equity is invoked. The decisions, with reasonable uniformity, declare, as a general rule, that where a senior attaching creditor has included in his judgment a claim which he knew did not exist, or has fraudulently included a claim which could not be the subject of a suit, the fraud vitiates the attachment, as against subsequent creditors, upon the ground that the fraud "corrupts and destroys the whole." *Fairfield v. Baldwin*, 12 Pick. 388; *Page v. Jewett*, 46 N. H. 441; *Peirce v. Partridge*, 3 Metc. (Mass.) 44; *Baird v. Williams*, 19 Pick. 381; *Hale v. Chandler*, 3 Mich. 531. But there must be some element of unfair dealing which entered into the conduct of the plaintiff in taking his judgment, in order to vitiate the attachment as against subsequent attaching creditors (*Felton v. Wadsworth*, 7 Cush. 587; *Hathaway v. Hemingway*, 20 Conn. 191); and if, in the absence of any fraudulent intent on the part of the parties to the suit, judgment is taken for a larger sum than ought to have been included in the note sued upon, it has been held that, as against subsequent attaching creditors, the judgment was divisible (*Ayres v. Husted*, 15 Conn. 514); and, where the attachment was issued before the maturity of the debt which was equitably due, and there was no actual fraud against subsequent creditors, "they cannot be preferred in equity, even if the suit could have been defeated by the debtor himself" (*Patrick v. Montader*, 13 Cal. 434).

Fourteen notes of the silk company, and a four-months renewal note of O. S. Chaffee, indorsed by the silk company, dated January 26, 1895, subsequently discounted by the bank for the benefit of the silk company, were assigned to Pangburn. Numbers 3, 4, 13, and 14 were in the possession of the bank when assigned, were never renewed, were never paid, and there is no reason to doubt their validity. All the other notes, with the possible exception of No. 8, for \$5,000, were, when they were assigned, the property of the bank for value, and all are, with their renewals, unpaid. It is true that renewals were taken, but, with the exception of two assigned notes, no renewal was ever discounted, and in all cases no note, or its renewal, was ever surrendered to the maker. These renewals were given as their predecessors matured, but the entire body of notes remained in the bank, and, in pursuance of an offer of the defendants, have been deposited in court. In regard to the undiscounted renewals, when a renewal is given and the original is retained the new bill or note does not discharge the precedent debt for which it is given, unless such be the agreement of the parties. 2 Daniel, Neg. Inst. § 1259; The Kimball, 3 Wall. 37; Downey v. Hicks, 14 How. 240. But it is said that "it may well be that, by common understanding and usage, when a note is discounted by a bank to take up a prior note held by the bank against the party procuring the discount, and the avails are credited to him, the transaction is to be regarded as an extinguishment of the prior note, though it may not have been actually surrendered." Insurance Co. v. Church, 81 N. Y. 226. This remark was obiter, was not stated as a matter of law; and it is true that the discount of a new note and the crediting of the proceeds to the maker is evidence of the payment of the prior note, notwithstanding the latter remains in the bank. But it cannot be conclusive, and the question of extinguishment depends upon the intention of the parties. In the case of the two notes in question, all the subsequent renewals remained in the bank, and were never paid. The whole conduct of Risley and of the silk company plainly shows that no note, not surrendered, was ever regarded as paid by a renewal, and the method of bookkeeping which was resorted to is immaterial. There is but one assigned note which was not clearly the property of the bank at the time of the assignment, and the ownership of that note is in doubt. This doubt pertains to the note of \$5,000, known as No. 8, dated January 19, 1894. An indorsement upon one of its predecessors, which was dated April 28, 1891, said that \$4,000 of the note belonged to H. E. Brainerd, and \$1,000 belonged to Risley. It appears to have been continuously renewed to January 28, 1895. The testimony simply leaves the ownership in some doubt. Upon such a state of facts, it would be manifestly improper for a court of equity to declare that the attachment was invalid, as against subsequent attaching creditors. It is next said that when the Pangburn suit was brought, on June 1, 1895, renewals of the notes sued on, amounting to \$21,992.63, had not matured. Some of them became due June 8th, and others on June 10th. It is a general rule that a renewal note, given and accepted in renewal of a pre-existing note, suspends the right of action upon such note until the maturity and dishonor of the new note, unless

an agreement has been made that such shall not be the effect. *Hubbard v. Gurney*, 64 N. Y. 447.

There are in this case peculiar circumstances, which demand the attention of a court of equity. A mass of silk company notes belonged to the bank, which steadily increased in amount, and for which renewals seem to have been quite uniformly given, with no reasonable expectation of payment. A renewal was a mere form, and ordinary rules of banking seem to have been lost sight of. On April 26, 1895, the silk company went into the hands of a receiver, by its consent, because it was hopelessly insolvent, and from that time its control of payments of its debts ceased. The debts for which the renewal notes now in question were given were equitably the debts of the company; and to declare, by decree of a court of equity, that, under the circumstances of the case, an attachment for their security was invalid, because made a few days before their actual maturity, partakes of the character of an inequitable exercise of authority. *Patrick v. Montader*, 13 Cal. 434. We are the more inclined not to place the decision upon this ground because we think that the plaintiffs are entitled to adequate relief by reason of the conduct in behalf of the defendant, which was, as against the plaintiffs, inequitable. The 107 cases which were originally in the care of Thompson in Greene street, as the bank's goods, went to Brooklyn, although the exact number which went there on May 25th is not clearly stated in the record. While creditors were inquiring with a sheriff at Greene street in regard to these goods, for the purpose of attachment, they were removed from place to place by the order of Dooley's counsel, were stored in his name, and were attached, in the suit of the bank against the silk company, by his direction. The attempted attachment by the complainants of the 45 cases in Greene street was prevented by their removal to Brooklyn. The counsel for Dooley distrusted the validity of the bills of sale, and desired to secure the bank by the aid of legal proceedings. The receiver of the bank had an equal right with other creditors to take legal steps to secure its debt, but had no right to take unfair steps. The removal of the 45 cases to Brooklyn, and the storage of the property in the name of Mr. Paige, so that it could be in a measure secreted, for the purpose of preventing the complainants from completing their attachment of these cases, was an unfair step. Hadden & Co. first appeared as attaching creditors on May 21st. At this time, 62 boxes had been attached in the Dooley suit, and 45 were in Greene street. The removal of these boxes after May 21st, to prevent the completion of the Hadden & Co. attachment, was an unfair advantage in this race between creditors, and compels a court of equity to declare that the complainants should have a prior lien upon the cases which were in Greene street when the sheriff's bond was being prepared. There is no apparent equity in giving priority to their attachment upon 107 cases, but they are entitled only to a prior lien upon the goods which they attempted to attach,—an attempt the success of which was foiled by a removal of the goods.

Decree of the court below should be reversed, with costs of this court, with instructions to decree priority of lien to the complain-

ants upon the 45 boxes of goods, to the extent of their judgment, interest, and costs, and to decree to them such further relief, by way of a sale or an accounting, as may be necessary. The ultimate disposition of the renewal notes, which were deposited with the clerk of the circuit court, will undoubtedly be made apparent upon the settlement of the receivership, and they can remain in the custody of the circuit court until its further order. The cause is remanded to the circuit court, with instructions to take further proceedings, and to enter a decree not inconsistent with the foregoing opinion.

WALLACE, Circuit Judge. I will briefly state the reasons for my concurrence in the opinion of Judge SHIPMAN. The case resolves itself into a question of priority of liens between judgment creditors of the Natchaug Silk Company having executions levied upon 107 boxes of silk in the storehouse of the Brooklyn Storage & Warehouse Company, and its decision depends upon the priority of the liens acquired by the attachments in the actions in which judgments were recovered. For the reasons fully stated by Judge SHIPMAN, the title to these goods, at the time they were removed to the storehouse from New York City, was, as against the creditors of the silk company, still in that company; the transfer from the company to the bank being fraudulent, and that made by Chaffee, its general manager, when it was moribund, being ineffectual, in the absence of express authority from, or subsequent ratification by, the directors. Of these goods, 45 boxes were removed by Dooley, the receiver of the Willimantic Bank, and stored in Brooklyn clandestinely, for the purpose of defeating a levy upon them under the attachment in the complainants' action until Dooley could procure an attachment and levy upon them through the instrumentality of Pangburn. A creditor having property of a debtor in his possession or under his control cannot thus defeat the rights of another creditor who has been in the meantime using proper diligence to attach it. A race of diligence between creditors is legitimate, but it cannot be won by the abuse of legal remedies. I cannot doubt that the complainants could recover of Dooley in an action on the case, for his acts in frustrating their attempted levy. A court of equity, under such circumstances, should postpone his lien to theirs.

Because the attachment in the Pangburn suit was valid, its lien cannot be displaced in favor of the complainants, as respects the goods removed before their attachment was obtained. The Pangburn suit was a proceeding by Dooley, the receiver of the bank, to procure an attachment against the silk company, which could not have been procured in an action in his own name, and by means thereof to levy upon the goods before other creditors of the silk company could do so. Although Pangburn was only a dummy, it was not a fraud upon the statutes of New York, nor upon creditors, for Dooley to make a formal assignment of the demands of the bank to a resident of New York, and prevail upon him to bring an action and obtain an attachment. An attachment could not have been obtained in an action brought by a nonresident against a foreign corporation, but what Dooley did was a legitimate device for obviating the difficulty. Mc-

Bride v. Bank, 26 N. Y. 450; Petersen v. Bank, 32 N. Y. 47. The lien is doubtless to be regarded as a lien obtained by Dooley, because the suit and attachment were, in everything but name, a suit and attachment by Dooley. The attachment cannot be defeated upon the ground that Pangburn did not have a valid right of action for the full amount of the claim against the silk company. The bank had an honest debt against the silk company for the demands assigned to Pangburn; and, this being so, it is immaterial whether the silk company could have defeated the action in part by interposing the defense that there were outstanding notes in renewal of some of those assigned. It did not do so; and, as it was under no moral obligation to attempt to defeat the collection of a just debt, creditors cannot be heard to complain. It had the right, if it chose, to permit Dooley to obtain a preference over its other creditors; and, if it had surrendered the outstanding notes to Dooley, to enable him to sue upon the original consideration, there would have been no legal wrong in doing so. If it appeared that the claims assigned were pretended claims, the attachment would be merely colorable, and the lien void, as against the complainants as attaching creditors. As it is, it is valid. The theory that the lien of Dooley, as receiver of the bank, should be postponed to that of the complainants because of a conspiracy between the bank and the silk company to defraud the complainants and other creditors, is too nebulous, upon the proofs, for practical consideration.

CITY OF WAXAHACHIE v. COLER et al.

(Circuit Court of Appeals, Fifth Circuit. February 28, 1899.)

No. 771.

APPEAL AND ERROR—TIME FOR TAKING—WHEN WRIT OF ERROR IS “SUED OUT.”

Within the meaning of the provision of the act of March 3, 1891, creating the circuit courts of appeals (26 Stat. 826, 829), that no writ of error shall be sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed, a writ of error is “sued out” by being obtained and issued, and not by the filing of the petition and bond and obtaining its allowance from the Judge of the court rendering the judgment. If the writ is not issued within the six months, the circuit court of appeals is without jurisdiction; and whether the failure to issue it in time is through the negligence of the plaintiff in error or the fault of the clerk appears to be immaterial.

In Error to the Circuit Court of the United States for the Northern District of Texas.

On motion to dismiss writ of error.

W. H. Clark, Wm. Thompson, and E. H. Farrar, for plaintiff in error.

W. S. Herndon and Ben B. Cain, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARDEE, Circuit Judge. A motion is made to dismiss this appeal, on the ground that the writ of error was not sued out within six months after the entry of the judgment. The judgment was entered March 5, 1898. On September 3, 1898, the plaintiff in error presented to the district judge of the Northern district of Texas, the court in which the judgment was rendered, a petition for a writ of error to this court, accompanied with an assignment of errors. The judge signed the order allowing the writ, conditioned upon the plaintiff in error furnishing a bond for \$1,000. On the 5th of September the bond was executed, approved, and filed, and on the same day the petition for the writ, the assignment of errors, and the order allowing the writ were also filed. On the 9th of September, four days after the expiration of six months from the entry of the judgment, the clerk issued and filed the writ, which bears teste and filing of that date; and the judge on the same day signed the citation in error. On October 4, 1898, the defendant in error filed a general appearance in this court.

The act of congress of March 3, 1891, creating the circuit courts of appeals, and defining their jurisdiction, provides, among other matters:

"That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit court of appeals under the provisions of this act, shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed."

And, further: "That all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and systems of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds, or other securities to be required and taken on such appeals and writs of error." 26 Stat. 826, 829.

The writ of error is the writ which removes the case from the inferior to the appellate court, and its "issuance" or "bringing" or "suing out" is jurisdictional.

In *Hodge v. Williams*, 22 How. 88, it is said:

"And this court have no appellate power over the judgment of the court below, unless the judgment is brought here according to the act of congress,—that is, by writ of error; and that writ, from its nature and character, must be sued out by the party who alleges error in the judgment of the inferior court. This writ is not mere matter of form, but matter of substance prescribed by law, and essential to the jurisdiction of this court. * * * It is the duty of the party who desires to bring a case before this court, to see that proper and legal process is sued out for that purpose; and if he fails to do so, he has no right to treat the defect as a mere clerical error, for which he is not to be held responsible."

In *Brooks v. Norris*, 11 How. 207, it is said:

"It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of congress must be calculated accordingly."

These declarations as to the necessity and effect of the writ of error have often been reiterated and followed, and never (to our knowledge) departed from. U. S. v. Curry, 6 How. 106, 113; Salt-marsh v. Tuthill, 12 How. 387, 389; Carroll v. Dorsey, 20 How. 204; *Mussina v. Cavazos*, 6 Wall. 355; Washington Co. v. Durant, 7 Wall.

694; *Cummings v. Jones*, 104 U. S. 419; *Scarborough v. Pargoud*, 108 U. S. 567, 2 Sup. Ct. 877; *Polleys v. Improvement Co.*, 113 U. S. 81, 5 Sup. Ct. 369; *Credit Co. v. Arkansas Cent. Ry. Co.*, 128 U. S. 258, 9 Sup. Ct. 107; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771; *Warner v. Railway Co.*, 2 U. S. App. 647, 4 C. C. A. 670, and 54 Fed. 920; *U. S. v. Baxter*, 10 U. S. App. 241, 2 C. C. A. 410, and 51 Fed. 624; *Union Pac. Ry. Co. v. Colorado Eastern Ry. Co.*, 12 U. S. App. 110, 4 C. C. A. 161, and 54 Fed. 22; *Stephens v. Clark*, 18 U. S. App. 584, 10 C. C. A. 379, and 62 Fed. 321; *Insurance Co. v. Phinney's Ex'x*, 48 U. S. App. 78, 22 C. C. A. 425, and 76 Fed. 617. A writ of error cannot be waived. See *Stephens v. Clark*, *supra*, and the many cases there cited.

The plaintiff in error contends that the term "sued out," as used in the act of 1891, does not mean the same as the term "brought," in section 1008, Rev. St. U. S.; and that, within the meaning of the act of 1891, a party has sued out a writ of error when he has filed his petition and bond therefor, and obtained the allowance of the writ from the judge of the court rendering the judgment. We find that the terms "brought" and "sued out," as applied to writs of error, and meaning the issuance of the writ by proper authority, and the filing of the same in the proper court, appear to be used synonymously in the statutes of the United States, in the decisions of the courts, and in the text-books. See Judiciary Acts 1789, 1875, 1891, and Rev. St. U. S. §§ 635, 1008; Rev. St. D. C. § 848; 25 Stat. 433; *Hodge v. Williams*, *supra*; *Kitchen v. Randolph*, 93 U. S. 86; *Tidd, Prac.* 1134 et seq. To sue out means to obtain judicially; to issue. To sue out a writ is to obtain and issue it. *Burr. Law Dict.* "Sued out" therefore means obtained and issued. As the writ of error in this case was not sued out—that is, obtained and issued—within six months from the entry of the judgment in the circuit court, it seems we have no jurisdiction to review the judgment of that court. Whether the failure to obtain and issue the writ in time resulted from the negligence of the plaintiff in error, or was the fault of the clerk, appears to be immaterial. *U. S. v. Curry*, *supra*; *Saltmarsh v. Tuthill*, *supra*. The writ of error is dismissed.

THE WILLIE D. SANDHOVAL.

(District Court, E. D. New York. February 28, 1899.)

1. CARRIERS—NONDELIVERY—GOODS NOT RECEIVED—LIABILITY.

The mere fact that goods were received for by the carrier's agent, who had no knowledge of their delivery, except a slip signed by the boatman, will not create liability for their nondelivery, where they were not in fact delivered to the carrier.

2. BILL OF LADING—RECEIPT—CONTRADICTION—ESTOPPEL.

A bill of lading acknowledging receipt of goods for transportation is not conclusive as to the amount of goods delivered to the carrier, and does not estop it from showing that the goods were not in fact received.

3. SAME—BURDEN OF PROOF—EVIDENCE.

While the burden is on a carrier to show that goods received for were not in fact received, yet where, in an action for their nondelivery, there

was no evidence that a particular lot of sugar in barrels was actually loaded on a vessel, and no part of the lot was on board at the first port, and the evidence was inconsistent with the theory that it was lost or stolen, the carrier will not be liable.

Hyland & Zabriskie, for libelant.
Carpenter, Park & Symmers, for claimant.

THOMAS, District Judge. On the 15th day of July, 1897, one Sandhoval, owner of a canal boat of the same name, was employed by the libelant to carry a cargo of sugar, and distribute the same at Utica and Syracuse. Thereupon the boat went to the factory of the American Sugar-Refining Company, on the East river, and took on a cargo of sugar, which was weighed by that company's men, and, as supposed, carried to the dock, tallied, and loaded by such men. Thereupon one Potter, a young man employed to work on the Sandhoval, signed a receipt for the sugar, although he had not tallied it, and knew nothing about the truth of the statements contained in the receipt, but relied upon the statement of the sugar company's workmen. The claimant was on the boat at the time, but was sick, and not attentive to the loading. Thereupon the boat was taken to the libelant's dock, Pier 7, East river, whereupon the claimant gave the slip so signed by the boatman to the libelant, and received a bill of lading corresponding to the contents thereof. The receipt and bill showed, among other items of cargo, 30 barrels of sugar, consigned to Head, of Utica, in two lots—one of 20 barrels, and one of 10 barrels. When the sugar arrived at Utica the lot of 10 barrels could not be found, although the consignee's men searched for the same; and, if it was loaded at the sugar refinery, it must have disappeared between New York and Utica. The barrels of sugar were in the hold, and could be lifted therefrom only with a tackle, or, if otherwise, with difficulty; and, if the sugar had been disposed of before the arrival of the boat at Utica, the two young men then in the employ of the claimant, and who on the trial testified with some alacrity against him, should have known the fact. If the sugar were loaded, the burden of explaining its nondelivery is on the carrier; but, if not loaded, the mere fact that it was received for in the manner above described would not create liability. It is certain that the bill of lading, under the explanation given, is no actual evidence of the fact of loading, save as the law raises a presumption of such fact. The bill is founded upon the receipt, and the receipt, in view of the evidence given, has only the probative force mentioned, as there is no pretense that the person signing it had the slightest knowledge of the truth of its statements. There is no evidence that the sugar was actually loaded, beyond the evidence that it was weighed, and in due course should have been removed to the dock, tallied, and put aboard. It is true that, when the captain went to get the sugar, it was his duty to know what he received; and when he went back to Walsh, the shipper, and delivered to him a receipt showing that 30 barrels of sugar had been loaded, Walsh was justified, until the contrary appeared, in relying upon the statement. Hence there rests upon the carrier the burden of showing that the sugar was not

loaded. Has he fulfilled this burden? The carrier states that it was not on his boat when he got to Utica. He denies any diversion of it. Is that sufficient proof that it was not loaded. Did thieves take it out in the night? How much easier to have taken the sacks, of which there were several hundred in the vessel! And, moreover, the difficulty of lifting the barrels from the hold without detection causes the court to doubt such an occurrence. No freight was delivered before the arrival of the boat at Utica. It apparently was not aboard at that time. It is not believed that the carrier abstracted the barrels. What would it have availed him to steal 10 barrels of sugar, for which, as a common carrier, he was liable? The error was probably at the sugar refinery's docks.

An examination of the evidence, aside from the receipt given by Potter, does not show that this particular sugar was loaded, although it does show that it was ordered of the sugar-refinery company; and the figures indorsed on the order, which are said to be those of the weighing master, indicate that it was weighed, and in due course of procedure it should have been carried out upon the dock, tallied, and placed aboard. But nobody is forthcoming to say that it was either weighed, carried on the dock, tallied, or loaded. Must the master go further than this, and show affirmatively that it was not loaded? For instance, assume that there was no evidence whatever of loading, beyond the shipping receipt and the bill of lading made therefrom, and the other evidence appeared tending to show that the sugar was not upon the boat when it reached Utica, and that the captain had not diverted it; must the captain, under the burden of proof which rests upon him, show that the sugar actually was not loaded at the sugar refinery? It must be kept in mind that there is no estoppel. In *The Ethel*, 59 Fed. 473, it was held that, in determining whether there is a shortage of cargo consisting of bags of sugar, both the consignee's output count and intake count, as shown by the bill of lading, are controlled, when the deficiency alleged is only three bags, by proof that the hatches were sealed after the sugar was in, and opened only by the port wardens on the vessel's arrival, and that there was no opportunity for loss or abstraction. In that case no port was touched from the time the vessel sailed until her arrival, and there was therefore no opportunity for the loss or abstraction of any part of the cargo. The court said, "I regard this testimony as more reliable than either of the counts made, and therefore accept it as conclusive." The libellant is apparently in error in his claim that the bill of lading is an estoppel. In *Meyer v. Peck*, 28 N. Y. 590, it was held that an ordinary bill of lading is not conclusive, as between the original parties, either as to the shipment of the goods named in it, or as to the quantity said to have been received, and any mistake or fraud in the shipment of the goods may be shown on the trial. The bill of lading in that case contained the stipulation that: "Any damage or deficiency in quantity, the consignee will deduct from the balance of freight due the captain." These words, it was held, did not affect the question, and were not a guaranty that the captain had received the whole quantity of goods specified, or an agreement to pay for that portion, if any, that should be found to be deficient of

what he has received. The interest of the bona fide holder of the bill of lading was not involved in that case. The authority of this decision upon the state of facts presented has not been modified. In Rhodes v. Newhall, 126 N. Y. 574, 27 N. E. 947, the court stated that there was no disposition to question the authority of the case, nor to disregard the principles there laid down. The last case was of a different character. There was a claim for deficiency in wheat. The wheat was weighed into the vessel under the supervision and control of carriers. The bill contained this clause: "All the deficiency in cargo to be paid by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee." It was held that the plaintiffs were by this clause estopped from questioning the correctness of their acknowledgment, and were bound to account for the precise quantity admitted. This decision rested upon the conclusion that the provisions fixed the quantity of grain received, and provided a mode by which any deficiency or excess in quantity should be dealt with, and that thereby the carrier would have the benefit of any excess, and would be responsible, without further specification, for any shortage. The same rule was adopted in Sawyer v. Mining Co., 16 C. C. A. 191, 69 Fed. 211, where the court expressly holds that the bill of lading is not in the ordinary form, probably because of the usual and ordinary variations in quantity, and that the stipulation inserted was intended to provide for an adjustment of such deficiency and excess without going back of the face of the bill. In Relyea v. Rolling Mill Co., 75 Fed. 420, it was held by Judge Shipman that where a master, who is also owner, of a vessel, gives a shipper a bill of lading reciting receipt of a certain amount of iron, and agreement to deliver it to the consignees, he is liable for damages to the consignees, who, relying on the correctness of the recital, pay the shipper for more iron than was actually on board. There the principle of estoppel is properly invoked. In the case at bar there was no payment, before the discovery of the shortage, in reliance upon the bill of lading; nor was the libelant placed in a position which estopped him from denying that the sugar had been actually loaded. He had the same rights under the bill of lading, and was subject to the same obligations, as is the respondent in the present action. In The Asphodel, 53 Fed. 835, it was held by Judge Brown, of the Southern district of New York, that a ship does not guaranty that the amount of cargo recited in her bills of lading as received on board, and based on her tally, has been actually so shipped and received; nor can the vendor and vendee of such goods, by any private arrangement, make the ship an insurer of the correctness of her tally, as against fraud or mistake, for their benefit, and as a fulfillment of the vendor's contract, when not fulfilled in fact; and, where there is proof of fraud or mistake, the ship and owners cannot be held accountable to the consignee beyond the number actually received on board. The opinion of the learned judge in this case is useful. The only doubt in this case is whether the claimant has fulfilled the burden of proof by his evidence that he delivered all the freight he had, and that he did not deliver the 10 barrels at Utica because they were not on board. What more could

he do? If there were any evidence of actual loading, it would be different. But all the evidence tending to show actual loading is the order of the sugar-refinery company to its factory to deliver the sugar consigned to Head, and certain figures, stated to be the weigher's figures, indorsed thereon. It is also to be observed that the missing sugar is a single lot of 10 barrels, of a particular kind of sugar, from a larger number of barrels. It would be strange if, by some chance, a person taking it from the hold should secure the precise shipment from the general whole. The very fact that a specific lot is unaccounted for tends to strengthen the conclusion that it was not abstracted after loading. The court is convinced that the sugar was not loaded, and the receipt and bill of lading based thereon must yield to that conviction. Let a decree be entered accordingly.

MOFFITT-WEST DRUG CO. v. BYRD.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1899.)

No. 1,069.

1. CONTRACTS—ACTION FOR BREACH.

It is error, in an action for damages for breach of contract, to permit a recovery without proof of a contract and a breach.

2. SAME—OFFER TO CONFESS JUDGMENT—EFFECT WHEN UNACCEPTED.

An offer by a defendant to confess judgment for a part of the amount claimed, if unaccepted, cannot be permitted to affect the issues, or the rights of the parties, and will not support a recovery without proof of the cause of action alleged.

3. DAMAGES—BREACH OF CONTRACT TO SELL GOODS.

Under the rule that damages which may be allowed for breach of contract must be the natural and probable consequences of the breach, the damages recoverable for the breach of a contract to sell and deliver merchandise, in the absence of allegation and proof of special circumstances known to the seller, are limited to the difference between the contract price and the market value of the goods at the time and place of delivery, with interest, and incidental expenses of the purchaser in connection with the contract cannot be considered.

In Error to the United States Court of Appeals in the Indian Territory.

This was an action by L. A. Byrd against the Moffit-West Drug Company. There was a judgment for plaintiff, which was affirmed on appeal by the court of appeals of Indian Territory (43 S. W. 864), and defendant brings error.

James B. Burekhalter, for plaintiff in error.

W. H. Tibbils, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. L. A. Byrd, the defendant in error, brought an action against the Moffit-West Drug Company, a corporation, and the plaintiff in error, for damages for breach of a contract to deliver to him a bill of goods whose purchase price was \$555.85. In his amended complaint he alleged that the drug company agreed to sell and deliver these goods to him; that he paid it \$100 of the pur-

chase price; that it failed to deliver the merchandise; and he prayed for judgment for the \$100 he had paid, for \$100 for loss of credit, for \$25 for loss of his time, and for \$75 for the difference between the price of the goods and their value at the time and place of delivery. The highest estimate of the difference between the contract price and the value of the goods was \$55.58. There was evidence that the defendant in error employed and boarded a clerk and his wife while he was waiting for the arrival of the goods, and that during this period of waiting he lost about \$30 on account of his own time and the expense of boarding and paying his employé, and upon this evidence the jury gave him a verdict for \$175 and interest. At the close of the trial the plaintiff in error requested the court to instruct the jury (1) that the defendant in error could not recover unless the jury found that there was a contract, and a breach of it; and (2) that, in case they found for the defendant in error, he would be entitled to recover only the difference between the contract price and the market value of the goods. The court refused to give this request, and charged the jury that Byrd was entitled to recover the \$100 he had paid on account of the purchase price of the goods, whether they found that there was a contract and a breach of it or not; and that, if they found that there was such a contract and breach, he could recover, in addition to that \$100, such other damages as they might find from the evidence he had sustained. The court gave them no rule by which to measure these damages.

This was an action for damages for the breach of a contract. No other cause of action, no other ground of recovery, was suggested in the complaint. It may or may not be true that the defendant in error was entitled to recover the \$100 he paid for the goods in an action for money had and received if there was no contract, or if there was no breach of it. That is a question that was not in issue in this action; a question that cannot be determined until the claim for this money on this ground is properly made and pleaded, and the plaintiff in error has had an opportunity to answer it. The drug company may have a perfect defense to or counterclaim against that cause of action when it is presented. It had no chance to defend against it in this action, and consequently there could be no lawful recovery here against such a claim. The purpose of pleadings is to notify the parties of the grounds upon which a recovery is sought or a defense is based. No rule is more indispensable to the just and impartial administration of justice, and none is better settled, than that the recovery permitted or the defense sustained must be in accordance with the allegations and the proofs (*Burton v. Platter*, 4 C. C. A. 95, 99, 53 Fed. 901, 905, and 10 U. S. App. 657, 663), and it is seldom that a violation of this rule more flagrant than is shown in this case is found. In an action for damages for breach of a contract the court charged that a recovery might be had, although there was no contract and no breach.

It is suggested that this charge is justified by the fact that during the trial of the case the plaintiff in error offered to confess judgment for \$100. If that offer had been accepted, the error in the charge would undoubtedly have been waived; but it was refused, and after

its refusal it was, upon well-settled principles, entitled to no consideration, and should have had no effect in the trial and determination of the case. The offer was made under sections 5221 and 5222 of Mansfield's Digest of the Statutes of Arkansas, 1884, which provide that the defendant may offer judgment for part of the amount claimed; that, if the offer is not accepted, and the plaintiff fails to recover more, he shall pay all costs incurred after the offer is made; and that "the offer shall not be deemed to be an admission of the cause of action, or amount to which the plaintiff is entitled, nor be given in evidence upon the trial." Beyond this, if there had been no such statute, this unaccepted offer would have been immaterial upon general principles. It was a mere attempt to buy peace,—to compromise the controversy,—and for this reason it was neither an admission of liability nor of the truth of any averment of the complaint. It is the policy of the law to favor the settlement of disputes, to foster compromises, and to promote peace. If every offer to buy peace could be used as evidence against him who presents it, many settlements would be prevented, and unnecessary litigation would be produced and prolonged. For this reason unaccepted offers to compromise claims or to purchase peace are inadmissible in evidence at the trial of controversies over the claims to which they appertain, and should not be permitted to affect the rights of the parties, or to influence the results of the trials. *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 548; *West v. Smith*, 101 U. S. 263, 273; *Laurence v. Hopkins*, 13 Johns. 288; 1 Phil. Ev. (5th Am. Ed.) 350, note 124. The unaccepted offer of judgment for part of the amount claimed did not warrant the charge, and it is error, in an action for damages for breach of a contract, to permit a recovery without proof of a contract and a breach.

The charge of the court on the measure of damages was also defective. There was no pleading or proof which would warrant a recovery of more than the \$100 paid by the defendant in error and the difference between the contract price and the market value of the goods at the time and place of the delivery, with interest thereon; and the court should have so instructed the jury. The damages for the breach of a contract for the sale of goods are ordinarily limited to the difference between the market value and the contract price, because this difference measures the only damages which flow naturally from the breach, and which can be reasonably anticipated by the parties when the agreement is made. Goods are bought to be sold again, and the parties to a sale know that the vendee buys to gain a profit which he may obtain by another sale at the market price in his locality, and that he will inevitably lose that profit if the contract is not performed. The receipt of this profit by the vendee is implied by the contract, and is contemplated by the vendor when the sale is made; and, while it falls within the established rules, it is generally the limit of the recovery that can be allowed for the breach. Those damages which are the natural and probable result of the breach of a contract, those which may be fairly considered as arising from its breach in the usual course of things, those which the parties may reasonably anticipate when the contract is made, and those only, are recoverable in an

action on a contract, in the absence of special circumstances, known to the defaulting party when the contract is made, from which other damages may be anticipated. The rule is universal that the damages which may be allowed must be the natural and probable consequence of the breach, and that they may not be so remote that the defaulting party could not have reasonably anticipated them under the circumstances of the particular case. *Rockefeller v. Merritt*, 22 C. C. A. 608, 617, 76 Fed. 909, 918, and 40 U. S. App. 666, 680; *Howard v. Manufacturing Co.*, 139 U. S. 199, 205-210, 11 Sup. Ct. 500; *Railroad Co. v. Bucki*, 16 C. C. A. 42, 46, 68 Fed. 864, 868, and 30 U. S. App. 454, 460; *Kempner v. Cohn*, 47 Ark. 519, 527, 1 S. W. 869; *Telegraph Co. v. Short*, 53 Ark. 434, 443, 14 S. W. 649. No special circumstances were pleaded or proved to have been known to the plaintiff in error at the time that the defendant in error claimed that it made the contract in suit from which it could reasonably have anticipated any other damages from its breach than those which ordinarily flow from breaking a contract to sell and deliver merchandise. The loss of the time of the purchaser, the loss of the salary of his employé, and of the expense of the board of that employé and his wife for two weeks, is certainly not the natural or probable consequence of the breach of an agreement to sell merchandise of the value of \$550, and it should not have been considered by the jury. Such damages are not implied by the contract, cannot be reasonably foreseen or anticipated as the result of a breach of it, do not ordinarily flow from such a breach, and cannot be permitted to form the basis of a judgment. *Telegraph Co. v. Short*, 53 Ark. 434, 443, 14 S. W. 649; *Railway Co. v. Mudford* (Ark.) 3 S. W. 814, 816; *Ingledeew v. Railroad*, 7 Gray, 86, 91; *Railroad Co. v. Kennedy*, 41 Miss. 671, 679.

The judgment of the United States court of appeals in the Indian Territory and the judgment of the United States court in the Indian Territory, Northern district, are reversed, and this case is remanded to the latter court for a new trial.

CENTRAL TRUST CO. OF NEW YORK et al. v. CLARK.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1890.)

No. 1,147.

1. BREACH OF CONTRACT—LOST PROFITS AS DAMAGES.
The recovery of lost profits, as damages for the breach of a contract, is governed by the same rules as the recovery of other damages.
2. SAME—DAMAGES REASONABLY ANTICIPATED.
Those damages which are the natural and probable result of a breach of a contract, those which the parties may reasonably anticipate as the effect of the breach under the particular circumstances of the case which are known to them when the contract is made, and those only, may be recovered in action upon a contract.
3. SAME—KNOWLEDGE OF DEFAULTING PARTY.
In the absence of proof aliunde of knowledge by the defaulting party, at the time the contract is made, of special circumstances which make other damages the natural and probable effect of a breach, such damages only as are implied by the contract itself, such as would naturally flow from its breach in the usual course of things, such as would reasonably

be anticipated by the parties to such contracts in the great multitude of such cases, and such damages only, may be recovered.

4. **SAME.**

Proof of knowledge by the defaulting party, at the time he makes the contract, of special circumstances which make damages other than those implied by the contract, and naturally flowing from it, the natural and probable effect of its breach, will warrant the recovery thereof.

5. **SAME—SPECULATIVE DAMAGES.**

Damages which are the natural and probable result of a breach of a contract, and which may be reasonably anticipated therefrom, but which are so speculative and so dependent upon numerous and changing contingencies that their amount is not susceptible of proof with any reasonable degree of certainty, may not be recovered.

6. **SAME.**

Plaintiff's assignor contracted to deliver a gear wheel and pinion to a street-railway company on January 3, 1893, but failed to deliver it until May 14, 1893. The wheel and pinion were purchased to replace worn and broken machinery, and because of the delay the company was able to operate its road at only three-fourths its normal capacity, and sustained a loss of \$181 per day during such time. *Held*, that in the absence of proof that plaintiff's assignor had knowledge, at or before the making of the contract, that the wheel and pinion were wanted to replace old machinery, which was liable to break, and thereby prevent the regular operation of the road, the loss sustained from the delay could not have been within the contemplation of the parties, or reasonably anticipated, when the contract was made; was not the natural and probable effect of the delay; and was too remote and inconsequential to be recovered.

Appeal from the Circuit Court of the United States for the District of Colorado.

William W. Field (Edward O. Wolcott and Joel F. Vaile, on the brief), for appellants.

Charles H. Toll and D. V. Burns (C. W. Bangs, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This case involves the right of the intervenor and appellee, Walter L. Clark, to payment for the purchase price of a gear wheel and pinion which was sold by his assignor, the Midvale Steel Company, to the Denver City Cable-Railway Company in 1892, out of the property of the latter company, notwithstanding a prior mortgage upon it, represented by the Central Trust Company, as trustee for the bondholders secured thereby. Clark intervened in the foreclosure suit brought by the trust company against the railway company, and insisted that his claim was entitled to a preference in payment over the bonds secured by the mortgage. The trust company contested this claim for a preference, and also pleaded that the Midvale Steel Company, by its delay in delivering the gear wheel and pinion, had inflicted damages upon the cable company in excess of the purchase price of the machinery. The circuit court sustained the position of the intervenor, and refused to hear the claim of the trust company to offset the damages caused to the cable company by the steel company's delay against the amount owing for the purchase price of the machinery. Upon an appeal from a decree based upon that ruling, this court decided that the claim of Clark was a preferential debt, but that the trust

company was entitled to a reduction of the claim of the appellee by the amount of any damages caused to the cable company by the failure of the steel company to perform the contract in the stipulated time, and remanded the case to the trial court, with directions to cause an investigation of this question to be made, and to deduct from the amount of the intervenor's claim such damages as the cable company sustained on account of the failure of the steel company to deliver the gear wheel and pinion within the contract period. Trust Co. v. Clark, 26 C. C. A. 397, 81 Fed. 269, 273, and 49 U. S. App. 453. Thereupon the circuit court tried this question before a jury, instructed them that no damages were proved, that they must return a verdict against Clark for only \$1, and entered a decree accordingly. The trust company, the Denver City Cable-Railway Company, the Denver City Railroad Company, which was the ultimate purchaser of the railroad at the foreclosure sale, and Edward C. Baggs, the receiver of this purchaser, have appealed from the decree. They have made various assignments of error, but the answer to one question effectually disposes of them all. That question is: Did appellants produce, or offer to produce, upon the trial, such evidence as would have entitled the cable company to substantial damages from the steel company on account of its delay in delivering the wheel and pinion in an original action between the cable company and the steel company? If this question is answered in the negative, there was no substantial error in the trial below, and, if in the affirmative, the case must be retried. We proceed to its consideration.

The appellants proved these facts: The cable company was a corporation operating a cable railway in the city of Denver, in the state of Colorado, and the steel company was a corporation engaged in manufacturing machinery in or near the city of Philadelphia, in the state of Pennsylvania. By means of telegrams and letters sent to each other between September 1, 1892, and October 4, 1892, these parties made a contract on October 3, 1892, to the effect that the steel company would make and deliver to the cable company a gear wheel and pinion suitable to operate its railway on January 3, 1893, in consideration of a stipulated price to be paid for it by the cable company. The delivery was not made until May 14, 1893. There was no provision in the contract that time was of its essence, and there was nothing in the correspondence which led to the contract to indicate that haste was required, or that delay would probably cause unusual loss. On January 3, 1893, and from that time until May 14, 1893, the old gears which the cable company was using were cracked and patched, so that its engineers considered it unsafe to move its cars at a greater speed than seven miles an hour, although their normal speed was ten miles an hour. During this time these gears were in such a worn and weak condition that occasional breakages and stoppages occurred, and the reduction of speed increased the spaces between the cars 25 per cent. After this evidence had been introduced, the appellants offered to prove that early in December, 1892, these old gear wheels, to replace which the contract in question was made, entirely broke down; that thereafter the condi-

tion of the machinery was such as to require a reduction of the speed of the cars until the new machinery was delivered; that at several times between the first breakdown, in December, and May 14, 1893, the old machinery collapsed; that the steel company was at all times constantly advised of all these matters; that between January 3, 1893, and May 14, 1893, the earnings of the road fell off between \$22,000 and \$25,000, as compared with its earnings in 1891 and 1892, while all the conditions except the diminished speed and the greater spaces between the cars were the same as in those years; that it was impracticable to operate the road at this diminished speed with the normal spaces between the cars, and that on account of the reduced speed at which the cable company was compelled to operate its road by reason of the failure of the steel company to deliver the gear wheel and pinion as agreed the mileage of the cable company was so reduced that it lost \$33,000. The appellee objected to this testimony on the grounds (1) that the intervenor was not liable under the contract for the damages which the appellant sought to prove, under any circumstances; and (2) that these damages were remote, speculative, dependent upon a great many contingencies, and related solely to the question of profits. The court sustained these objections, and directed a verdict for nominal damages.

In the arguments and briefs in this case our attention is sharply and repeatedly called to the fact that the damages sought consist entirely of losses of anticipated profits. The mere fact, however, that damages claimed as a result of the breach of a contract consist of anticipated profits, neither establishes the right nor bars the claim to their recovery. Some profits may be and others may not be allowed. The rules which govern their recovery do not differ materially from those which measure the recovery of expenses incurred or other losses sustained through the breach of an agreement. One who breaks a contract of sale of merchandise is liable in damages for the difference between the contract price and the market value of the goods at the time and place of delivery, although this difference is in fact nothing but the profit which the purchaser would have made if the contract had been performed, and which he necessarily lost by its breach. One who prevents his contractor from performing his agreement is liable in damages for the profits which he would have made if he had performed it, because such profits are the direct and immediate fruits of the contract which the parties necessarily contemplated, and in fact promised, when the agreement was made. *Masterton v. Mayor, etc., of Brooklyn*, 7 Hill, 61, 69; *Railroad Co. v. Howard*, 13 How. 307, 344; *U. S. v. Beham*, 110 U. S. 338, 4 Sup. Ct. 81; *Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876. On the other hand, it was held in the leading case of *Hadley v. Baxendale*, 9 Exch. 341, 354, 356, that one who delivered a broken shaft to a common carrier to take to a manufacturer as a model for a new one, and who at the same time notified the carrier that his mill was stopped on account of the break, and asked him to forward the shaft immediately, could not recover from the carrier what he would have gained by running his mill during the latter's unreasonable delay. In *Howard v. Manufacturing Co.*, 139 U. S. 199, 206, 11 Sup. Ct. 500,

the manufacturing company brought an action for a balance due to it upon a contract it had made to reconstruct a mill, to place in it all machinery and material necessary to erect and complete a flour mill of 200 barrels capacity in 24 hours, and to have the mill completed and ready to run on or before July 15, 1885. The defendant answered, among other things, that the mill was not completed until 60 days after July 15, 1885, and that he thereby lost a profit of \$1 per barrel on 1,200 barrels of flour which he would have manufactured in his mill if it had been completed according to the agreement, but the supreme court refused to permit him to recoup these profits. Profits of this character may not be recovered for two reasons: In the first place, parties ought not to be held to pay, for breaches of their contracts, damages which they cannot reasonably anticipate, and which they do not contemplate when they make the contracts, because the presumption is that the contracts would not have been made if such damages had been foreseen or anticipated. In the next place, profits of this character are generally so uncertain, and dependent upon so many unforeseen and changing contingencies, that no reasonable basis for the estimate of their amount can be established. An examination of the opinions in the cases to which we have adverted will conclusively show that the fact that the damages sought in an action on a contract consist of lost profits has little tendency to determine the question whether or not they may be allowed, and that we must recur to the established rules for the measure of damages in general for a correct decision of that question. From the considerations which move the reason, and from the American and English authorities upon this subject, the following general rules may be deduced, which are equally applicable to the measurement of damages based upon the loss of profits and to the measurement of damages founded upon other losses:

(1) Those damages which are the natural and probable result of a breach of a contract, those which the parties may reasonably anticipate as the effect of the breach under the particular circumstances of the case which are known to them when the contract is made, and those only, may be recovered in action upon a contract. *Rockefeller v. Merritt*, 22 C. C. A. 608, 617, 76 Fed. 909, 918, and 40 U. S. App. 666, 680, and cases there cited.

(2) In the absence of proof aliunde of knowledge by the defaulting party at the time the contract is made of special circumstances which make other damages the natural and probable effect of a breach, such damages only as are implied by the contract itself, such as would naturally flow from its breach in the usual course of things, such as would reasonably be anticipated by the parties to such contracts in the great multitude of such cases, and such damages only, may be recovered. *Drug Co. v. Byrd*, 92 Fed. 290; *Railroad Co. v. Bucki*, 16 C. C. A. 42, 46, 68 Fed. 864, 868, and 30 U. S. App. 454, 460; *Hadley v. Baxendale*, 9 Exch. 341, 354, 356; *Primrose v. Telegraph Co.*, 154 U. S. 1, 29, 14 Sup. Ct. 1098; *The Ceres*, 19 C. C. A. 243, 72 Fed. 936, 943; *Boyd v. Brown*, 17 Pick. 453, 461; *Ingledew v. Railroad*, 7 Gray, 86, 91; *Railway Co. v. Mudford* (Ark.) 3 S. W. 814, 816; *Kempner v. Cohn*, 47 Ark. 519, 527, 1 S. W. 869.

(3) Proof of knowledge by the defaulting party, at the time he makes the contract, of special circumstances which make damages other than those implied by the contract, and naturally flowing from it, the natural and probable effect of its breach, will warrant the recovery thereof. *Boutin v. Rudd*, 27 C. C. A. 526, 82 Fed. 685.

(4) Damages which are the natural and probable result of a breach of a contract, and which may be reasonably anticipated therefrom, but which are so speculative and so dependent upon numerous and changing contingencies that their amount is not susceptible of proof with any reasonable degree of certainty, may not be recovered. *Howard v. Manufacturing Co.*, 139 U. S. 199, 205-210, 11 Sup. Ct. 500, and cases there cited; *Cahn v. Telegraph Co.*, 46 Fed. 40.

The application of these rules to the facts of the case in hand readily answers the question it presents. The contract of the steel company was to deliver a gear wheel and pinion within three months of October 3, 1892. The damages to the cable company, with which the appellants seek to reduce the claim for the purchase price of this machinery, consist of the loss of income entailed upon the cable company during the delay in the delivery of the wheel and pinion after January 3, 1893, by the fact that the machinery to replace which they were ordered broke down early in December, 1892, and was thereafter so badly cracked and worn that it was insufficient to operate the cable at more than three-fourths of its normal speed. The purchase price of this machinery was \$10,500. The lowest estimate of the cable company's loss by the delay of four months and a half in its delivery is \$22,000, or at the rate of about \$181 per day. No knowledge by or notice to the steel company at or before it made this contract that this gear wheel and pinion were ordered to replace old machinery, or that the old machinery was badly worn or weak, or liable to break or to be insufficient to operate the railroad at its normal speed, or that the income of the cable company was liable to be reduced \$181 per day, or at all, by its failure to complete its contract on January 3, 1893, was either proved or offered to be proved at the trial of this case. The contract, therefore, falls under the second rule we have announced, and the only damages recoverable for its breach are those implied by the contract itself, those which are the natural and probable effect of the breach in the usual course of affairs. In *Hadley v. Baxendale*, 9 Exch. 341, the loss of the profits of the mill during the carrier's unreasonable delay in taking the broken shaft to a manufacturer was held to be too remote and inconsequential to authorize a recovery, although the carrier knew, when he received the shaft, that the mill had stopped because it was broken. In *Howard v. Manufacturing Co.* the anticipated profits from operating a mill during the delay in the completion of a contract to reconstruct and furnish the machinery for it, and to have it finished and ready to operate on July 15, 1885, were held to be such as did not naturally flow from a breach of the contract, such as could not reasonably have been anticipated by the parties when they made it, and their allowance was refused. How, then, can it be said that a manufacturing company, which simply agrees to make a wheel and pinion for a railway company within a certain time, and

which has no notice or knowledge, when it makes the contract, that the time of its fulfillment is material, no notice or knowledge that it has been ordered to replace old machinery, no knowledge or notice that such old machinery is worn, weak, or liable to break, or that thereby the income of the railway company is liable to be decreased by its delay,—how can it be said that such a manufacturing company could anticipate the loss of the income of a railway company as the result of a delay in the fulfillment of its contract, or that such a loss flows naturally from the breach? The question is its own answer. The loss of a part of the profits of a railroad company or of a manufacturing company is not the natural or probable effect of a delay in filling a contract with it to furnish machinery suitable to operate its railroad or manufactory, because it would not ordinarily follow such a delay; it would not be as likely to follow it as it would to fail to follow it, and it would not be contemplated by the parties when the contract was made. Our conclusion is that the loss of the income of the cable company from the delay in the fulfillment of the contract to furnish it a gear wheel and pinion could not have been in the contemplation of the parties, and could not have been reasonably anticipated by them, when the contract was made; was not the natural and probable effect of the breach; and was too remote and inconsequential to form a basis for its allowance.

The conclusion already reached renders it unnecessary for us to consider the objection that the damages which the appellants sought to prove are so speculative and contingent in their nature that they may not form the basis for a recovery.

The objections of the appellee to the consideration of this case on the merits have not been considered, because the result we have reached is the same we should have attained if these objections had been considered and sustained. The decree below must be affirmed, and it is so ordered.

UNITED STATES v. FREEL et al.

(Circuit Court, E. D. New York. February 15, 1899.)

1. PRINCIPAL AND SURETY—RELEASE OF SURETY—ALTERATION OF CONTRACT.

Where the release of a contractor's surety from the obligation of a building contract on account of subsequent changes therein, without his consent, is involved, the true meaning and intent of the contract should be ascertained according to usual rules of construction; but, when the expressed intention of the parties has been determined, the obligation of the surety is strictissimi juris, from which he is discharged by any alteration of the substantial terms of the contract, whether the same be harmful or beneficial to him. Where the contract authorizes the parties to enter into auxiliary contracts for alterations of the work from that shown in the plans and specifications, without invalidating the primary contract, the parties may stipulate, without releasing the surety, for such enlargement or extension of the work as, in nature, magnitude, and expense, would be consistent with, and bear a reasonable and subsidiary relation to, the work first undertaken.

2. SAME.

Under such a provision, the alteration of the plans and specifications of a contract for the construction of a dry dock for the United States,

in consideration of \$612,000, so that its length should be 670 rather than 600 feet, with an increased payment of \$45,566, and an extension of the time of performance for three months, was within the contemplation of the parties and sureties to the original contract, and the latter were not released thereby. But a supplemental contract changing the location of the entire dry dock from the water side, as provided in the initial contract, to a location 64 feet inland, and requiring the contractor to make all necessary excavations and connections with the water at an increased payment of \$5,063.18, and with an increased time for performance, released the sureties, inasmuch as all consent of the sureties anticipating changes in the contract related to alterations in the attached plans and specifications, of which the location of the structure was no part.

(Syllabus by the Court)

This is an action by the United States on the bond of a contractor for the construction of a dry dock at the Brooklyn navy yard. On demurrer to complaint.

George H. Pettit and Robert H. Roy, for the United States.
James R. Soley and Howard A. Taylor, for defendants.

THOMAS, District Judge. The question presented on this demurrer is whether the sureties of a contractor, who undertook by contract concluded with the United States, on the 17th November, 1892, in consideration of \$612,000, to build a dry dock, "to be located at such place on the water line of the navy yard, Brooklyn, N. Y., as shall be designated," are relieved from liability by reason of a change of such contract by a supplemental agreement concluded between the contractor and the United States, on the 16th day of June, 1893, whereby it was stipulated that the dry dock should be extended to the length of 670 feet, which was 70 feet in excess of the length as originally provided, at an agreed price of \$45,556, whereby also "the time fixed in the original contract for the completion of the said dry dock shall be extended three (3) months, on account of the extra labor," etc., or are relieved from liability by reason of an agreement concluded on the 17th of August, 1893, between the contractor and the United States, whereby, in consideration of \$5,063.18, to be paid the contractor, it was stipulated to "change its location to one sixty-four (64) feet further inland than that laid down and staked out when the said contract was entered into," and whereby the contractor undertook that "he will perform all the additional excavation necessary at the entrance of the dry dock in consequence of the said change of location; also, all the additional work necessary to lengthen the suction pipes provided to be laid down from the present pump house, including the piping, round piles, sheet piles, timber, iron work, excavation, and back filling, etc., and all other work incident to said change of location, supplying all the labor and materials therefor," whereby also "the time limited by the said contract for the completion of the dry dock shall be extended for a period of eight (8) weeks." The plaintiff answers the contention that the supplementary contracts effect the discharge of the sureties by the claim that such contracts were made pursuant to the seventh article of the contract, whereby the sureties anticipated such contracts, and consented there-

to. Before considering the seventh article, a survey of the applicable law may be obtained by summarizing the holdings:

1. The obligation of the surety is coincident primarily with that of his principal. *Benjamin v. Hillard*, 23 How. 149, 164; *McCluskey v. Cromwell*, 11 N. Y. 593, 598; *Bank v. Dillon*, 30 Vt. 122, 126.

2. In estimating the extent of the liability of a surety for the performance of a contract, the true intent, meaning, and fair scope of the contract should be ascertained. *U. S. v. Boyd*, 15 Pet. 187, 208; *Smith v. U. S.*, 2 Wall. 219, 235; *Lee v. Dick*, 10 Pet. 482; *McCluskey v. Cromwell*, 11 N. Y. 593, 598; *Gates v. McKee*, 13 N. Y. 232, 235; *Dobbin v. Gradley*, 17 Wend. 422, 425; *Crist v. Burlingame*, 62 Barb. 351, 355; *Lodge v. Kennedy* (N. D.) 73 N. W. 524; *Wehr v. Congregation*, 47 Md. 177, 187; *Beers v. Wolf*, 116 Mo. 179, 184, 22 S. W. 620; *Lionberger v. Krieger*, 88 Mo. 160; *Locke v. McVean*, 33 Mich. 473.

3. In ascertaining its true intent, meaning, and scope, the same rules of construction should be employed as are used in the interpretation of other contracts. The extent of the surety's obligation must be determined from the language used, read in the light of the circumstances surrounding the transaction. But, when the intention of the parties has thus been ascertained, then the courts carefully guard the rights of the surety, and protect him against a liability not strictly within the precise terms of his contract. *Leggett v. Humphreys*, 21 How. 66, 73; *Association v. Conkling*, 90 N. Y. 116, 121, 122; *McCluskey v. Cromwell*, 11 N. Y. 593; *Crist v. Burlingame*, 62 Barb. 351; *Ludlow v. Simond*, 2 Caines, Cas. 1; *Plow Co. v. Walmsley*, 110 Ind. 242, 246, 11 N. E. 232; *Irwin v. Kilburn*, 104 Ind. 113, 3 N. E. 650; *Birdsall v. Heacock*, 32 Ohio St. 177; *Dobbin v. Bradley*, 17 Wend. 422, 425; *Gamble v. Cuneo*, 21 App. Div. 413, 47 N. Y. Supp. 548; *People v. Backus*, 117 N. Y. 196, 201, 22 N. E. 759; *Smith v. Molleson*, 148 N. Y. 241, 246, 42 N. E. 669; *Gates v. McKee*, 13 N. Y. 232, 237; *Belloni v. Freeborn*, 63 N. Y. 383; *Brandt, Sur. § 54.*

4. The liability of the surety cannot be extended by implication. *Miller v. Stewart*, 9 Wheat. 680; *U. S. v. Boyd*, 15 Pet. 187, 208; *Smith v. U. S.*, 2 Wall. 219, 234; *U. S. v. Boecker*, 21 Wall. 652; *U. S. v. American Bonding & Trust Co.*, 89 Fed. 925; *Dobbin v. Bradley*, 17 Wend. 422, 425; *Livingston v. Moore*, 15 App. Div. 15, 44 N. Y. Supp. 125; *Raney v. Baron*, 1 Fla. 327; *Field v. Rawlings*, 6 Ill. 581; *Bank v. Cole*, 39 Me. 188; *Blair v. Insurance Co.*, 10 Mo. 559; *Henderson v. Marvin*, 31 Barb. 297; *Grant v. Smith*, 46 N. Y. 93, 97.

5. A surety has the right to stand on the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, his liability will be extinguished, even though such alteration be for his own benefit. *Miller v. Stewart*, 9 Wheat. 680; *Id.*, 4 Wash. C. C. 26, Fed. Cas. No. 5,951; *U. S. v. Boecker*, 21 Wall. 652, 657; *Smith v. U. S.*, 2 Wall. 219; *Martin v. Thomas*, 24 How. 315, 317; *Reese v. U. S.*, 9 Wall. 13, 21; *U. S. v. Tillotson*, 1 Paine, 305, 324, Fed. Cas. No. 16,524; *U. S. v. American Bonding & Trust Co.*, 89 Fed. 925; *Earnshaw v. Boyer*, 60 Fed. 528; *Ludlow v. Simond*, 2 Caines, Cas. 1; *U. S. v. Hillegas*, 3 Wash. C. C. 70, Fed. Cas. No.

15,366; *Grant v. Smith*, 46 N. Y. 93, 97; *Paine v. Jones*, 76 N. Y. 274, 279; *Page v. Krekey*, 137 N. Y. 307, 314, 33 N. E. 311; *Dobbin v. Bradley*, 17 Wend. 422; *Bangs v. Strong*, 7 Hill, 250; *Livingston v. Moore*, 15 App. Div. 15, 44 N. Y. Supp. 125; *Mackay v. Dodge*, 5 Ala. 388; *Bethune v. Dozier*, 10 Ga. 235; *Taylor v. Johnson*, 17 Ga. 521; *Plow Co. v. Walmsley*, 110 Ind. 242, 11 N. E. 232; *Mayhew v. Boyd*, 5 Md. 102; *Brigham v. Wentworth*, 11 Cush. 123; *Bank v. Cole*, 39 Me. 188, 193; *Simonson v. Grant*, 36 Minn. 439, 31 N. W. 861; *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *Ryan v. Morton*, 65 Tex. 258; *Wylie v. Hightower*, 74 Tex. 306, 11 S. W. 1118; *Bonar v. MacDonald*, 3 H. L. Cas. 226, 239; *Rees v. Berrington*, 2 Ves. Jr. 540. (a) While the authorities state that the surety is relieved, whether the alteration is material or not (*Paine v. Jones*; *Page v. Krekey*; *Livingston v. Moore*, *supra*), yet it is probable that trivial or very minor changes, relating to detail, and not effecting any substantial change in the terms of the contract, will not release the sureties. *Grant v. Smith*, 46 N. Y. 93, 96; *U. S. v. Tillotson*, 1 *Paine*, 305, Fed. Cas. No. 16,524; *Mayhew v. Boyd*, 5 Md. 102; *Plow Co. v. Walmsley*, 110 Ind. 242, 11 N. E. 232. (b) Changes in the specifications of building contracts fall within this rule. *Evans v. Graden*, 125 Mo. 72, 28 S. W. 439; *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620.

6. A variance in the agreement, without the sureties' consent, by a modifying contract, releases the sureties, although the alleged liability is incurred under the original contract. *Bonar v. MacDonald*, 3 H. L. Cas. 226; *Pybus v. Gibb*, 38 Eng. Law & Eq. 57.

7. A contract for new work, by which no new terms are added to the original contract, and whereby the prior contract is in no way embarrassed by greater difficulties of fulfillment, does not release the sureties. *Ryan v. Morton*, 65 Tex. 258; *Barclay v. Deckerhoof*, 151 Pa. St. 375, 24 Atl. 1067, where the contract for additional work was indorsed on the original contract. See, also, *Warden v. Ryan*, 37 Mo. App. 467. (a) The construction by a contractor engaged to build a sewer, of 15 additional feet, is not a modification of the original contract discharging his sureties, but is a new and additional contract. *Fitzpatrick v. McAndrews*, 12 Pa. Co. Ct. R. 353.

8. If the primary contract contemplate changes in the work, either in nature or extent, similar to that stipulated in the supplemental contract, the performance whereof will be obligatory upon the contractor, the surety's consent to the secondary contract will be deemed to have been anticipated by his placing himself in the relation of surety to the original contract. *Wehr v. Congregation*, 47 Md. 177; *Village of Chester v. Leonard*, 68 Conn. 495, 37 Atl. 397; *De Mattos v. Jordan*, 15 Wash. 378, 386, 46 Pac. 402; *Northern Light Lodge v. Kennedy* (1897; N. D.) 73 N. W. 524; *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *Stewart v. McKean*, 10 Exch. 675; *Hayden v. Cook*, 34 Neb. 670, 52 N. W. 165. (a) It is immaterial that the primary contract does not make the execution of the changes obligatory upon the contractor, provided it empower him to make a subsidiary contract for the performance thereof, or contemplate that he may make voluntarily such contract. *Lodge v. Kennedy* (1897; N. D.) 73 N. W. 524; *Beers v. Wolf*, 116 Mo. 179, 185, 22 S. W. 620.

9. Where the original contract provides that the agreement for changes shall be in writing, alterations made pursuant to verbal agreements or directions, without the consent of the surety, release him. *Eldridge v. Fuhr*, 59 Mo. App. 44; *Killoren v. Meehan*, 55 Mo. App. 427; *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620. But see *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669. (a) When the contract is to be agreed upon between the superintendent and the parties of the second part, the sureties must be parties to the supplemental agreement if they are formal parties to the first contract. *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620.

10. Where the original contract provides for making payments to the contractor in certain amounts, a departure from such method of payment may discharge the sureties. *Village of Chester v. Leonard*, 68 Conn. 495, 37 Atl. 397; *Rowan v. Manufacturing Co.*, 33 Conn. 1; *Howard Co. v. Baker*, 119 Mo. 397, 24 S. W. 200; *Ryan v. Morton*, 65 Tex. 258; *Evans v. Graden*, 125 Mo. 72, 28 S. W. 439; *Bragg v. Shain*, 49 Cal. 131; *Navigation Co. v. Rolt*, 6 C. B. (N. S.) 550; *Calvert v. Dock Co.*, 2 Keen, 638. See *De Mattos v. Jordan*, 15 Wash. 378, 46 Pac. 402; *Leavel v. Porter*, 52 Mo. App. 632.

The seventh article, to which reference is made above, is as follows:

"Seventh. The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed, and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States; but the same shall be satisfactorily supplied, performed, and observed by the contractor, and all claims for extra compensation by reason of, or for or on account of, such extra performance are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect, except upon the written order of the bureau of yards and docks, and that, if at any time it shall be found advantageous or necessary to make any change, alteration, or modification in the aforesaid plans and specifications, such change, alteration, or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof which the contractor shall receive, if any: provided, that, whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars (\$500), the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers to be appointed by the secretary of the navy for the purpose, and the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation he shall be entitled to receive in consequence of such change or changes: Provided, further, that if any enlargement or increase of dimensions shall be ordered by the secretary of the navy during the construction of said dry dock, that the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers, to be appointed by the secretary of the navy, who shall revise said estimate, and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract: and provided, also, that no further payment shall be made, unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part; and further provided that no

change herein provided for shall in any manner affect the validity of this contract."

A characteristic feature of this article is, as well stated by the demurrant, the statute of fraud which it embodies. Its salient and essential purpose was to guard the government from claims for extra work. This appears repeatedly as the section progresses. The contract is declared to be upon the express condition that the plans and specifications shall not be changed except upon a written order of the bureau of yards and docks, and that, if it shall be found "advantageous or necessary" to make any change "in the aforesaid plans and specifications," the same must be agreed upon by the parties to the contract. This is followed by the proviso that, where the increased cost exceeds \$500, a board of naval officers shall determine the sum to be paid or deducted from the contract; and the second proviso states "that, if any enlargement or increase of dimensions shall be ordered by the secretary of the navy during the construction," the same shall be ascertained by a board of naval officers, who shall determine the sum that shall be paid to the contractor for the "additional work that may be required under this contract"; and the third proviso is to the effect that "no further payment shall be made, unless the supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part." There is a final proviso that "no change herein provided for shall in any manner affect the validity of this contract."

It is unnecessary to determine whether it would be obligatory upon the contractor to enter into the supplemental contract to which reference is made in this article, however doubtful it may be whether the United States is protected in that regard. Nevertheless, the article does provide a procedure to be observed, should occasion arise, for deduction from, or addition to, the work as prescribed in the plans and specifications; and it is contemplated, at least, that the contractor may enter voluntarily into such a contract, and that such contract shall not affect the validity of the main agreement. Did not the sureties, when reading this provision, discover and understand that such changes might be called for; that the contractor might make a supplemental contract therefor; and that the change stipulated would not invalidate the original contract to which they stood in the relation of parties? Would it be reasonable to hold that the sureties understood, or were fairly justified in understanding, while reading this seventh article, that any changes made pursuant to it would release them from their relation to the original contract, whose continued validity was declared notwithstanding such changes? Finally, would it be consonant with the intention of the parties, including the sureties, to read into the seventh article a provision that the making of an auxiliary contract without the consent of the sureties should release them? It is considered that, although the contractor was not by any specific terms obligated to enter into any subsidiary agreement, yet that he might be asked to do so, and that the article contemplated his assent to modifications of the work, without impairing the main obligation or the

liability of those who assured its performance. If this be correct, did the contemplated change of the contract justify the agreement for the 70-feet extension of the dock? This presents a grave question, and its solution requires some just rule of general application. Do sureties, by consenting to changes involving an enlargement of the work, consent to an unlimited extension thereof? Could the dry dock have been doubled in length? If the contract were for a 2-story house, could it have been increased to 20 stories? If it were agreed that the material should be of wood, could marble be substituted? Obviously, such excessive changes would not be within the thought or the understanding of the parties or the sureties. But a rule of interpretation, otherwise suitable, cannot be defeated by showing the absurdity of its unlimited application. All rules operate within reasonable limits, and the court regards their legitimate use, and not their abuse. Where a building contract contemplates changes in the work, which will bind the sureties for the fulfillment of the contract as modified, the changes subsequently made must bear in extent and value some reasonable ratio to the original structure. If the plans and specifications call for a house of particular dimensions and quality, a consent to changes anticipated in the contract should be construed to be limited to changes relevant to, and consistent with, the structure first projected. Changes of such nature, and only such changes, would be anticipated by all the parties to the contract as would be reasonable and cognate to the structure primarily planned, and its purpose. In the case at bar a large dry dock was required by the United States to be located at a principal navy yard, and it was manifestly intended for the accommodation of all classes of government vessels. Article 7 manifestly contemplated that changes in its dimensions might be required, and provided for auxiliary contracts for fixing a due consideration for such extension, without disturbing otherwise the continuance of the principal engagement. The subsidiary contract provided for an extension of 70 feet, which was nearly 12 per cent. of the length first adopted, at an increased cost of about $7\frac{1}{2}$ per cent. of the whole consideration. Considering the magnitude of the structure as first intended, and its great expense, and the large use to which it was devoted, the change seems to be such as the parties might have had in view in subscribing to the provisions of the seventh article. The change is a homogeneous, and not an incongruous, addition, nor even a duplication of parts, as would be the case in multiplying the stories of a house; but it is the mere symmetrical enlargement or extension of a specific thing, the construction of which was undertaken, and such enlargement is not greater than the customary use of a dry dock by the government might demand in common reason. Although article 7 might well have contained clearer provisions for the continued obligation of the sureties and the protection of the government thereby, yet it seems to admit fairly of the interpretation given.

There have been various judicial expositions of the allowable departure from original plans and specifications, when some change of plans was contemplated by the original building contract, to some

of which reference will be made. Slight and inexpensive departure did not release the sureties. *Risse v. Planing-Mill Co.* (Kan Sup.) 40 Pac. 904 (see cases in opinion). So, reasonable alterations that did not materially increase the cost. *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104. So, change of material for the window lintels of a court house from stone to railroad iron. *Howard Co. v. Baker*, 119 Mo. 397, 24 S. W. 200. So, sinking the foundation of a building two or three feet deeper, in the course of repair. *Club v. Finlay*, 53 Mo. App. 250. So, enlargement of a church 3½ feet, and the change of the material for certain foundations from brick to stone, the court stating that "it is no argument against the construction adopted that there is great difficulty in fixing a limit within which additions and alterations might be made." *Wehr v. Congregation*, 47 Md. 177. So, even unnecessary alterations, amounting to less than \$250, made by direction of the architect. *Association v. Fitzmaurice*, 7 Mo. App. 283. So, in the case of a contract to build waterworks, where a line of pipes to be laid in a highway for a distance of over 2,500 feet was transferred to private property; another line was changed from one street to another, and considerably lengthened; another line was shifted for a distance of over a mile, so as to be at some points 200 feet from that marked on the original plans; and where the dimensions and length of some of the pipes also varied, so as to call for additional expense on the part of the contractor, none of which changes were necessary to the proper fulfillment of the work. *Village of Chester v. Leonard*, 68 Conn. 495, 37 Atl. 397. So, in the erection of a building in the city of Fargo, North Dakota, where alterations were made, which increased the price \$1,000 (*Lodge v. Kennedy* [1897; N. D.] 73 N. W. 524). So, the surety on a bond for the faithful performance of a building contract, which provided that the owner should have the right during the progress of the work to make changes and alterations in the building, was not released by the fact that during the progress of the work some changes and additions in the building were made which increased its cost to an inconsiderable extent. *Hayden v. Cook*, 34 Neb. 670, 52 N. W. 165.

Respecting the change of location of the dry dock, a different conclusion is necessary. The contract itself, as distinguished from the plans and specifications, provides that the dock shall be built on the water side, while the supplemental contract expressly changes the location to a point 70 feet from the water side, and provides that the contractor shall do all the excavation and work, and furnish all the additional material, necessitated by the change, at an increased remuneration of \$5,063.18. The transfer of the site 70 feet from the water side is of itself a distinct departure from the original project. In considering whether this change releases the sureties, it should be remembered that broad, liberal, and equitable considerations may not prevail, but rather that the rule is technical and strict. It has been said that sureties are favorites of the law. *Ludlow v. Simond*, 2 Caines, Cas. 1, 29. It may be said better that the surety assures the performance of a certain contract, and his liability is conditioned inflexibly upon the continuance of the very terms of that contract.

If the principal parties thereto change their agreement, there springs into being a new contract, to which the sureties are strangers; and, if the guaranty of its performance is desired, it must be obtained *de novo*. Of this a learned judge said as follows:

"Now, it must always be recollect ed in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper measure and effect of the written engagement he has entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say: 'The contract is no longer that for which I engaged to be the surety. You have put an end to the contract I guaranteed, and my obligation therefore is at an end.'" Blest v. Brown, 6 Law T. (N. S.) 620.

This holding illustrates the tendency of the rule. In any case, the surety, in binding himself to the first contract, limited rigidly his liability to that instrument, and its scope measures with precision his undertaking. If he consented to vouch unwisely, he is entitled to suffer to the full measure of his folly, without a favorable revision of his liability by the principal. And, on the other hand, it is his right to fix the final boundary of his faith in the financial, and, in the case of a building contract, the architectural, capacity of his principal, and mark out in the agreement whatever method should attend the execution of the work; and the main contracting parties may not add ever so little to the burden which the contractor has assumed, or deviate from the methods which were to accompany its fulfillment. It results from this that he who would charge a surety for his principal's breach of contractual duty must travel without deviation the way pointed out in the contract, however iron-bound it may be, for there is for the surety in the enforcement of his bond no equity nor latitude beyond its strict terms. Such is the nature of the implied condition upon which the surety's liability depends.

In the case at bar the plaintiff is bound, when a breach of condition is alleged, to plead performance or waiver of the condition, which waiver would be inferred from a consent to the change of location. But this it has failed to do, because, from the nature of the case, it could not be done. At this juncture the seventh article does not aid. That article consents to changes in the plans and specifications "annexed" to the contract, and the whole article has immediate and sole reference thereto, and does not provide for alteration in the location of the structure itself, which location is no part of the plans and specifications, but has its own distinct place in the contract. Therefore there seems to be no saving clause respecting this change of location, and the case falls within the stern rules which have been presented. Some knowledge of the strictness with which the law here involved has been applied may be obtained from a consideration of similar contracts.

In U. S. v. Corwine, 1 Bond, 339, 25 Fed. Cas. 671, the principals bound themselves to the United States to open a ship canal 300 feet wide and 20 feet deep, and keep it open, of such dimensions, for 4½ years from the time of acceptance by the secretary of war. The

principals did not perform their agreement for opening the canal according to its terms, and the government accepted the work with a channel only 18 feet in depth. The sureties of the contractor were released by the change in the terms of the contract.

In *U. S. v. Tillotson*, 1 Paine, 305, Fed. Cas. No. 16,524, a person made a contract with the war department to build a fort, in which it was provided that the fortification was principally, as to the revetment walls, to be built of brick, and thereafter there was an auxiliary contract, by which it was agreed that, in place of brick, a certain composition, called "tapia," which was a species of artificial stone formed by a union, in proper proportions, of sharp sand, fresh lime, and oyster shells, with water sufficient to produce adhesion, should be used in such portions of the walls as should be designated by the superintending engineer, and the contractor stipulated to receive \$10 for every cubic yard of tapia, instead of \$11 for every cubic yard of brickwork as mentioned in the agreement. This was held to be a material alteration, and released the contractor's surety.

In *U. S. v. Case* (U. S. Cir. Ct. 2d Cir. 1879) 25 Int. Rev. Rec. 56, Fed. Cas. No. 14,743, the guarantors undertook that a bidder for a contract to furnish stone about to be let by the plaintiff would, in case the contract was awarded to him, enter into the contract, with sufficient sureties, to furnish the material in conformity to the terms of the advertisement under which the bid was made. It was held, under the facts presented, that the undertaking was that a contract should be executed to furnish stone of a description designated by a sample which was to accompany the proposal, and that the guarantors were released when the bid was to furnish a different kind of stone from certain quarries.

In *Mundy v. Stevens*, 9 C. C. A. 366, 61 Fed. 77, sureties for the payment by a contractor to a subcontractor of all moneys received for work under a government contract as provided in the contract were released by an alteration of such agreement, whereby the right secured to the original contractors to deduct from the monthly payments 3 cents per yard for material dredged subsequently was modified so that payments of $2\frac{1}{2}$ cents per cubic yard should be made monthly.

In *U. S. v. Boecker*, 21 Wall. 652, it was held that where a distiller's bond recited that a person is about to be the distiller at one place, to wit, "at the corner of Hudson street and East avenue, situate in the town of Canton," his sureties are not liable for taxes in respect of business carried on by him at another, as "at the corner of Hudson and Third streets," in the same town, even though he had no distillery whatever at the first-named place, about four squares from the last-named place.

In *Grant v. Smith*, 46 N. Y. 93, it was decided that a change of a contract to purchase a steam engine and two boilers of a given capacity and power, at an agreed price, by which an engine with three boilers, and of greater capacity and power was substituted, at an additional price, released the sureties.

In *Ludlow v. Simond*, 2 Caines, Cas. 1, it was held that, where a surety agreed to make good a deficiency in the sale of property at a

particular place, he was released if the sale was had at a different place, by order of the agent of the principal.

In *Rowan v. Manufacturing Co.*, 33 Conn. 1, a contract provided that rifles should be made "with all possible dispatch"; but a supplemental contract, made before performance, provided that 300 rifles per week should be delivered for a certain period, and 600 per week afterwards. The surety was discharged.

In *Bethune v. Dozier*, 10 Ga. 235, the obligee bound himself to furnish 800 acres of pine land to furnish stock for a saw mill, and the principal accepted of 680 acres in fulfillment of the contract, without the surety's consent, and it was held that the surety was discharged.

In *Zimmerman v. Judah*, 13 Ind. 286, it was decided a supplementary agreement to put an additional story on a house released the surety for the contractor in the original contract.

In *Morgan Co. v. McRea*, 53 Kan. 358, 36 Pac. 717, the sureties on a bond, conditioned for the erection in accordance with certain plans and specifications, and keeping in repair of bridge abutments, were released from liability by a change in the plans of the work made by the principals, and accepted by the obligee of the bond, without their knowledge or consent. In the opinion it is said:

"The specification as to the west abutment, which is the one that fell, is that it shall be 7x20 feet at the base, 3x16 feet at the top, 26 feet high, and containing 90 cubic yards. It is definite as to dimensions and form, and calls for a four-sided structure, sloping in presumably on all sides. The structure actually erected and accepted by the plaintiff had wing walls at the ends, the stone of which were interlocked with those of the main part of the abutment. The bond executed by the defendants requires them to keep the work in repair."

It was held that to repair such a work was not the same thing as to repair the abutment of the form and dimensions specified in the contract.

In *Beers v. Wolf*, 116 Mo. 187, 22 S. W. 620, there was a change of six inches in the depth of the basement, and in the depth of the closets, and these changes made an additional cost in plastering alone of \$221.61. The change in the depth of the basement added the cost of a bulkhead to secure sewer connection, and there was a different arrangement of the closets. The primary work was an addition to an hotel, at the price of \$31,070. The sureties were released.

In *Erickson v. Brandt* (Minn.) 55 N. W. 62, it was held that the sureties on a bond of indemnity against liens arising in the course of construction of a building under a contract between the owner and contractor were released by a departure from the plans and specifications involving different materials and additional labor, which are included in the lien claims.

In *Whitcher v. Hall*, 5 Barn. & C. 269, 11 Eng. Com. Law, 225, the surety engaged for another to the plaintiff, for the milking of 30 cows, at a given price each per annum. Subsequently an agreement was concluded without the surety's consent, whereby the hirer was to have 28 cows for one-half the year, and 32 for the remainder, and it was held that the surety was released.

Pursuant to the foregoing views, the demurrer must be sustained.

CHICAGO G. W. RY. CO. v. KOWALSKI.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1899.)

No. 1,089.

1. RAILROADS—INJURY AT CROSSING—QUESTIONS FOR JURY.

In an action for an injury at a railroad crossing, where the evidence shows that the crossing was on one of the principal business streets of a city, constantly traveled by large numbers of people, and on which was a street-car line, the question whether the railroad company was negligent in failing to maintain a flagman or gates at the crossing is one of fact for the jury.

2. NEGLIGENCE—INJURY TO INFANT—CONTRIBUTORY NEGLIGENCE OF PARENTS.

In an action by an infant in its own right for personal injuries resulting from the negligence of a third party, the fault or negligence of its parents, contributing to the injury, cannot be imputed to the child.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This was an action by Frank Kowalski, an infant, by his next friend, against the Chicago Great Western Railway Company, to recover for personal injuries. There was judgment on a verdict for plaintiff (84 Fed. 586), and defendant brings error.

D. J. Lenehan (D. E. Lyon, on the brief), for plaintiff in error.

N. E. Utt (Alphons Matthews, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a railroad crossing case which originated in the city of Dubuque, Iowa. Frank Kowalski, the plaintiff below and the defendant in error here, at the time of the injuries complained of, was an infant about three months old, and was riding in a two-horse wagon with his father and mother along Rhomberg avenue, in the city of Dubuque. The track of the Chicago Great Western Railway Company, the plaintiff in error, crosses this avenue in a busy part of the city; and, as the wagon in which the Kowalskis were riding reached the crossing, it was struck by one of the defendant company's trains which was at the time moving backward from the northwest across the avenue. The petition specified various acts of negligence on the part of the railway company,—among others, that the train was moving at a dangerous rate of speed; that there was no lookout or brakeman at the rear end of the train; that no warnings of its approach were given by sounding the bell or blowing the whistle; and that the company also failed to maintain a watchman at the crossing as it should have done, in view of the location of the crossing, the amount of travel over the same, and its dangerous character. At the conclusion of the case, the trial court charged the jury, in substance, that the plaintiff below had failed to produce any evidence in support of any of the charges of negligence contained in the petition, save the charge that the defendant company should have maintained a watchman at the crossing; and it left the jury at liberty to determine, in view of all the facts and circumstances in evidence, whether that charge was well founded.

and whether, in the exercise of ordinary care, a flagman should have been stationed at the crossing. It also instructed the jury that, as the plaintiff below was a mere infant only three months old, it was not capable of exercising any care for its own protection, and that the negligence of its parents could not be imputed to it. There was a verdict in favor of the infant for \$2,000, but the same jury, on the same evidence, returned a verdict against the child's mother, Dora Kowalski, who was injured by the same collision, and who had sued the defendant company for damages.

There are only two questions presented by the record which require notice; the first being whether the trial court erred in permitting the jury to determine, as a matter of fact, whether the company was guilty of culpable negligence in failing to station a flagman at the crossing; and the second being whether the court erred in holding that the parent's negligence could not be imputed to the infant plaintiff.

Concerning the first of these questions, it may be said that there was evidence before the jury which tended to show that Rhomberg avenue is one of the principal thoroughfares of the city of Dubuque; that the defendant's railroad track crosses the avenue rather obliquely from the northwest to the southeast; that a street-railway track was laid in the avenue which crossed the defendant's railroad track at the place where the accident occurred; that there was a great amount of travel of various kinds along the avenue, it being in the business part of the city; and that in approaching the defendant's track from the northeast, the direction in which the Kowalskis were driving on the occasion of the accident, the view up the railroad track to the northwest was more or less obstructed by buildings, by a fence and a grape vine growing thereon, and by telegraph or telephone poles, so that a traveler approaching the crossing could not see up the track to the northwest until he was about 30 feet from the crossing, and could then see only about 100 feet. It also appeared that there was a pump factory in the immediate neighborhood of the crossing containing some heavy machinery, which made considerable noise when it was in operation, and that on the morning of the accident a gang of men were working on Rhomberg avenue, near the railroad track, macadamizing the street, and that by reason of their work the street was quite rough, and that the gang of workmen made more or less noise.

Without going further into details respecting the evidence, it will suffice to say that the testimony concerning the location and surroundings of the crossing was of such a character that it fell within the province of the jury, rather than the court, to decide whether the exercise of ordinary prudence on the part of the railway company, and a proper regard for human life, did or did not require it to station a watchman at the crossing, or to maintain gates to warn travelers upon the avenue of the approach of trains. No court ought to say, as a matter of law, with respect to a crossing located as this was in the heart of a city, on one of its principal thoroughfares, and with such surroundings as the evidence discloses, that a company maintaining such a crossing discharges its full duty to the public, and is

guilty of no negligence, although it fails to provide a watchman or gates to warn persons traveling in vehicles of approaching trains. If such a standard of duty is to be adopted it should be done by juries rather than by judges. It is very probable, we think, that, if a flagman had been stationed at the crossing in question, the injuries complained of would not have been sustained, and so the jury evidently concluded. We have no fault to find with that conclusion. We think that the trial court properly submitted the issue as to the defendant's negligence in failing to station a flagman at the crossing to the consideration of the jury, and its action in that regard is well sustained by the authorities. *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679; *Railway Co. v. Tripkosh's Adm'r*, 32 U. S. App. 168, 14 C. C. A. 615, and 67 Fed. 665; *Railway Co. v. Kuhn*, 86 Ky. 578-589, 6 S. W. 441; *Improvement Co. v. Stead*, 95 U. S. 161.

The question in the case of principal interest is whether the trial court rightly instructed the jury that the negligence of the parents of the child on the occasion of the accident could not be imputed to the child. The authorities upon this point, as is well known, are at variance. The doctrine that the negligence of a parent is imputable to his infant child in a suit brought by the infant in his own right to recover damages for an injury sustained through the negligent act of a third party, which was in part occasioned by the parent's fault, owes its origin in this country to the decision in *Hartfield v. Roper*, 21 Wend. 615, decided in 1839 by the supreme court of New York, which doctrine has since been adhered to in that state. *Thurber v. Railroad Co.*, 60 N. Y. 326-333. The New York doctrine has been followed in Massachusetts without much discussion of the grounds upon which it rests (*Gibbons v. Williams*, 135 Mass. 333, and cases cited); also in the state of Maine (*Brown v. Railway Co.*, 58 Me. 384-388); also in Minnesota (*Fitzgerald v. Railway Co.*, 29 Minn. 336-339, 13 N. W. 168); also in California (*Meeks v. Railroad Co.*, 52 Cal. 602); also in Wisconsin (*Parish v. Town of Eden*, 62 Wis. 272, 22 N. W. 399); and in a few other states. The doctrine of *Hartfield v. Roper* was early repudiated in Vermont in a decision rendered by Judge Redfield in 1850. *Robinson v. Cone*, 22 Vt. 213-225. The doctrine was examined and rejected in New Jersey in an able decision by Chief Justice Beasley in the case of *Newman v. Railroad Co.*, 52 N. J. Law, 446, 19 Atl. 1102. It was there held that the negligence of a parent could not be imputed to his infant child in a suit brought by the infant in its own right for injuries sustained through the negligence of a third party, either on the ground that the parent is an agent of his child, or on the ground of any supposed identity of the parent and child. The New Jersey rule is approved in Pennsylvania (*Railway Co. v. Schuster*, 113 Pa. St. 412, 6 Atl. 269); also in Virginia (*Railroad Co. v. Groseclose's Adm'r*, 88 Va. 267, 13 S. E. 454); also in North Carolina (*Bottoms v. Railroad Co.*, 114 N. C. 699, 19 S. E. 730); also in Iowa (*Wymore v. Mahaska Co.*, 78 Iowa, 391-398, 43 N. W. 264); also in Missouri (*Winters v. Railway Co.*, 99 Mo. 509-519, 12 S. W. 652); also in Ohio (*Railroad Co. v. Eadie*, 43 Ohio St. 91, 1 N. E. 519); and in several other states which are enumerated by Judge Baker in *Berry v. Railroad Co.*, 70 Fed. 679-682. The

New York doctrine was followed at first in Indiana, Illinois, and Kansas in the following cases: *Hathaway v. Railroad Co.*, 46 Ind. 25, *Railroad Co. v. Grable*, 88 Ill. 441, and *Railroad Co. v. Smith*, 28 Kan. 541-557; but it has been very recently repudiated in those states, after a careful consideration of the subject, in the following cases: *City of Evansville v. Senhenn* (Ind. Sup.) 47 N. E. 634, *Railway Co. v. Wilcox*, 138 Ill. 370-377, 27 N. E. 899, and *Railroad Co. v. Bockoven*, 53 Kan. 279-289, 36 Pac. 322. The decision of this court in *Railway Co. v. Lapsley*, 4 U. S. App. 542-554, 2 C. C. A. 149, and 51 Fed. 174, did not commit, and was not intended to commit, this court to either view of the question now at issue, because it was not involved in that case.

We think that there is at the present time a decided preponderance of authority in favor of the doctrine that, in a suit brought by an infant in its own right for personal injuries, its parents' fault or negligence cannot be imputed to the child. In view of the general trend of the authorities, it is highly probable that this view will ultimately prevail in the courts of last resort of all the states composing this circuit which have not already adopted it, and for that reason, among others, we think that it should be sanctioned by this court. The judgment of the lower court is therefore affirmed.

LAFAYETTE COUNTY, MO., v. WONDERLY.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1899.)

No. 1,071.

1. JUDGMENTS—RIGHT OF REVIVAL—PROCEEDINGS BY SCIRE FACIAS.

The purpose of a proceeding by scire facias to revive a personal judgment is not to raise the issue of the validity of the original judgment, but to give the debtor an opportunity to show, if he can, that it has been paid, satisfied, or released, and, if he cannot, to avoid the statute of limitations against it, and to give the creditor a new right of enforcement from the date of the judgment of revival. Such proceeding is not a substitute for an action of debt on the judgment, but one which may be maintained concurrently with such action, and without regard to its pendency.

2. SAME—STATUTE OF MISSOURI.

The statutes of Missouri having provided for the revival of judgments by writ of scire facias, without making any exceptions, the courts cannot except a judgment from their operation on the ground that it is not a lien on property, or because no execution could issue thereon.

3. SAME—MANNER OF ENFORCEMENT—WRIT OF MANDAMUS.

A writ of mandamus to enforce the collection of a judgment against a municipality performs the office of, and is legally the equivalent of, an execution upon a judgment against an individual.

4. SAME—PROCEEDINGS TO REVIVE—LIMITATIONS.

The issuance of a writ of scire facias to revive a judgment suspends the running of the statute of limitations against it for the purposes of the proceeding, and the fact that the judgment would have become ineffective for any purpose, by limitation, before the hearing, had the proceeding not been commenced, is no defense to a revival.

5. SAME—DEFENSE—JUDGMENT IN CONCURRENT ACTION OF DEBT.

The pendency of an action of debt on a judgment concurrently with a proceeding by writ of scire facias for its revival is not a defense to the latter proceeding; nor is a judgment for the plaintiff in the former action before the hearing on the writ.

In Error to the Circuit Court of the United States for the Western District of Missouri.

The writ of error in this case challenges a judgment of revivor (77 Fed. 665) upon a writ of scire facias on a judgment against the county of Lafayette, in the state of Missouri, rendered on October 31, 1885. The writ was issued on October 25, 1895. It was in the usual form. It recited the judgment of 1885; the fact that it had been assigned to Charles P. Wonderly, the defendant in error; that it was suggested that this judgment had never been satisfied; that the defendant in error had asked that the judgment be revived; and it summoned the county to appear and show cause why this request should not be granted. The county made numerous objections to the relief sought by demurrer and by answer, only four of which are insisted upon in this court. They are that the judgment of 1885 could not be lawfully revived by means of the scire facias: (1) Because no execution was issuable upon it; (2) because it was not a lien upon any property of the judgment debtor; (3) because the judgment of 1885 was barred on October 31, 1895, by the act of the legislature of Missouri of April 9, 1895 (Laws 1895, p. 221); and (4) because it was merged into a judgment against the county which was rendered prior to the judgment of revivor herein, in the circuit court of Lafayette county, in the state of Missouri, in an action which had been brought in that court by the defendant in error upon the same judgment on September 18, 1895.

Elijah Robinson (James M. Lewis, William Aull, and Stuart Carkener, on the brief), for plaintiff in error.

Frederick A. Wind, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The proceeding by writ of scire facias to revive a personal judgment is statutory. It had its origin in the statute of Westminster II. (13 Edw. I. c. 45). It is not an original proceeding, but a mere continuance of the former suit,—a supplementary remedy to aid in the recovery of the debt evidenced by the original judgment. Adams v. Savage, 3 Salk. 321, 2 Bac. Abr. 598; McGill v. Perrigo, 9 Johns. 259; Humphreys v. Lundy, 37 Mo. 320, 323. Its purpose is not to raise the issue of the validity of the original judgment, but to offer the debtor an opportunity to show, if he can, that the former judgment has been paid, satisfied, or released, and, if he cannot, to avoid the statute of limitations against the judgment and its lien, if it have one, and to give the creditor a new right of enforcement from the date of the judgment of revival. Its effect, when it results in a new judgment, is to avoid the statute of limitations, to set it running again from the date of the judgment of revival, and to reinstate the old judgment, and any lien which it evidences, as of the date of the judgment of revival. 2 Cooley, Bl. Comm. 3, 656; Walsh v. Bosse, 16 Mo. App. 231, 233; Insurance Co. v. Hill, 17 Mo. App. 591, 593; Fagan v. Bently, 32 Ga. 534; Farrell v. Gleeson, 11 Clark & F. 702, 712. It is not a substitute for the action of debt upon the judgment, but is an independent, concurrent remedy, of which the creditor may avail himself, regardless of such an action. Until pay-

ment of the debt has been enforced, he may prosecute his action of debt and his proceeding by scire facias at the same time, and the pendency of the one is no defense to the other. 2 Coke, Inst. 472; Carter v. Coleman, 34 N. C. 274; Lambson v. Moffett, 61 Md. 426, 431. The time, manner, and effect of the use of this proceeding in the state of Missouri have been prescribed by positive and clear enactments of the legislature of that state. These statutes (Rev. St. 1889) furnish the test by which the objections of the plaintiff in error must be tried, and they read in this way:

"Sec. 6012. The Commencement, Extent and Duration of Lien. The lien of a judgment or decree shall extend as well to the real estate acquired after the rendition thereof, as to that which was owned when the judgment or decree was rendered. Such liens shall commence on the day of the rendition of the judgment, and shall continue for three years, subject to be revived as herein-after provided. * * *

"Sec. 6013. Scire Facias to Revive, may Issue, When. The plaintiff or his legal representatives may, at any time within ten years, sue out a scire facias to revive a judgment and lien: but after the expiration of ten years from the rendition of the judgment, no scire facias shall issue.

"Sec. 6014. Revival to Take Effect from Rendition, When. If a scire facias be issued after the expiration of the lien, and a judgment of revival is afterwards rendered, such revival shall only take effect from the rendition thereof and shall not prevail over intermediate encumbrances.

"Sec. 6015. Scire Facias before Lien Expires, Effect of. If a scire facias is issued to revive a judgment and lien before the expiration of the lien, and a judgment of revival is afterwards rendered, although it may be after the expiration of the lien, yet the lien shall prevail over all intermediate encumbrances."

Section 6016, 6017, and 6018 prescribe the method of service of the scire facias.

"Sec. 6019. Judgment Revived, When. If, upon the service of the scire facias or publication as aforesaid, the defendant, or any of his creditors, do not appear and show cause against reviving the judgment or decree, the same shall be revived, and the lien continued for another period of three years and so on, from time to time, as often as necessary.

"Sec. 6020. Execution may Issue, When. Execution may issue upon a judgment at any time within ten years after the rendition of such judgment."

Section 6796, as amended by the act of April 9, 1895 (Laws Mo. 1895, p. 221):

"Every judgment, order or decree of any court of record of the United States, of this or any other state or territory, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the rendition of such judgment or order, or decree, or in case a payment has been made thereon, and duly entered upon the record thereof, after the expiration of ten years from the day of the last payment so made; and after the expiration of ten years from the day of the rendition or from the day of the last payment no execution, order or process shall issue thereon, and neither shall any suit be brought thereon to collect the amount of the same as a debt."

We are now prepared to give attention to the specific objections to the judgment of revivor in hand, and we will proceed to consider them in their order, in the light of this legislation.

The contention that the judgment of 1885 could not be revived by scire facias, because no execution could be issued upon it, and because it was not a lien upon any of the property of the judgment debtor, is met by the fatal objection that the statutes of Missouri authorize the revival of all judgments, and contain no exceptions.

The legislature of that state had the undoubted power and right to except from the benefit of this writ judgments upon which no execution could issue, judgments which created no liens, and any other judgments it might specify; and it had the same right and power to authorize the use of the writ to revive all judgments. It exercised this power. It authorized the issue of this writ to revive every judgment, and made no exception. Where the legislature has granted a right or extended a privilege to every member of a class, and made no exception, the conclusive presumption is that it intended to make none, and it is not the province of the courts to do so. *Madden v. Lancaster Co.*, 12 C. C. A. 566, 573, 65 Fed. 188, 195, and 27 U. S. App. 528, 540; *Contracting Co. v. Ward*, 28 C. C. A. 667, 675, 85 Fed. 27, 35, and 55 U. S. App. 730, 741; *Morgan v. City of Des Moines*, 8 C. C. A. 569, 60 Fed. 208, and 19 U. S. App. 593. Again, section 6020 authorizes the issue of an execution upon every judgment, and our attention has been called to no act which prohibits its issue upon a judgment against a county. It may be true that the issue of an execution upon such a judgment would be futile, in view of the exemption of public property from a levy under it by sections 4904 and 4905, Gen. St. 1889. But even if an execution were not issuable upon this judgment, and if the statute excepted, as it does not, judgments upon which an execution could not issue, a writ of mandamus was certainly available to compel a levy of a tax to pay the judgment; and upon this ground the judgment against the county would fall within the intent of the legislature, and the spirit and meaning of this statute, because the writ of mandamus to enforce the collection of judgments against municipalities performs the office and is legally the equivalent of the writ of execution upon judgments against private individuals. *Dempsey v. Oswego Tp.*, 2 C. C. A. 110, 112, 51 Fed. 97, 99, and 4 U. S. App. 416, 434; *U. S. v. Same*, 28 Fed. 55; *Stuart v. Justices*, 47 Fed. 482; *State v. Slavens*, 75 Mo. 508. The position that the judgment could not be revived, because it evidenced no lien, is not only in the teeth of the general enactment found in section 6013, which covers all judgments, but is also inconsistent with the specific provision of section 6014, which declares the effect of a revival of a judgment after the expiration of its lien. Beyond this, there is no sound reason why a judgment which creates no lien may not be revived by scire facias. One of the objects and effects of a revival is to avoid the statute of limitations, to give the creditor a new right to enforce his judgment from the date of the judgment of revival, and to set the statute of limitations to running from the date of the latter judgment. The creditor is entitled to pursue this purpose and to accomplish this result by the use of this writ, both under the express provisions of the statute of Missouri, and under the general rules of law which govern the use of the writ, whether the judgment revived created a lien upon the debtor's property or not. The imposition of a lien by means of a judgment is not indispensable to the exercise of a right to revive it by scire facias. *Conyngham Tp. v. Walter*, 95 Pa. St. 85, 88.

The next position of the county is that the judgment of revival was erroneously entered because the original judgment of October 1, 1885,

became barred and dead upon October 31, 1895, by virtue of the act of April 9, 1895, which limits the life of a judgment to 10 years, and provides that, "after the expiration of ten years from the day of the rendition or from the day of the last payment, no execution, order or process shall issue thereon, and neither shall any suit be brought thereon to collect the amount of the same as a debt." The patent answer to this contention, however, is that the writ in this case was issued on October 25, 1895, within the 10 years prescribed by the act of 1895, as well as by section 6013 of the General Statutes, and upon well-settled principles the statute of limitations ceased to run on that day, as against the pending proceeding to revive the judgment. The issue which the writ tendered to the debtor was whether or not any payment or release of the judgment had been procured which made it unjust to revive it. The fact that the county had not paid it, but had waited until it would have become barred by the statute if the writ had not issued, constituted no cause why it should not be revived, but was a conclusive reason why it should be.

Finally it is insisted that the judgment of revival is erroneous because the plaintiff in error commenced an action of debt on the original judgment on October 18, 1895, which resulted in a judgment in his favor in one of the courts of the state of Missouri before the judgment of revival was rendered in the court below. It is said that the original judgment was merged in the new judgment in the state court, and became *functus officio*, so that it could not be the basis of any action or recovery, and in support of this view *Freem. Judgm. § 215; Cooksey v. Railway Co., 74 Mo. 477; Wilson v. Railway Co., 87 Mo. 431; and Blake v. Downey, 51 Mo. 437*,—are cited. But a careful consideration of the nature of the proceeding by *scire facias*, and of its relation to an action of debt on the same judgment, shows that the principle announced in these authorities has no application to the case at bar. Under the statute of Westminster II., and under the statutes of Missouri, this proceeding by *scire facias* is a remedy for the avoidance of the statute of limitations, independent of, but concurrent with, an action of debt upon the judgment. Either or both remedies may be pursued at the same time, and the pendency of one is no defense to the prosecution of the other. The creditor may pursue both until he secures the payment or satisfaction of his debt. Payment or satisfaction by means of the concurrent remedy—and that only—constitutes a defense to the other proceeding. *2 Coke, Inst. 272; Carter v. Coleman, 34 N. C. 274; Lambson v. Moffett, 61 Md. 426, 431; Masterson v. Cundiff, 58 Tex. 472; Standley v. Roberts, 8 C. C. A. 305, 314, 59 Fed. 836, 841, and 19 U. S. App. 407, 421; Merritt v. Barge Co., 24 C. C. A. 530, 536, 79 Fed. 228, 233, and 49 U. S. App. 85, 96; Stanton v. Embrey, 93 U. S. 548, 554.* The action of debt on the judgment of 1885 was commenced on September 18, 1895. It was pending, but had not matured into a judgment, when, on October 25, 1895, the defendant in error sued out the writ of *scire facias* in this case. That writ summoned the county to show cause, if any it had, why the original judgment should not be revived. Under the established rules which govern the proceedings under this writ, the only cause it was open to it to show was that it had paid or satisfied the

debt in some such way that it would be unjust to avoid the statute of limitations and to revive the judgment. Obviously, the fact that it had not paid the judgment, but had continued to refuse to pay it until another judgment that it ought to pay it had been rendered in another court, which it still refused to pay, had no tendency to show that the original judgment had been paid or satisfied, or that any injustice would be done by continuing it in force. The existence of the unsatisfied judgment in the state court constituted no defense to this proceeding, but was rather an added reason why the defendant in error should have the relief he sought. The judgment below must be affirmed, with costs, and it is so ordered.

CHICAGO, R. I. & P. RY. CO. v. LEE.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1899.)

No. 1,074.

1. CARRIERS—INJURY TO PASSENGER—RIDING IN FREIGHT CAR.

A contract made by a railroad company for the carriage of a fine mare gave free transportation for a part of the distance for an attendant, in consideration of which it was provided that the mare should be in his sole charge, and the company should not be responsible for her protection, whether from theft, heat, jumping from the car, or injury she might do herself. It was the custom on that road for a person in charge of fine stock to ride in the same car with such stock, and the person in charge of the mare so rode, with the knowledge of the train officials, and without objection from them. While so riding, the car was derailed through the negligence of those in charge of the train, and the attendant was injured, though the caboose remained on the track. *Held*, that the contract must be construed as one for the carriage of the attendant in the car where he was, and that he was therefore not guilty of negligence, in not riding in the caboose, which would defeat his recovery for the injury.

2. SAME—PAYMENT OF FARE.

The fact that a passenger on a railroad train had not paid his fare at the time he received an injury will not affect his right to recover therefor, when the fare had not yet been demanded by the conductor.

3. SAME—CONTRACT EXEMPTING CARRIER FROM LIABILITY.

A minor riding on a contract made by his father, by which the person traveling thereon was given free transportation for a portion of the distance, and which provided that he should assume all risk of personal injury, except from gross negligence of the carrier, is not bound by such provision.

In Error to the Circuit Court of the United States for the District of Kansas.

W. F. Evans (M. A. Low, on the brief), for plaintiff in error.

J. R. McClure, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge. This is an action against the railroad company for personal injuries sustained by Ray Lee, the defendant in error, through the derailment of a stock car of the company, in

which he was riding with a mare of which he had the charge. This is the second appearance of the case in this court. A judgment against the plaintiff in error was reversed in 22 C. C. A. 132, 76 Fed. 212, and 40 U. S. App. 298, and a second trial has now resulted in a second judgment and verdict against the company. Several errors are assigned, but, at the conclusion of the argument in this court, the counsel for the railroad company requested us to disregard them, and affirm the judgment, unless we were of the opinion that, upon the whole case, there was insufficient evidence of negligence upon the part of the plaintiff in error to sustain the verdict, or such evidence of contributory negligence upon the part of the defendant in error as imposed the duty upon the trial court to instruct the jury that he could not recover. As the jury has rendered a verdict for the defendant in error, and has thereby found the disputed questions of fact in his favor, we must, in accordance with the settled rules in such cases, state and consider the disputed facts as they were related by his witnesses. So far as they are material to the determination of the questions presented for our consideration, they were these: Ray Lee, the defendant in error, was a minor. On October 6, 1894, his father, A. D. Lee, made a written contract with the railroad company whereby it agreed to transport a mare from Joliet, in the state of Illinois, to Junction City, in the state of Kansas, and at the same time he notified the company that his son, Ray Lee, was to accompany and take charge of the animal. Rock Island is a station on the road of the plaintiff in error between Joliet and Junction City. The contract contained these stipulations:

"In consideration of free transportation for one person to Rock Isld., hereby given by said railway company, such person to accompany the stock, it is agreed that the cars containing the stock of said Lee & Sons are in the sole charge of such person or his agents for the purpose of attention and protection to the stock while in transit, and the company assumes no responsibility for safety to stock in charge of shipper or his agents, whether from theft, heat, jumping from car, injury in loading or unloading, injury or damage which stock may do to themselves or which may arise from the reasonable delay of trains, or from any other cause or accident or injury, except those occurring by reason of gross negligence of the company. It is also agreed in all cases that the liability of the company for damage to valuable or common live stock shall not exceed one hundred dollars for each animal, except by special agreement; and, further, that the persons who receive free transportation in charge of said stock, in consideration of the receipt of the same, agree to assume all risk of personal injury from any cause whatever, except injuries arising from gross carelessness of the railway company."

The company furnished the car at Joliet, Ill., for the transportation of the mare. She was put into it with the sulky, blanket, and harness, and the defendant in error climbed in to take charge of and care for her. On the railroad of the Rock Island Company it was customary for men in charge of fine animals to ride with them in the cars which carried them. The car in question passed through the charge of two conductors between Joliet and Happy Hollow, in the state of Iowa, where the accident occurred, one east and the other west of Rock Island. These conductors knew that the defendant in error was riding in the car with the mare, but neither of them objected or warned him to go elsewhere. The rules of the company forbade pas-

sengers to ride on freight trains without special permits, but there was no evidence of the existence of any rule which forbade passengers in charge of animals in transit under special contracts to ride with them in the cars, when the agreements required them to take sole charge of the animals. The defendant in error had no transportation and paid no fare over that part of the railroad west of Rock Island, and the conductor had made no demand for any when the accident happened. As the train was passing some reverse curves at Happy Hollow, at an unusually high rate of speed, the car in which the defendant in error was riding was derailed, and he was injured, but the caboose attached to the train in which this car was hauled remained on the track, and he would not have sustained any injury if he had been riding in that car.

Under this state of facts, the unusual speed, the reverse curves, and the derailment of the car furnished sufficient evidence of negligence on the part of the company for the consideration of the jury, if the defendant in error was a passenger. The questions are, was he a passenger? and was it contributory negligence for him to ride in the stock car rather than in the caboose? The presumption, in the absence of countervailing evidence, is that one who rides in a baggage car, an express car, a stock car, or on a freight train is not a passenger on it, and, even if he is, since he is riding out of the place provided by the company for passengers, that he has assumed the increased risk resulting from riding there, and is therefore guilty of contributory negligence. *Bryant v. Railway Co.*, 4 C. C. A. 146, 147, 53 Fed. 997, 998, 12 U. S. App. 115, 123; *Player v. Railway Co.*, 62 Iowa, 727, 16 N. W. 347; *Jenkins v. Railway Co.*, 41 Wis. 112, 121; *Railway Co. v. Miles*, 40 Ark. 298; *Gardner v. Northampton Co.*, 51 Conn. 143, 152; *Powers v. Railroad Co.*, 153 Mass. 188, 190, 26 N. E. 446; *Eaton v. Railroad Co.*, 57 N. Y. 382; *Files v. Railroad Co.*, 149 Mass. 204, 21 N. E. 311; *Hoar v. Railroad Co.*, 70 Me. 65, 72, 73; *Graham v. Railroad Co.*, 23 U. C. C. P. 541; *Sheerman v. Railway Co.*, 34 U. C. Q. B. 451; *Railroad Co. v. Michie*, 83 Ill. 427; *Railway Co. v. Lee*, 22 C. C. A. 132, 76 Fed. 212, 40 U. S. App. 298. But the agreement of carriage is nothing, after all, but a contract, and a railroad company may lawfully stipulate to carry a passenger in a baggage car, in an express car, a stock car, or on a freight train generally. If it makes such a contract, it is required to exercise ordinary care in the performance of it. What was the meaning of the agreement of the parties in this case? Their contract must, like other agreements, be read and construed in the light of the circumstances surrounding them when they made it; and when it is considered that it was customary for the men in charge of fine animals to ride in the cars with them on this railroad; that the car in which the defendant in error was riding was furnished at Joliet for the transportation of the mare; that the company knew that the defendant in error was to go in charge of her; that he climbed into the car at Joliet, and rode there until he was injured; that the two conductors through whose charge he passed knew that he was riding in that car before the accident occurred, and made no objection; and that the written contract expressly provided that the car con-

taining the animal was in his sole charge, for the purpose of attention to, and the protection of, the mare during the transportation, and that the company assumed no responsibility for her safety while in his charge, whether from theft, heat, jumping from the car, or injury or damage which she might do herself,—we are constrained to hold that the fair interpretation of this agreement is that it was a contract to carry the defendant in error in the stock car occupied by the mare from Joliet to Junction City upon his payment of fare from Rock Island to the latter place. If this was the contract, the defendant in error was guilty of no negligence in occupying that car rather than the caboose, because he had the right to rely upon the presumption that the company would use ordinary care to carry him safely in the car in which the contract permitted him to ride.

The fact that the defendant in error had not paid his fare from Rock Island to Junction City was immaterial, inasmuch as the conductor had not asked for it, and, if the defendant had undertaken to carry him without the payment of fare, it was bound to exercise all due care in the performance of the obligation thus voluntarily assumed. *Bryant v. Railway Co.*, 4 C. C. A. 146, 147, 53 Fed. 997, 998, 12 U. S. App. 115, 123; *Railway Co. v. Derby*, 14 How. 468; *The New World v. King*, 16 How. 469; *Waterbury v. Railway Co.*, 17 Fed. 671, 673.

The stipulation in the contract that the person who receives free transportation under it agrees to assume all risk of personal injury from any cause whatever, except from injuries arising from the gross carelessness of the railroad company, is entitled to no consideration, because the defendant in error was a minor, and because this stipulation was not his contract, but the agreement of his father, A. D. Lee.

As the errors assigned which have not been considered were expressly waived by the counsel for the plaintiff in error, the judgment below must be affirmed; and it is so ordered.

CHICAGO & A. R. CO. v. EHRET.

(Circuit Court of Appeals, Eighth Circuit. February 7, 1899.)

No. 1,068.

REVIEW ON APPEAL—EXCEPTIONS TO INSTRUCTIONS.

An exception to a charge as a whole is unavailing, where any part of the charge is correct.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

W. H. Morrow (N. W. Morrow, on the brief), for plaintiff in error.

D. V. Herider, E. N. Watson, and E. S. Herider, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. Charles G. Ehret was a locomotive engineer in the employ of the Chicago & Alton Railroad Company,

the plaintiff in error; and on the 27th of February, 1897, while running his engine, which was pulling a train of cars, the engine was derailed, the train wrecked, and Ehret killed, as a result of the derailment of his engine. The defendant in error, Emma J. Ehret, is the widow of the dead engineer, and brought this action to recover damages for his death, which her complaint alleges resulted from the derailment of his engine, caused by the following acts of negligence on the part of the railroad company: (1) That the railroad company used old, worn, and insufficient rails in a curve in its track at the place where the engine was derailed; (2) that it failed to maintain an outer rail on its track in the curve of sufficient height to render the operation of trains over it reasonably safe; (3) that the ties under the rails at the place of derailment were so old, worn, and rotten as to render the use of that part of its track unsafe and dangerous; and (4) that the railroad company failed to put tiling on the outer side of its track in the curve to drain off the water, as a result of which water accumulated in the cut, and rendered the road-bed soft and unsafe.

The company denied the alleged acts of negligence. The issues thus raised were tried to a jury, who returned a verdict in favor of the plaintiff, upon which judgment was rendered, and the defendant sued out this writ of error.

It is assigned for error that the court refused at the close of all the evidence to instruct the jury to return a verdict for the defendant. There was no error in refusing this instruction, because there was abundant evidence to entitle the plaintiff to go to the jury. The rule as to when a court is justified in withdrawing the case from the consideration of the jury by giving a peremptory instruction based on the assumption of the insufficiency of the evidence to support a verdict is too trite to justify its repetition.

The only other error assigned is based on the following exception to the charge of the court:

"At the conclusion of the charge the defendant said it had no specific exceptions to make, but would like to except to the charge as a whole. The court said, 'You may do so, but I fear, under the well-settled practice of the court of appeals, it will do you no good.'"

The defendant's attorney did not heed the admonition of the learned trial judge, and his exception to the "charge as a whole" goes for nothing; for it is clear from an inspection of the charge that it was not all bad law, which would have to be the case to render such an exception of any avail. *New England Furniture & Carpet Co. v. Catholicon Co.*, 49 U. S. App. 78, 24 C. C. A. 595, 79 Fed. 294. The judgment of the circuit court is affirmed.

GRAND ISLAND CANNING CO. v. COUNCIL BLUFFS CANNING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 13, 1899.)

No. 1,015.

LANDLORD AND TENANT — ACTION FOR RENT — CONSTRUCTION OF CONTRACT OF LEASE.

Plaintiff and defendant corporations entered into a contract by which plaintiff agreed to furnish \$22,000 for the erection of a canning factory, which defendant agreed to rent, paying as annual rent 10 per cent. on its cost, and also to purchase each year, at par value, not less than 10 per cent. of the capital stock of plaintiff from its stockholders, until it was all absorbed. *Held*, that under such contract the rent was to be computed on \$22,000, the original cost of the factory, without including the cost of additions and improvements made by defendant after it took possession, but that defendant was bound to pay such rental until it had taken up all plaintiff's stock, whether it occupied the factory or not.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

Warren Switzler (Charles G. Ryan, William A. Prince, Jacob Sims, and George H. Thummel, on the brief), for plaintiff in error.

John N. Baldwin, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an action at law for rent reserved in a contract. The court below tried it without a jury, made a special finding of facts, and rendered a judgment for \$2,200 and interest for the rent for the year 1893, and for \$2,200 and interest for rent for the year 1894, found that the rent for 1895 had not been paid, but held that the plaintiff in error, the Grand Island Canning Company, was not entitled to recover the rent for this year, because neither the Council Bluffs Canning Company, one of the defendants in error, nor its lessees or grantees, who had occupied the leased premises in 1893 and 1894, were in occupancy thereof in 1895. The defendants in error Daniel W. Archer, George A. Keeline, and Samuel Haas were guarantors of the contract of the Council Bluffs Canning Company. The only errors assigned are that the court should have concluded from the facts that the rental under the contract was \$3,810, instead of \$2,200, per annum, and should have concluded that the plaintiff in error was entitled to judgment for rent for the year 1895. The facts found by the court below which are material to the determination of the questions presented by this assignment are these: On March 18, 1887, the Council Bluffs Canning Company made an agreement with the Grand Island Canning Company whereby the latter company promised to furnish \$22,000 for the purpose of purchasing a site and erecting a canning factory at Grand Island, in the state of Nebraska, and the Council Bluffs Company agreed to furnish any additional capital required to complete this factory, and to fulfill the promises contained in the following stipulation of the contract:

"The party of the first part [the Council Bluffs Canning Company] hereby undertakes and agrees to rent said property, from the time of its completion ready for use and occupancy, at an annual rental equal to ten per cent. of

the actual cost of said property, to keep the same insured for the reasonable amount of its cost, and to purchase annually and take from the stockholders of the party of the second part [the Grand Island Canning Company], at its face or par value, and they (the second parties) hereby agree to sell thereat, not less than 10 per cent., and as much more as said first party may elect, of the capital stock of the party of the second part, which shall in no case be issued for an amount more than twenty-two thousand dollars, unto the parties furnishing that amount, excepting as hereinafter provided, and to as much less as the plant may actually cost when completed."

The Grand Island Company furnished the \$22,000, and the factory was completed according to the agreement, and turned over to the Council Bluffs Canning Company, about July 10, 1887. At the end of the first year, in 1888, the Council Bluffs Company redeemed 10 per cent. of the original stock of the Grand Island Company, by paying the sum of \$2,200; and altogether it then advanced \$15,000 or \$16,000 to that company, and received some of its stock therefor. There were other facts found by the court below, but none that in any way affect the determination of the questions now at issue.

The contention that the annual rental was \$3,810, instead of \$2,200, is without foundation. The contract was that this rental should be 10 per cent. of the actual cost of the property. The cost intended by the parties to the agreement was evidently the first cost, the original cost,—not the cost of the factory, with the additions and improvements which may have been subsequently made to it; and there is nothing in the findings of the court to show that this cost exceeded the \$22,000 originally furnished by the Grand Island Company.

The position that the liability of the Council Bluffs Company to pay the rent was not limited by its occupancy of the property, or by the occupancy of its grantees or lessees, is of a different character. Repeated readings of the contract have failed to bring to our attention any such limitation. The substance of the agreement was that the stockholders of the Grand Island Company would furnish to the Council Bluffs Company on July 10, 1887, a factory which should cost \$22,000, and that the Council Bluffs Company would pay this \$22,000 back to them, in annual installments of not less than 10 per cent., on or before 10 years, and that until it did so, or until the 10 years had expired, it would pay their company a rental of \$2,200 per year. There is no intimation in the contract that the liability of the Council Bluffs Company to pay this rent, or to repay this money, or to perform any of its covenants, was conditioned upon its continued occupancy of the factory, and by the plain terms of the agreement the Council Bluffs Company promised as positively to pay the rent of 1895 as it did to pay that of any previous year. The judgment below should have included \$2,200 and interest for the rental of the year 1895. That judgment must be reversed, and the case remanded to the court below, with directions to enter a judgment for the rental of the years 1893, 1894, and 1895, with interest, and it is so ordered.

DAVIS v. BOHLE et al.

(Circuit Court of Appeals, Eighth Circuit. February 13, 1899.)

No. 12.

1. BANKRUPTCY—EFFECT ON ASSIGNMENT FOR CREDITORS.

Under Bankruptcy Act 1898, § 3, declaring that it shall be an act of bankruptcy if a person shall have "made a general assignment for the benefit of his creditors," such an assignment is voidable at the instance of creditors; and, if proceedings in bankruptcy are instituted against the assignor within four months thereafter, an adjudication therein will avoid the assignment, and the trustee in bankruptcy may recover the assigned estate, or its proceeds, from the assignee.

2. SAME—PROPERTY IN POSSESSION OF VOLUNTARY ASSIGNEE.

Where a debtor has made an assignment of his property for the benefit of his creditors, and a petition in bankruptcy is filed against him, alleging such assignment as an act of bankruptcy, and his assignee is in possession of the estate, has had the same appraised, and is about to make sale thereof, the court of bankruptcy has jurisdiction to enjoin such assignee from proceeding further with the administration of the estate, and to appoint the marshal to take charge of the property assigned, and to hold the same until the dismissal of the petition or the appointment of a trustee.

Petition for Review of a Decision of the United States District Court for the Eastern District of Missouri in Bankruptcy. In re Sievers, 91 Fed. 366. Affirmed.

Chester H. Krum, for petitioner.

William E. Fisse (Henry Kortjohn, on the brief), for respondents.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an original proceeding in this court; the same being a petition filed under section 24 of the bankrupt act, approved July 1, 1898, to review the action of the district court of the United States for the Eastern district of Missouri in a certain bankruptcy case pending in that court. Attached to the petition for review is a transcript of the record of the district court, embodying the order which is claimed to have been erroneous. From such transcript it appears that on December 6, 1898, Charles F. Sievers, at the city of St. Louis, executed a voluntary deed of assignment in favor of Henry B. Davis, the petitioner, covering all his property and effects, and for the equal benefit of all of his creditors, pursuant to the laws of the state of Missouri regulating voluntary assignments (Rev. St. Mo. 1889, c. 8); that on the same day the petitioner filed his bond as assignee, and took possession of the assigned property and effects, consisting of a stock of groceries, accounts, and other personal property, and certain real estate; that in due season the assignee caused appraisers to be appointed and an inventory to be taken, in accordance with the local law, and that he also obtained from the proper state court permission to sell the assigned property and effects; and that a sale was thereupon advertised by the assignee to be held on December 30, 1898. On December 17, 1898, certain creditors of Sievers, the assignor, filed a petition in bankruptcy against him in the district court of the United

States for the Eastern district of Missouri, counting upon the aforesaid assignment as an act of bankruptcy. On December 24, 1898, the same creditors petitioned the district court to enjoin the assignee from further proceeding under the deed of assignment to administer upon the estate of the insolvent debtor. A hearing having been had on said petition, after due service of process upon the assignee, at which hearing the assignee appeared and made defense, the district court awarded an injunction as prayed for by the petitioning creditors, and further entered an order directing Louis C. Bohle, the marshal for the Eastern district of Missouri, and one of the respondents, to take possession of the assigned property and effects, and hold them subject to the further order of the court. This latter order is alleged by the petitioner to have been erroneous, and this court is asked to annul the same, and to direct the restoration of the property to the assignee named in the deed of assignment, to be administered by him pursuant to the laws of the state of Missouri regulating voluntary assignments.

The main contention on the part of the assignee is that the deed of assignment executed December 6, 1898, vested him with an indefeasible title to the assigned property, and that he is entitled to administer upon the same pursuant to the laws of the state, notwithstanding the commencement of proceedings in bankruptcy against his assignor. This contention is based on the ground that the local assignment law was neither superseded nor suspended in its operation by the enactment of the recent bankrupt act, because the local assignment law does not permit preferences, nor provide for the discharge of insolvent debtors, when they shall have surrendered their property for the benefit of their creditors, and because all assignments made under the local law are purely voluntary. *Ogden v. Saunders*, 12 Wheat. 213; *Mayer v. Hellman*, 91 U. S. 496; *Boese v. King*, 108 U. S. 379, 2 Sup. Ct. 765; *Manufacturing Co v. Hamilton* (Mass.) 51 N. E. 529.

It is further urged that congress must have intended by the recent bankrupt act to permit an assignee in a deed of assignment which is executed under such a law as prevails in Missouri to administer upon the assigned estate committed to his charge, pursuant to the local law, because the bankrupt act fails to declare in express terms that such deeds of assignment shall be deemed void, as to creditors of the assignor, if he is subsequently adjudged a bankrupt, or to provide that the trustee in bankruptcy may recover the assigned property and effects from the assignee. We are of opinion, however, that this latter contention is untenable, for the reason that it fails to give due effect to that clause of section 3 of the bankrupt act which declares, in substance, that the making of a general assignment for the benefit of creditors shall be "an act of bankruptcy." This was but another form of saying that if a person, subject to the provisions of the act, should make a general assignment, it should entitle his creditors to have him adjudged a bankrupt within four months after the commission of the act, and to have his estate administered by a trustee or trustees of their own selection, pursuant to the provisions of the act, rather than by the assignee who had been chosen by the insolvent debtor for that purpose. Inasmuch as an assignee under

a voluntary deed of assignment is not a purchaser for value of the assigned property, but is merely an agent or trustee of the assignor and his creditors, and holds the assigned property solely for their benefit, congress, when it provided that a general assignment should be regarded as an act of bankruptcy, did not deem it necessary to say further, and in so many words, that the assigned property might be taken from the custody of the assignee at the instance of creditors, if the assignor was subsequently adjudged a bankrupt. It was assumed, no doubt, that by declaring a general assignment to be an act of bankruptcy, with all which that declaration implied, the assignee named in such a deed would take a defeasible title to the assigned property, which would instantly fail when the assignor was adjudged a bankrupt, and that he would thenceforth be accountable to the trustee appointed in the bankruptcy proceedings for the assigned property or its proceeds. Such, we think, is the necessary effect of the clause making a general assignment an act of bankruptcy, when that clause is read in the light of decisions both in this country and England construing prior bankrupt laws, which decisions must be presumed to have been well known to the lawmaker. Thus, under an English bankrupt act (6 Geo. IV. c. 16, § 3), which made it an act of bankruptcy if a person executed any fraudulent conveyance or transfer with intent to defeat or delay his creditors, it was repeatedly held that a voluntary assignment by a debtor of his whole estate for the equal benefit of all his creditors was an act of bankruptcy, within the meaning of the aforesaid statute, not because such a conveyance was fraudulent in fact, but because it was constructively fraudulent, and in violation of the bankrupt act, in that it provided for a different mode of administration upon the effects of the insolvent debtor than that contemplated by the act. *Stewart v. Moody*, 1 Cromp. M. & R. 777; *Barnes v. Rettew*, 2 Fed. Cas. 868, and cases there cited. The same view, in substance, was taken with respect to our own bankrupt law of March 2, 1867 (14 Stat. 517, c. 176). The thirty-ninth section of that act declared, in substance, that if one who was insolvent, or in contemplation of insolvency, should make any gift, grant, sale, conveyance, or transfer of his property, with intent by such disposition thereof to defeat or delay the operation of the act, he should be deemed to have committed an act of bankruptcy; and it was repeatedly held that a general assignment by an insolvent debtor for the equal benefit of all his creditors was an act of bankruptcy, within the meaning of this provision, because of its tendency to defeat or delay the operation of the act by providing a different method of administration than that contemplated by the act, and that the same conclusion would have followed in view of the English decisions construing the English bankrupt act, from which ours was in part borrowed, even if our act had stopped with the single declaration that conveyances by an insolvent debtor with intent to delay, defraud, or hinder his creditors should be deemed an act of bankruptcy. *Barnes v. Rettew*, *supra*; *In re Beisenthal*, 3 Fed. Cas. 76; *Globe Ins. Co. v. Cleveland Ins. Co.*, 10 Fed. Cas. 488, and cases there cited; *In re Burt*, 1 Dill. 439, Fed. Cas. No. 2,210. We think, therefore, that when congress declared, as in the recent bankrupt law, that a general

assignment for the benefit of creditors should be deemed an act of bankruptcy, it said, in effect, that conveyances of that nature are opposed to the policy of the national bankrupt act, in that they interfere with the course of administration which that act contemplates, and tend, in a measure, to defeat its operation, and that creditors of the assignor shall be entitled to treat such assignments as void, if, within the period named in the act, they so elect.

The view last expressed (that whatever title an assignee acquires by a deed of general assignment is rendered null and void, if his assignor is subsequently adjudged a bankrupt within the statutory period) is strongly reinforced by the further consideration that if such is not the result of the adjudication, and if the contention made in the present case prevails, then the creditors of a person who makes a general assignment will derive little or no benefit from the commencement of bankruptcy proceedings against him, since such proceedings, if instituted, will only result in a discharge of the insolvent debtor. If it be held that the assignee named in a deed of general assignment is entitled to hold the property committed to his charge, and administer the same pursuant to local laws, although the assignor is adjudicated a bankrupt, then the singular, not to say absurd, result will follow, that the creditors of the assignor will be deprived of the benefit of all the provisions of the national bankrupt act which relate to the disposition, control, and management of bankrupt estates. In other words, a law which was intended in part, at least, for the benefit of creditors, will be rendered practically valueless, as to them, in those cases where the debtor makes a general assignment. It is one of the fundamental rules for the construction of statutes that they should receive a sensible interpretation, and that a construction should always be avoided which in its practical operation tends to defeat any of the purposes of the statute, or which leads to an absurd consequence. Exceptions may be presumed, or words omitted or supplied, when it is necessary to accomplish the obvious intent of the lawmaker and to prevent injustice or oppression. *U. S. v. Kirby*, 7 Wall. 482; *Heydenfeldt v. Mining Co.*, 93 U. S. 634; *Church of Holy Trinity v. U. S.*, 143 U. S. 457, 460, 461, 12 Sup. Ct. 511; *Scott v. Latimer*, 33 C. C. A. 1, 89 Fed. 843; *Thurber v. Miller*, 32 U. S. App. 209, 14 C. C. A. 432, and 67 Fed. 371. We feel confident that congress did not intend by the recent bankrupt act to commit the administration of any insolvent estate to an assignee chosen by the bankrupt, who should be free from the control of the bankruptcy court having jurisdiction over the person of the bankrupt, or to deprive the creditors of a bankrupt in any case of those rights and remedies that have been carefully provided by congress to secure a faithful, economical, and uniform management of bankrupt estates. It follows, therefore, that a construction of the act which would lead to the aforesaid results should be rejected.

It is proper to add that the question at issue in this case, besides having been carefully considered by the trial court (*In re Sievers*, 91 Fed. 366), has been recently considered, in an elaborate opinion, by Judge Brown, of the Southern district of New York, in *Re Gutwillig*, 90 Fed. 475, 480. In the latter case it was held (and we find no

occasion to question the soundness of that view) that the provisions of section 70 of the recent bankrupt act are in themselves sufficient to vest the trustee in bankruptcy, when appointed, with the title to property of the bankrupt held by an assignee under a general assignment for the benefit of creditors, executed, as in this case, prior to proceedings in bankruptcy, if an adjudication subsequently follows within the statutory period of four months. That section declares, in substance, that the trustee shall be vested by operation of law with the title of the bankrupt to "property transferred by him in fraud of his creditors"; and, as Judge Brown well observes, the fraud therein referred to is not limited to frauds arising, as at common law, from the intent of the bankrupt, but comprehends as well those constructive frauds which consist in making conveyances like a general assignment, which, if suffered to stand, will impair substantial rights conferred on creditors by the bankrupt law,—such as the right to have the estate administered by a trustee of the creditors' own choice, and under and subject to the provisions of the act and the control of the proper bankruptcy court.

In conclusion, it is only necessary to say that the trial court, in our judgment, pursued the proper course and took the proper steps to recover the assigned property from the assignee, and preserve it for the time being until the assignor had been adjudicated a bankrupt, and a trustee had been selected by the creditors. Full warrant for all that was done in this respect is to be found in section 2 of the act, which empowers courts of bankruptcy, in substance, to appoint receivers or marshals, upon application of parties in interest, to take charge of the property of bankrupts after the filing of petitions against them, for the preservation of their estates, and to make such orders, issue such process, and enter such judgments as may be necessary for the enforcement of the provisions of the act. The regularity of the proceedings taken by the lower court, in our judgment, cannot be successfully criticised. The case before us being a petition to review the action of the trial court, it results from what has been said that the petition for review must be dismissed, and the action of the district court stand approved and confirmed. It is so ordered.

In re JOHN A. ETHERIDGE FURNITURE CO.

(District Court, D. Kentucky. February 14, 1899.)

1. BANKRUPTCY—SUSPENSION OF STATE INSOLVENCY LAWS.

The enactment by congress of a national bankruptcy law suspends the operation of state insolvency laws.

2. SAME—APPOINTMENT OF RECEIVER PENDING ADJUDICATION.

Where proceedings in bankruptcy are instituted against a corporation, on the ground of its having made a general assignment for the benefit of creditors, and the answer admits the insolvency of the company and the making of the assignment, and the assignee is in possession of the estate, and is proceeding to administer the same under the direction of a state court, in accordance with the insolvency law of the state, the court of bankruptcy has jurisdiction to appoint a receiver to take charge of the estate pending the adjudication in bankruptcy.

3. SAME.

On an application to the court of bankruptcy for the appointment of a receiver of the property of an insolvent corporation, against which proceedings in involuntary bankruptcy are pending, the act of bankruptcy charged being the making of a general assignment for creditors, where it appears that the assignee is a creditor of the corporation, and desires the appointment of a receiver, and that he is perfectly solvent, is in possession of the assigned property, and has had the same inventoried and appraised, such assignee may himself be appointed receiver, upon giving a bond, to be approved by the court, for the faithful performance of his duties as such receiver.

4. SAME—PLEADING—ANSWER.

In proceedings in involuntary bankruptcy, the allegation of the petition that the petitioning creditors have provable claims which amount, in the aggregate, in excess of the value of securities held by them, to \$500, is not met by an answer that they had not provable claims to the required amount at the time of the commission of the act of bankruptcy charged.

5. SAME—INTERVENTION—CREDITORS JOINING IN PETITION.

The requisite number of creditors having filed a petition in involuntary bankruptcy, other creditors of the respondent, having provable claims, may intervene and join in the petition.

In Bankruptcy. On motion for the appointment of a receiver.

W. W. & J. R. Watts, for petitioning creditors.

Fred Forcht, for alleged bankrupt.

J. R. W. Smith, for assignee.

BARR, District Judge. The Marietta Chair Company, the Phoenix Manufacturing Company, the Northwestern Wire-Mattress Company, and the Illinois Glass Company, four creditors of the John A. Etheridge Furniture Company, have filed a petition to declare that company an involuntary bankrupt. The grounds alleged in the original petition are that the John A. Etheridge Furniture Company, being insolvent, on the 20th day of January, 1899, made, executed, and delivered to John J. Hyatt a general deed of assignment of all of its property for the benefit of its creditors, which assignment was duly executed, acknowledged, recorded, and delivered. This is the only ground alleged in the petition filed January 21, 1899. However, in a petition which seems to be intended to be a petition for the appointment of a receiver, filed January 31, 1899, the same petitioners have set out that John J. Hyatt, the assignee in the general deed of assignment executed on the 20th day of January, 1899, was a creditor of the Etheridge Furniture Company in a large sum of money, and that he now holds money and securities for money and other evidences of debt, belonging to the Etheridge Furniture Company, in his capacity as creditor, and which had theretofore been transferred to him (Hyatt) as creditor, for a pre-existing debt, and in preference to the creditors of the said Etheridge Furniture Company, including the petitioners. It is also alleged that said Etheridge Furniture Company executed and acknowledged a chattel mortgage to one Charles G. Hulsegewe, to secure said Hulsegewe in his indorsement of a note of \$5,700 executed by said furniture company to said Hyatt; that this mortgage is dated the 11th of August, 1898, but was not recorded until the 20th of January, 1899; that said Hyatt got the benefit of said \$5,700 note; and that it is a device by which he gets a preference

over the creditors of said company, through the agency of the chattel mortgage given to Hulsewede. This petition was filed on the 31st of January, when a motion was made for the appointment of a receiver by the petitioning creditors. The motion for the appointment of a receiver was laid over until the 2d of February, with leave to both sides to file affidavits. On that day, John G. Hyatt, against whom a subpoena was issued on the original petition, filed an answer, as did also the Etheridge Furniture Company. The answer of the furniture company admits that it was insolvent on the 20th day of January, 1899, and that it then made a general assignment for the benefit of its creditors to the assignee, Hyatt, and sets out what seems to be intended as grounds why it should not be declared an involuntary bankrupt: (1) It denies that the petitioning creditors had claims provable against that company in excess of securities held by them, amounting to the sum of \$500; (2) it is alleged that the assignee, Hyatt, named in the general deed of assignment, has qualified and accepted the trust, and taken possession of all of the assets of the defendant, and that on the same day, to wit, on the 20th of January, 1899, said Hyatt, as assignee, filed in the Jefferson circuit court of Louisville, Ky., against the petitioners and other creditors of said furniture company, his bill in equity, and thereby placed said assigned estate in the hands of said court, and that said court is now directing and administering said trust estate in the law and equity division of said court. The assignee, John J. Hyatt, filed his answer on the same day, in which he denies that the furniture company has in any way or manner made a preference to him over the other creditors in the petition, and denies that he had anything to do with, or is in any manner interested in, the mortgage of the furniture company to Charles G. Hulsewede, or that he knew of the existence of said mortgage or its execution, or of its being of record until after the assignment was made. He alleges that he is executing the deed of assignment, collecting the debts, and reducing the assigned property to money. He also alleges that he is the largest creditor of the furniture company, and insists that he should have a voice in its liquidation, and alleges that he is solvent, and abundantly able to respond for any of the trust estate that may come into his hands, and desires, if the court should appoint a receiver, that he himself should be the receiver appointed.

The only motion before the court is the motion to appoint a receiver, as the question of the involuntary bankruptcy was not ripe for consideration; and that raises the question of whether the fact of the general assignment under the state law, and its being administered in the state court, is a sufficient reason why this court should not take jurisdiction of the motion to appoint a receiver. The making of the general assignment for the benefit of creditors is one of the acts of bankruptcy prescribed by the bankrupt act, and as the insolvency of the furniture company at the time of the execution of this assignment is admitted by the furniture company, the question arises whether or not this court should appoint a receiver to take possession of the assets of the furniture company before said company has been adjudicated a bankrupt. As congress has been empowered by the

federal constitution to pass a bankrupt law, it may be assumed, we think, as true, that the jurisdiction of the bankrupt court is exclusive, and must be so far as is necessary to adjudicate that the party is a bankrupt, and to settle and liquidate the estate of the bankrupt thus declared, and that this jurisdiction cannot be concurrent with that of the state courts, but must be exclusive, and that the insolvent laws of the state are suspended after the passage of the bankrupt act. Subsection B of section 71 provides: "Proceedings commenced under said insolvent laws before the passage of this act shall not be affected by it." This would clearly indicate that proceedings commenced after the passage of the bankrupt act cannot be effectual to prevent the administration of the bankrupt estate in bankruptcy. To allow the bankrupt to select the trustee to administer upon his estate, instead of the creditors, as provided in the bankrupt act, or to allow the state court to take jurisdiction of the estate of the bankrupt, and administer and distribute it, would effectually destroy the efficiency of any bankrupt act that might be enacted by congress, and thus effectually destroy the power granted to congress to pass a bankrupt act. This view is taken by Judge Brown, district judge of the Southern district of New York, in the well-considered case of *In re Gutwillig*, 90 Fed. 475; and by Judge Seaman, of the Eastern district of Wisconsin, in *Re Bruss-Ritter*, *Id.* 651; and also by the supreme court of Massachusetts, in *Manufacturing Co. v. Hamilton*, 51 N. E. 529. It follows, therefore, we think, notwithstanding the furniture company has not yet been declared a bankrupt, in view of its admission of the grounds of bankruptcy, this court ought to grant the motion for the appointment of a receiver.

The denials and allegations of the answer of the furniture company are so indefinite in regard to the amount of debt due the petitioning creditors that I do not think it makes an issue upon the question of those creditors having an indebtedness exceeding \$500. It is true that they deny the Illinois Glass Company has a claim of \$14.85 or any other sum; but this is the only explicit denial as to the indebtedness of the petitioning creditors, and this is a very small part of the claims set out. The denial that the petitioning creditors, at the time of the execution of the general assignment, had claims provable against the furniture company in excess of securities held by them, amounting to the sum of \$500, is not material. The allegation of the petition itself is that they had provable claims amounting in the aggregate in excess of securities held by them to the sum of \$500, not that they were creditors to that amount at the time of the assignment. The West Michigan Furniture Company, a Michigan corporation, and Showers Bros., tendered, on the 2d of February, an intervening petition to be made co-petitioners with the Marietta Chair Company, etc., against the Etheridge Furniture Company, and asking to join in the prayer of the original petition. These creditors allege claims against the furniture company of over \$1,200. This application will be granted, and said parties will be made co-plaintiffs with the original petitioners.

In view of the fact that the defendant Hyatt desires the appointment of a receiver, and is perfectly solvent, and has heretofore had

inventories and appraisement made of the bankrupt property, I think it is desirable that he should be appointed receiver. He must, however, give a bond to be approved by the court in the sum of \$8,000, for the faithful performance of his duties.

MATHER et al. v. COE et al.

(District Court, N. D. Ohio, E. D. February 27, 1899.)

No. 83.

1. BANKRUPTCY—FORM OF PETITION AGAINST PARTNERSHIP.

No official form having been prescribed for a petition in involuntary bankruptcy against a partnership, form No. 3 (the general form of a creditors' petition) is to be used for that purpose, with such adaptations as will meet the exigencies of the particular case.

2. SAME—PLEADING—MULTIFARIOUS MATTER IN PETITION.

It is improper to incorporate in a creditors' petition for an adjudication in involuntary bankruptcy allegations charging other creditors with having received voidable preferences, or a prayer for the seizure of property of the alleged bankrupt in the possession of adverse claimants, or a prayer for an injunction forbidding a receiver of the respondent, appointed by a state court, to distribute the property in his hands, as such matters can only be litigated in a separate proceeding. Such allegations and prayers are multifarious, and will be considered as stricken out.

3. SAME—ANSWER—FORM No. 6.

An answer to a petition in involuntary bankruptcy should follow the simple form of denial prescribed by form No. 6. If responsive to multifarious matter in the petition, or unnecessarily defensive, it must be prepared in proper form, and resiled as of the original date; the original answer, however, remaining on file.

4. SAME—ACTS OF BANKRUPTCY—PREFERENCE.

Where two members of an insolvent partnership, with the knowledge of their co-partners, and without opposition on their part, filed in a state court a petition for the appointment of a receiver to take possession of all the partnership property, and administer it under the insolvency laws of the state, and a receiver was accordingly appointed by the court, who took possession, and paid the claims of certain creditors entitled to priority under the state laws, to an amount greater than would be allowed to the same creditors under the bankruptcy act, *held*, that the firm had committed an act of bankruptcy, in procuring or suffering a transfer of its property, enabling such creditors to obtain a preference through legal proceedings.

In Bankruptcy. Petition in involuntary bankruptcy against the defendants, individually and as co-partners.

Hoyt, Dustin & Kelley, for petitioning creditors.

Dickey, Brewer, Bentley & McGowan, for defendants.

Kline, Carr, Tolles & Goff and Gilbert & Hills, for certain creditors.

RICKS, District Judge. This is an involuntary proceeding in bankruptcy. The original petition was filed December 24, 1898. In its form and prayer it goes beyond the simple requirements of the form of an involuntary petition in bankruptcy, and interjects controversies between creditors that properly belong only to suits between a trustee in bankruptcy, when appointed, and the creditors who are alleged to have received voidable preferences or transfers of property. This

will be readily seen by reference to form No. 3 for a creditors' petition, as prescribed by the supreme court. It does not seem to have prescribed any form for a creditors' petition against a partnership, but clearly intends that the form No. 3 shall be used for that purpose, by filling in the skeleton blanks to meet the case of a partnership; and there is, of course, an implication of general power to adapt these forms to the exigencies of any particular facts which need to be pleaded.

The petition in this case assumes that it may unite causes of action of the trustee, when appointed, against the preferred creditors. It prays that a warrant may issue to take possession of the assets, which is an entirely supplemental proceeding, even as against the bankrupt (Bankruptcy Law, §§ 3c, 69), and, as to the prayer that the warrant may extend to the seizure of the bankrupt's property, in whosesoever hands it may be found, is an impossible prayer in the creditors' involuntary petition. That cannot be done until after an adjudication in bankruptcy, and only by the trustee, under section 60 of the bankruptcy statute. The duty of receiving the property is conferred upon him, and not the petitioning creditors. The alleged preferred creditors, or any receiver or assignee holding for them, must be parties to such a proceeding, and must have their day in court to be heard and defend against it. It does not follow that because the alleged bankrupts have committed an act of bankruptcy, as charged, that even the trustee can recover the property from adverse holders. What is to be the effect of the adjudication on the property transferred, and its adverse holders, is a matter for future consideration, when the necessary proceedings by the trustee are taken against the adverse claimants. If, before the trustee can be appointed, it be necessary for the petitioning creditors to take steps to save the property pendente lite, and while the contest over the adjudication is pending, that must be done by special proceedings in a court of competent jurisdiction, whether this court or some other court, wherein the adverse holders are made parties defendant, and given a day in court to be heard against the proposed seizure. The fourteenth amendment of the constitution requires this, as otherwise the seizure could not be "due process of law." They must have notice of such steps as are taken, to make the proceeding valid. Hence the special prayer of this petition, that W. A. Creech, the receiver appointed in the state court, be enjoined from disposing of the property in his hands, is wholly inadmissible, and foreign to this proceeding. The petition is, for the reasons above stated, multifarious.

Moreover, as before stated, in provisional proceedings either to preserve the property taken by the creditors pending the contest over the involuntary bankruptcy petition of creditors, or by the trustee after adjudication, the adverse holders of the property have a right to show that, notwithstanding the act of bankruptcy alleged, the property in their hands cannot be taken, because "they had no reasonable cause to believe" that the act complained of as a preference by the bankrupt "was intended thereby to give a preference." Bankruptcy Law, § 60b. They have had no such opportunity in this case, have not been made parties to this petition, and have had no notice, and could not

have been in this proceeding, which is a mere petition for an adjudication through involuntary proceedings. It is true that, by section 59f, other creditors than the original petitioners are granted the privilege of appearing and joining in the petition, or "file an answer and be heard in opposition" to an adjudication. But this is purely a voluntary privilege, and they cannot be compelled to appear. What would be the legal effect of such an appearance and defense on their part as relates to their right to hold the property, if the case be decided against them and an adjudication be had, we need not now inquire, because no creditors have appeared in opposition. The result is that this petition in involuntary bankruptcy must be confined to the simple purpose of form No. 3, and all the multifarious matter as to outside parties, other than the alleged bankrupts, be considered as stricken out.

Similarly, the answer is not in the simple form of denial of bankruptcy, to be filed in the involuntary proceedings by creditors, as is prescribed by form No. 6 of the supreme court rules in bankruptcy. It answers the multifarious matter found in the creditors' petition. It is sufficient in substance, as a compliance with form No. 6, to present the issue of a contested adjudication, but is misleading and unnecessarily defensive in its statements. It must be refiled as of the original date, in the simple form of the supreme court rule (form No. 6). But it must remain on file as it is in the original answer. The pleadings then stand, in conformity to the bankruptcy rules, as a creditors' petition, on form 3, and the alleged bankrupt's denial, on form 6.

We will proceed, therefore, to consider whether the acts of bankruptcy alleged to have taken place in the petition are true. The petition avers:

That "within the four calendar months next preceding the date of the filing of this petition, said Coe, Powers & Company, and the individual members thereof, did commit acts of bankruptcy, within the meaning of said act, at the dates and in the manner herein more fully set forth, and while the said firm of Coe, Powers & Company, and the individual members thereof, were insolvent to their own knowledge, to wit: That on or about the 27th of August, 1898, the said Benjamin F. Powers and the said George E. Needham, members of the co-partnership of Coe, Powers & Company aforesaid, with the knowledge, assent, and approval of their remaining co-partners, Henry L. Coe and Eubert C. Powers, filed in the common pleas court of Cuyahoga county, Ohio, their petition, wherein they asked said court to appoint a receiver to take possession of all the property of said co-partnership of Coe, Powers & Company, and in said petition admitted their inability, and the inability of said Coe, Powers & Company, to pay debts; that upon said petition such proceedings were had that the said court of common pleas of Cuyahoga county, Ohio, on said August 27th, 1898, appointed W. A. Creech as receiver of said Coe, Powers & Company, with authority to take possession of all the property, assets, and credits of the said Coe, Powers & Company; that on said August 27th, 1898, the said W. A. Creech duly qualified as such receiver, and on said day took possession of all of said property, assets, and credits of the said Coe, Powers & Company, and has ever since remained in such possession; and that the affairs of said co-partnership have not been finally settled. That your petitioners are informed and believe, and upon such information and belief so state the fact to be, that the total liabilities of the said co-partnership of Coe, Powers & Company are in excess of the sum of \$60,000, and that its total assets, of every nature, kind, and description, do not exceed the sum of \$15,000; that under and by virtue of the laws of the state of

Ohio each and every of the individual members of the said co-partnership of Coe, Powers & Company are individually liable for the debts of the said co-partnership."

Do the facts as herein charged constitute an act of bankruptcy, within the meaning of the statute? Section 60a provides:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable anyone of his creditors to obtain a greater percentage of his debt than any other of his creditors of the same class."

Did said firm, or the members thereof, "procure or suffer" their property to be transferred, so that the distribution of the same would work a preference through legal proceedings to one creditor over another? The allegation is, as already quoted, that, in August, 1898, Benjamin F. Powers and George E. Needham, two members of the firm of Coe, Powers & Co., filed a petition in a court of Cuyahoga county, Ohio, asking for the appointment of a receiver to take possession of all the property of said partnership, admitting their inability to pay the firm's debts. Now, while it is true that the two members of the firm filed the petition, and actively prepared to prosecute it, the other two members did not oppose such proceedings. If they had been solvent, and personally able to pay their own debts and those of the firm, and did not intend to aid or abet an act of bankruptcy, they would certainly have taken some steps in court to make their purpose known and effective. It appears, from the testimony and the records, that they have not yet filed an answer denying the allegations of their co-partners. It therefore seems to me that the court is entirely justified in finding that they "procured or suffered" their partnership property to be transferred by order of the court to a receiver appointed by said court to take possession of all the partnership property and administer it under the insolvent laws of Ohio, and that a preference to certain creditors appears through the operation of an Ohio statute allowing claims for labor and services rendered to the alleged bankrupts, the receiver having paid them the amount allowed by the Ohio statute, which is greater than the sum fixed for the same services in the bankruptcy act. Any disposition or payments by the receiver of the state court to creditors entitled to a preference under the state law is such a final disposition of the property of the bankrupt affected by the preference as will complete the act of bankruptcy, under section 3, subsec. 2.

It being established by the proof that any one of the alleged acts of bankruptcy mentioned in the petition has been committed by the defendants, it is not necessary to consider any others as alleged or established by the proof. It only remains to direct that the defendants to the petition be adjudicated bankrupts, according to the prayer thereof, and that the clerk be directed to enter the order of adjudication as prescribed by form 12 of the rules of the supreme court of the United States, which is ordered accordingly.

In re GUTWILLIG.

(Circuit Court of Appeals, Second Circuit. January 25, 1899.)

1. BANKRUPTCY—FRAUDULENT TRANSFERS—ASSIGNMENT FOR CREDITORS.

A voluntary general assignment for the benefit of creditors, with or without preferences, made by an insolvent debtor within four months prior to the filing of a petition in bankruptcy against him, is a fraud upon the bankruptcy act, and made with intent to "hinder, delay, and defraud his creditors," since its necessary effect is to defeat the operation of the bankruptcy act, and the right of creditors to such an administration of the assets as that act provides, and is therefore void, as against his subsequently appointed trustee in bankruptcy, under section 67 of the bankruptcy act (30 Stat. 564).

2. SAME—JURISDICTION—ENJOINING ASSIGNEE.

Where an insolvent debtor makes a general assignment for the benefit of creditors, and within four months thereafter a petition in bankruptcy against him is filed, the court of bankruptcy has jurisdiction, pending the hearing on such petition, to enjoin the assignee from disposing of or interfering with the property transferred to him under the assignment.

In Bankruptcy. Petition to review an order of the district court of the United States for the Southern district of New York.

In this case, a petition in involuntary bankruptcy having been filed against a debtor who had previously made a general assignment for the benefit of his creditors, the district court, on motion of the petitioning creditors, granted a restraining order forbidding the assignee to dispose of the assigned property or its proceeds until the adjudication upon the petition. 90 Fed. 475. And thereupon the assignee brought this petition for review of such order.

George Fielder, for petitioner.

Stillman F. Kneeland, for respondent.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. If the general assignment made by the alleged bankrupt would, in the event of an adjudication of bankruptcy, be treated as void as against the trustee of his estate, the order enjoining the assignee from disposing of or interfering with the property transferred pending the hearing was a proper and expedient exertion of the authority conferred upon courts of bankruptcy by clause 15, § 2, of the present act.

The assignment, which was made November 9, 1898, recites the insolvency of the assignor, and transfers all his property and effects to an assignee for the benefit of creditors, upon the trusts to convert the same into money, and, after paying the expenses of executing the trust, to pay all creditors of the assignor ratably, and in proportion to their several demands.

It is insisted for the appellant that whenever the question arises the assignment must be determined to be valid, because it was without preferences, and does not appear to have been made with any actual intent by the insolvent debtor to defraud his creditors. This contention rests upon the terms of that section of the act which enumerates what transfers of property by a person who afterwards becomes a bankrupt, and what liens upon such property, are void as against

the trustee of the estate. Section 67. The section declares, among other things, that "all conveyances, transfers, assignments, or encumbrances of his property" made or given by a person adjudged a bankrupt within four months prior to the filing of the petition "with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against his creditors, except as to purchasers in good faith and for a present fair consideration," and all property transferred and incumbered "as aforesaid" shall remain a part of his estate, and pass to the trustee.

We entertain no doubt that a voluntary general assignment, with or without preferences, made by an insolvent debtor within the prescribed four months, is fraudulent, and intended by him to "hinder, delay and defraud" creditors, within the meaning of the section, because its necessary effect is to defeat the operation of the bankrupt act and the rights of the creditors to such an administration of the assets as that act is intended to provide. The reasons for this conclusion, and the authorities in support of it, are so fully and satisfactorily set forth in the opinion of Judge Brown in the court below that we do not deem it necessary to enlarge upon them. They are summarized in the following extract from his opinion:

"Since the time of George II., and even prior, the current of English adjudications, followed by our own, has been that a voluntary assignment of all his property by an insolvent debtor to an assignee of his own choosing, though without preferences, is itself an act of bankruptcy, a fraud upon the act, and hence a fraud upon the creditors, as respects their rights in bankruptcy, and voidable at the trustee's option, even without an express provision to that effect in the statute."

The citations referred to by him amply sustain the general proposition. Among the most instructive are Barnes v. Rettew, 2 Fed. Cas. 868, and Globe Ins. Co. v. Cleveland Ins. Co., 10 Fed. Cas. 488.

The general purpose of bankrupt laws, and of the present act, is not only to administer the assets of insolvent debtors on the basis of equality, but to secure that result by giving to the creditors, and not to the debtor, the selection of the person to be intrusted with the administration. To permit the administration to be committed by an insolvent debtor, who is on the heels of an adjudication of bankruptcy, to a trustee selected by himself, and thus be wholly withdrawn from the supervision of the bankrupt court, is irreconcilable with any reasonable view of the purpose of such legislation. Hence it has been almost uniformly adjudged that any disposition of his property by a debtor intended to accomplish that purpose is a fraud upon the creditors, who have a right to invoke its protection. That such disposition is not one which is fraudulent at common law is immaterial. It suffices if its necessary effect is to defraud, hinder, or delay creditors in their rights and remedies under the bankrupt law.

By the laws of New York and of many of the other states, general assignments by insolvent debtors for the benefit of creditors, if free from actual fraud, are valid, notwithstanding they create preferences between creditors; and, if the contention urged upon this appeal is sound, such assignments, as well as those which are made to distribute the debtor's property ratably, are, by the terms of the section, good against the trustee in bankruptcy. The language applies unequiv-

ocally to all transfers or assignments, and declares those only null and void which are made with the intent and purpose to hinder, delay, or defraud creditors, and places an assignment with preferences on the same footing as one without, because it makes no distinction between them. The language also includes, not only assignments of every kind, but every kind of transfer or conveyance by which a debtor may elect to secure a creditor in preference to or exclusion of his other creditors. If it is the meaning of the section to permit preferences by assignments or other conveyances if they are not fraudulent at common law, an anomaly has been introduced into the present act not found in any bankrupt law hitherto enacted in this country or England; and it exists in an act, and in the very section of the act, which nullifies preferences obtained by legal proceedings. It is impossible to believe that congress, while precluding a creditor from obtaining preferences over other creditors by legal proceedings, however regularly and fairly employed, should have intended to permit the debtor to select one or more favored creditors, and give him or them preference by his voluntary act. The section annuls "all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him," and any "lien created by, or obtained in, or pursuant to any suit at law or in equity * * * begun against a person within four months before the filing of a petition in bankruptcy by or against such person * * * (1) if it appears that said lien was obtained or permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act, * * * provided that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause of inquiry."

These provisions manifest unmistakably the intention of congress not only not to permit preferences to be acquired upon the bankruptcy of a debtor when he is about to become a bankrupt, but also to annul all dispositions of his property, except to innocent purchasers, which will defeat the rights of creditors to a distribution by the instrumentalities and according to the scheme of the bankrupt act. The purchaser of a title under a lien acquired by legal process is not protected, unless he took it without notice of its preferential origin. The purchaser under a voluntary conveyance must not only be a purchaser in good faith, but he must be one who has subtracted nothing essentially from the value of the debtor's assets. They are wholly inconsistent with an interpretation of the clause annulling voluntary conveyances which will permit such conveyances to stand when intended to defeat the operation of the bankrupt act. This clause must be interpreted in a sense which harmonizes with the general intent of the section as gathered from the other clauses; and, thus read, it annuls any conveyance made to impair or defeat the remedy of creditors

under the bankrupt act, unless made to a purchaser not in complicity with the insolvent, and for a "present fair consideration."

The order of the district court is affirmed, with costs.

In re SAPIRO.

(District Court, E. D. Wisconsin. January 30, 1899.)

BANKRUPTCY—PRODUCTION OF BANKRUPT'S BOOKS—PRIVILEGE AGAINST SELF CRIMINATING EVIDENCE.

A voluntary bankrupt cannot refuse to deliver the books of account kept by him in his business, and necessary to an investigation of his affairs, to his trustee, on the ground that matter contained therein might tend to criminate him. If the constitutional privilege extends to civil proceedings, the filing of a voluntary petition in bankruptcy operates both as a waiver of such privilege, in relation to the bankrupt's books, and as a transfer of the right of custody of the same to the court and its officers.

In Bankruptcy.

Louis Sapiro, having been adjudged bankrupt on his voluntary petition, was ordered by the referee to deliver to his trustee in bankruptcy certain books of account kept in the business which the bankrupt was conducting at the time of filing his petition. Upon the failure of the bankrupt to comply with this order, proceedings were instituted against him for contempt of court. The bankrupt contended that he should be excused from producing the account books, on the ground that matter contained therein, or the evidence thus furnished, might tend to criminate him, and claimed privilege under the fifth amendment to the constitution of the United States. The referee found, as facts, that the said books were in the possession or control of the bankrupt, and that they were necessary to enable the trustee to determine the state of the bankrupt's affairs and for his other purposes; and, as conclusions of law, that the title to said books vested in the trustee as of the date of his appointment, and that the bankrupt, in refusing to deliver them, was guilty of contumacious contempt of the orders and directions of the court. The referee's findings were certified to the judge for review.

Bloodgood, Kemper & Bloodgood, for trustee.
Timlin & Glicksman, for bankrupt.

SEAMAN, District Judge. Upon careful review of the authorities, I am satisfied that the bankrupt cannot be excused from production of the account books in question upon the ground of constitutional privilege. Whether the privilege exists in favor of a witness or party in a civil proceeding, as here presented, does not clearly appear from the decision of the supreme court in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, or in the later case of *Brown v. Walker*, 16 Sup. Ct. 644; but I assume, for the purposes of this case, that it may be invoked in civil, as well as in criminal, proceedings. Although much stress in these opinions is placed upon the distinction that the investigation by the grand jury is of criminal nature there is force in the argument that the reasoning of the opinions applies equally to any proceeding in which a witness is required to testify; and such view has the support of recent decisions cited by counsel and of *In re Emery*, 107 Mass. 172, cited with approval in the *Counselman* Case. But the privilege is

asserted here in favor of the bankrupt to excuse him from producing the books of account kept in the business which he was conducting when his voluntary petition was filed to invoke the benefits, and submit to the requirements, of the bankruptcy law. He thereby elected to place all his property (aside from exemptions), including these books of account, which contain apparently the only evidence of credits outstanding, at the disposition of this court. If he were otherwise privileged to withhold the books, his petition operates both as a waiver and as a transfer of the right of custody, and the books cannot now be withheld or withdrawn upon the assertion that they may contain criminating evidence or matter. If within the knowledge or control of the petitioner, the books must be disclosed and produced. Ruling upon the facts is postponed for the hearing of further testimony.

UNITED STATES v. BREWER et al.

(Circuit Court of Appeals, Second Circuit. January 30, 1899.)

No. 52.

CUSTOMS DUTIES—REIMPORTATION OF AMERICAN-MADE BAGS—IDENTIFICATION
—TREASURY REGULATIONS.

Under paragraph 493 of the tariff act of October 1, 1890, which permits the free reimportation of certain articles of American manufacture, including bags which have been exported filled with American products, or exported empty and returned filled with foreign products, but requires proof of identity to be "made under general regulations to be prescribed by the secretary of the treasury," the provision as to the manner of proof is of the essence of the exemption; and, the secretary having promulgated such general regulations, reasonable in their requirements, an importer cannot ignore them, and obtain the exemption by substituting other evidence satisfactory to the customs officers. Bags claimed to have been exported filled from another port, but of which fact no certificate of the collector is furnished, as required by article 331 of the treasury regulations, are properly dutiable.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision and judgment of the circuit court, Southern district of New York, which affirmed the decision of the board of United States general appraisers, which had reversed the decision of the collector in regard to the classification for duty of certain empty bags.

D. Frank Lloyd, Asst. U. S. Atty.

Stephen G. Clarke, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The importers do not object to the rate of duty if the bags are dutiable, but contend that they are entitled to free entry, under paragraph 493 of the tariff act of October 1, 1890. That paragraph provides that, among the articles exempt from duty, there shall be included "bags * * * of American manufacture

* * * * * exported filled with American products or exported empty and returned filled with foreign products; * * * but proof of the identity of such articles shall be made under general regulations to be prescribed by the secretary of the treasury." Construing this paragraph in U. S. v. Dominici, 24 C. C. A. 116, 78 Fed. 334, this court held that "this express provision as to proof is * * * of the essence of the exemption from duty which paragraph 393 accords." In compliance with the provisions of paragraph 493, the secretary of the treasury prescribed general regulations for making proof of identity. One of such regulations reads as follows:

"Art. 331. If returned to the port of original exportation, the fact of regular clearance for a foreign destination must be shown by the records of the customs, except in regard to exports to Canada, and by the declaration of the person making the entry. But when the reimportation is made into a port other than that of original exportation, there shall be required, in addition to the declaration, a certificate from the collector and a naval officer, if any, of the port where the exportation was made, showing the fact of exportation from that port."

On April 6, 1893, the appellees imported by the Bovic, from Liverpool, 50,000 empty bags. They claimed that all of these were of American manufacture, and stated on their entry that the bags had been exported from San Francisco filled with American products, as follows: Twenty thousand bags by the Dovenby, August 16, 1892; 10,000 bags by the Earlscourt, July 8, 1892; and 20,000 bags by the Glaucus, December 21, 1891. They also presented a certificate to the like effect, of the foreign shipper, attested by a United States consul, as provided in article 336 of the regulations. Certificates from the collector of the port of San Francisco, whence it is claimed the bags were exported, covered 20,000 bags by the Dovenby, and 10,000 by the Earlscourt, but showed that only 7,880 bags had been exported by the Glaucus. On the difference between this amount and 20,000—viz. 12,120 bags—the collector at New York exacted duty. Upon being informed of the discrepancy of certificates as to the Glaucus, the importers secured an additional certificate from the foreign shipper, duly attested, setting forth that the 12,120 bags were exported from San Francisco by the Cara, December 28, 1896. The board of appraisers found, as the evidence shows, that the statement in the first foreign shipper's certificate, "20,000 by Glaucus," was a clerical error; and, being satisfied by proof sufficient to convince their minds that all the bags were in fact of American manufacture, reversed the decision of the collector. The circuit court reached the same conclusion.

This cause is within the ruling in U. S. v. Dominici, *supra*. The paragraph of the tariff act is the same; the regulations of the secretary of the treasury have been duly made and promulgated; there has been no attempt to defeat the provisions of the act by prescribing unreasonable regulations, or such as it is impossible to comply with,—indeed, the particular one in controversy (article 331, *supra*) seems to provide the most natural and effective method for determining the identity of the articles claimed to have been "exported empty, or exported filled with American products." Therefore, since no certificate from San Francisco of exportation of the 12,120 bags by the Cara was ever laid before the collector (and, indeed, no effort to obtain

such certificate was made by the importer), the proof of identity which the statute provided for was never made, and the bags in question were not entitled to free entry. The decision of the circuit court is reversed.

UNITED STATES v. BREWER et al.

(Circuit Court of Appeals, Second Circuit. January 30, 1899.)

No. 53.

1. CUSTOMS DUTIES—REIMPORTATION—METHOD OF IDENTIFICATION.

Where bags of American manufacture, on being exported to be returned, were marked for identification as required by article 336 of the treasury regulations, but on their attempted reimportation an examination of sample packages disclosed but 8 per cent. having the same marks, they were not entitled to free entry under paragraph 493 of the tariff act of October 1, 1890, on other proof that they were of American manufacture.

2. SAME—CLASSIFICATION—DUTY OF IMPORTER TO SEPARATE FREE FROM DUTIABLE GOODS.

It is the duty of an importer to make affirmative proof of a state of facts relieving his merchandise from duty to which it would otherwise be subject, and to segregate from the same class of goods such portions as are claimed to be free. He cannot require the officers to separate free from dutiable goods indiscriminately mingled, and in such case duty should be assessed on all.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court, Southern district of New York, reversing a decision of the board of general appraisers which had affirmed a decision of the collector of the port of New York touching the classification of certain merchandise for customs duties.

D. Frank Lloyd, Asst. U. S. Atty.

Stephen G. Clarke, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The articles imported were 50,000 flour bags, which the appellees contend were duty free under paragraph 493 of the tariff act of October 1, 1890, as "bags of American manufacture." The provisions of the statute and treasury regulations will be found recited in our opinion in U. S. v. Brewer (filed to-day) 92 Fed. 341. The various documents required by the treasury regulations were presented to the collector. It appears from the findings of the board of general appraisers that:

"To establish the identity required by law a list of brands was furnished by the importer, with the number of bags bearing each brand exported by four several vessels, to wit: By the Durham City, 19,315; by the Boston City, 12,524; by the Charlotte, 18,100; and by the Ariadne, 61,—thus accurately accounting for the whole importation of 50,000 bags." "But when the contents of one bale came to be examined, the bale was found to contain only thirteen brands which were included in the invoice list, and 152 brands which were nowhere on the invoice list. In other words, there was *prima facie* identification of 8 per cent. of the contents of this bale, and conclusive disproof of the identity of 92 per cent. thereof."

The circuit court held that the bags were entitled to free entry, because they were in fact of American manufacture. We are unable to concur in this decision, because the importers failed to prove that fact in the way prescribed by the treasury regulations. Article 336 of those regulations prescribes that:

"Such bags * * * exported to be returned should, when practicable, be marked or numbered, in order that they may be identified on their return; and the marks or numbers should appear on the shipper's manifest upon which they are exported."

It does not appear that such marking or numbering was impracticable; on the contrary, the bags were marked and numbered, but neither marks nor numbers conformed to the marks and numbers on the export certificate. No question was raised in the protest that the examination was not made of a sufficient number of bales. The opinion of the board most clearly explains the necessity of an identification of such merchandise by marks and numbers, and we entirely concur with their conclusion that:

It is "the duty of the importer to make affirmative proof of a state of facts relieving his merchandise from duty to which it would otherwise be subjected, and that he should segregate from the same class of goods such portions as are claimed to be free. He does not perform his duty by throwing upon the hands of the examining officers importations enormous in bulk and number, containing goods that are free and dutiable indiscriminately mingled together, and requiring an army of officials to separate them. If segregated, the appraiser's subordinates could make such an inspection as is contemplated by law to verify the declarations made on entry; and the law does not contemplate the individual handling of the countless millions of articles of imported merchandise. Such a method of administration, if made necessary, would require the expenditure of the revenue in the effort to collect it, or would entail unendurable and obstructive delays in the management of the public business."

We do not find in U. S. v. Ranlett, 19 Sup. Ct. 114, any reason for disagreeing with the conclusion of the board that, upon the examination, the collector was warranted in classifying the entire importation as liable to duty; and the record does not furnish sufficient evidence on which to make any division into free and dutiable bags. The decision of the circuit court is reversed.

LEOVY v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 28, 1899.)

No. 745.

1. NAVIGABLE WATERS—OBSTRUCTION—PROSECUTION—EVIDENCE.

In a prosecution for the erection of a dam in a navigable stream without consent of the secretary of war, prohibited by 27 Stat. 110, c. 158, § 3, a resolution of state levee commissioners within the district in which the dam was built, approving defendant's action, passed after indictment found, was irrelevant.

2. SAME—QUESTION FOR JURY.

Where evidence of the character of a stream is conflicting, whether it is a navigable stream, within 27 Stat. 110, c. 158, § 3, prohibiting the erection of any dam, etc., in navigable streams of the United States, is a question of law and fact, for the jury.

3. SAME—NAVIGABLE RIVERS—OUTBREAK—STATE'S RIGHT TO CLOSE.

That an outlet of the Mississippi river resulted from a break or crevasse in the natural channel does not warrant its closing by the state or local authorities without consent of the United States, where it has been open and navigable for over 60 years, and during such time has been a commercial highway.

4. SAME—POLICE POWER.

A state has no authority, under its police power, to close any navigable water of the United States, though located wholly within the limits of the state, for the purpose of reclamation of swamp lands, without the consent of the federal government.

5. SAME—INSTRUCTIONS.

Where defendant was charged with obstructing a navigable stream, prohibited by 27 Stat. 110, c. 158, § 3, an instruction that unless such stream, when closed, was substantially useful for interstate commerce, the federal legislation prohibiting its closing was unconstitutional, was properly refused, as inapplicable to the issues.

6. SAME—NAVIGABLE WATERS—DEFINITION.

In a prosecution under 27 Stat. 110, c. 158, § 3, prohibiting the obstruction of any navigable water of the United States, a charge defining a "navigable water" as such as, of itself or in connection with other water, permits a continuous journey by boat, by one of the principal methods of commerce, from one state to another, was correct.

7. SAME—FEDERAL CONTROL—CONSTITUTIONAL POWERS—STATE RIGHTS.

The power vested in the federal government by Const. art. 1, § 8, to regulate interstate commerce, etc., involves the control of waters of the United States which are navigable in fact, so far as to insure their free navigation; and hence a state has no power to close any such navigable waters, though located wholly within its limits.

8. SAME—STATUTES—CONSTRUCTION—PENALTY.

The rivers and harbors act of September 19, 1890 (26 Stat. 426, 454, c. 907, § 7), prohibits the erection of obstructions in navigable waters of the United States; and section 10 provides that every person guilty of a violation of the provisions of section 7 shall be punished by fine or imprisonment, or both. By Act 1892 (27 Stat. 88, 110, c. 158) section 7 of the act of 1890 was amended and re-enacted, the amendment, however, relating only to the alteration of ports, harbors, etc., and the balance of the re-enacted section was the same as the original. Held, that section 10 applied to section 7 as amended and re-enacted, and imposed a penalty for its violation.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Augustus F. Leovy and Robert S. Leovy were indicted on May 19, 1897, under Act Sept. 19, 1890 (26 Stat. 454), as amended by Act July 13, 1892 (27 Stat. 110, c. 158, § 3).

The indictment charged them with having, on November 16, 1895, and on other days during that month, built a dam across Red Pass, a navigable stream of the United States, in the parish of Plaquemines, La., without permission of the secretary of war, and thus having closed said navigable stream, in violation of said law. Defendants pleaded not guilty, and on trial the jury rendered a verdict finding Augustus F. Leovy not guilty, and finding Robert S. Leovy guilty as charged; and the court sentenced Robert S. Leovy to pay a fine of \$200 and costs of prosecution.

Plaintiff in error, Robert S. Leovy, on the trial reserved three bills of exceptions to the rulings of the trial judge, and on this writ presented eleven assignments of error. These exceptions and assignments of error, summarized, are as follows, viz.: Bill No. 1 and assignment No. 1 complain because the trial judge refused to allow the defendants to put in evidence a resolution passed by the Board of Commissioners of Buras Levee District, on November 20, 1897, approving the action of Robert S. Leovy in the dam-

ming and closing of said Red Pass. Bill No. 2 and assignment No. 2 complain because the trial judge refused to instruct the jury to acquit the defendants. Bill No. 3 and assignments Nos. 3, 4, 5, 6, 7, 8, 9, and 10 embrace the following complaints, viz.: "(a) Because the trial judge refused to instruct the jury that, 'if the jury shall find that Red Pass is not a natural stream, but simply the result of a crevasse or outbreak of the Mississippi river from its natural channel, they must acquit the defendants.' (b) Because the court refused to charge the jury that, 'if the jury shall find that Red Pass was a crevasse or outbreak of the Mississippi river from its natural channel, the result of which was to overflow a large portion of Plaquemines parish, to the detriment of the inhabitants thereof by the destruction of their property and prejudicial to their health, the state, in the exercise of its police power, delegated to the police jury of the parish of Plaquemines, had a right to close it.' (c) Because the trial judge refused to instruct the jury that, 'if the jury shall find that Red Pass is a crevasse or outbreak of the Mississippi river from its natural channel, and overflows the lands situated on the banks of Red Pass, and that its closing was necessary to reclaim, drain, or levee said lands, or any of them, then it was the duty of the state, under the acts of congress of 1849 and 1850, to close Red Pass.' (d) Because the court refused to charge that 'unless the jury shall be satisfied, from the evidence, that Red Pass was, at the time when it was closed, as alleged in the indictment, substantially useful to some purpose of interstate commerce, the jury are instructed that any federal legislation purporting to prohibit or prevent or interfere with the closing of said stream would be beyond the powers granted to the congress of the United States by article 1, § 9, of the constitution, or otherwise vested by the constitution of the United States in congress, and would be contrary to amendment 10 of the constitution of the United States; and the jury are instructed that the defendants, claiming and being entitled to the protection of that constitution, must be acquitted.' (e) Because the court refused to request and charge the jury that, 'if the jury shall find that the dam constructed at the mouth of Red Pass was constructed by authority of the police jury of the parish of Plaquemines, and that the defendant Robert S. Leovy was an officer of said parish, and in constructing said dam was acting as such under authority of the police jury thereof, they must acquit him.' (f) Certain portions of the general charge are also objected to, viz.: 'I wish, also, to say that the question whether, some 60 years ago, the Jump resulted from the enlargement of some canal which was then in existence, or, as has been contended here, was a "crevasse," in that sense of the word, you are not to consider at all. As you have been appealed to in the argument to consider that this question involved the right of the state to close a gap in its levees, I say that you have nothing of that sort to consider. I repeat to you that whether or not, 63 years ago, the Jump was formed in the manner in which it was contended it was, is not a matter for your consideration.' 'I charge you, gentlemen, that the police jury of the parish had no right to authorize Mr. Robert S. Leovy to dam Red Pass, if Red Pass was a navigable water of the United States. I say that it had no authority, because, in the year 1890, the congress of the United States passed the law under which this indictment has been brought, forbidding the damming of any navigable stream of the United States without the previous authorization of the secretary of war. Therefore, as it was not contended in this case that there was any authority from the secretary, but, on the contrary, there is proof tending to show there was no such authority, then it results that it is no defense for Mr. Robert S. Leovy to show his pretended or alleged authority from the police jury of the parish of Plaquemines. The police jury of the parish of Plaquemines could not lawfully have dammed it. Therefore Mr. Leovy could not.' 'What is a navigable water of the United States? It is a navigable water which, either of itself or in connection with other water, permits a continuous journey to another state. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another state from the state in which you start on that journey, then it is a navigable water of the United States. It is so called, in contradistinction to waters which arise and come to an end within the boundaries of

the state. * * * But if, from the water in one state, you can travel by water continuously to another state, and the water is a navigable water, then it is a navigable stream of the United States. * * * If it was navigable, and connected with waters that permitted a journey to another state, then it is a navigable water of the United States. In this case, if it was navigable, it would be a navigable water of the United States, or might be so, in two ways: By connecting with the waters of the Gulf, if you should find it connected that way; or by connecting with the waters of the Mississippi. I mean to say that, if there is evidence here that you could leave the Mississippi, and go into the Jump, and then go to the place where this dam was built by Robert S. Leovy, and some distance beyond that, and that it was navigable for boats or vessels carrying on commerce, then it would be a navigable water of the United States, because it would connect with the Mississippi, and from the Mississippi you could go to the other states of the Union. I say, again, that it might connect in another way. It might connect through the Gulf. But the fact that I wish to impress upon you is this: That it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the Gulf, because, if, from some point beyond the place where Mr. Robert S. Leovy built this dam towards the Mississippi river, the stream was navigable, then it would be a navigable stream of the United States, because it would connect with the Mississippi river.' " The eleventh assignment of error complains about the sentence and judgment, because it is averred "there was no penalty imposed by law for the offense charged."

Henry J. Leovy, John D. Rouse, and Wm. Grant, for plaintiff in error.

J. Ward Gurley, for the United States.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

After stating the case as above, the opinion of the court was delivered by PARDEE, Circuit Judge.

The first assignment of error, based upon the first bill of exceptions, complains of the refusal of the court to permit to be read in evidence on the trial a certified copy of a resolution passed by the Board of Commissioners of Buras Levee District, at a meeting thereof held on the 20th of November, 1897, said Board of Commissioners of Buras Levee District being a body corporate under the laws of Louisiana, whose duties and powers are defined by law. The bill of exceptions does not recite any facts proved or offered to be proved, nor any other matter, tending to show whether the resolution offered was relevant or irrelevant; and, standing by itself, the bill presents a purely abstract question. It is true that, in another bill of exceptions, all the evidence admitted and offered in the case is recited; but it is not the duty of the court to go through the whole body of evidence to find a state of facts which would make the resolution offered pertinent to some issue in the case. As a matter of fact, however, the resolution offered was one passed by the board of commissioners after the indictment found, and it was wholly irrelevant to any issue presented before the jury.

The second assignment of error is based on a bill of exceptions which contains all the evidence taken and offered on the trial of the case, and the complaint is that, upon consideration of the whole evidence adduced, the court erred in refusing to direct the jury to acquit

the defendants. Whether or not Red Pass was a navigable stream, within the meaning of the rivers and harbors act of September 19, 1890, and the amendments of section 7 of the act of July 13, 1892, is a question of law and fact, and the evidence submitted thereon was conflicting. The question was properly left to the jury under the instructions of the court.

The third assignment of error complains of the refusal of the court to instruct the jury that, if they should find that Red Pass was not a natural stream, but simply the result of a crevasse or outbreak of the Mississippi river from its natural channel, they must acquit the defendants. The proposition of law involved, even if correct in principle, is too general in terms, and the effect of it, under the evidence, which tended to show that over 60 years ago there was a crevasse or outbreak in the Mississippi river at the Jump, resulting in the formation of Red Pass, which might have been, and probably was, a navigable stream from that date, would have been to confuse and embarrass the jury.

We notice that the eighth assignment of error complains of a part of the charge given to the jury as follows:

"I wish, also, to say that the question whether, some 60 years ago, the Jump resulted from the enlargement of some canal which was then in existence, or, as has been contended here, was a 'crevasse,' in that sense of the word, you are not to consider at all. As you have been appealed to in the argument to consider that this question involved the right of the state to close a gap in its levees, I say that you have nothing of that sort to consider. I repeat to you that whether or not, 60 years ago, the Jump was formed in the manner in which it was contended it was, is not a matter for your consideration."

From our examination of the whole evidence brought up in the record, and the whole charge as given, we are of opinion that this instruction was correct and proper; no such case having been made as would warrant the jury to consider whether or not Red Pass was the result of a crevasse. At the same time, it is proper to say that a recent crevasse in the levee on the bank of the Mississippi river or other navigable stream may be closed by the state or local authority, although, while open, it may be navigable; but it does not follow that an outlet of the Mississippi river, near its mouth, resulting from an outbreak of the natural channel over 60 years ago, and which became navigable long before the United States ceded the swamp lands to the state of Louisiana for drainage purposes, and which has since been a highway for commerce, may now be closed by either the state or local authorities, without the consent of the United States. This disposes of the third and eighth assignments of error.

The fourth assignment of error raises the question whether the court ought to have instructed the jury, on request, that the police jury of the parish of Plaquemines had the right to close Red Pass, in the exercise of the police power of the state, delegated to said police jury. There is no legitimate evidence in the record tending to show that the police jury of the parish of Plaquemines ordered Red Pass closed for the purpose of effecting or promoting the peace, morals, education, health, or good order of the people; but the case does show that the pass was ordered closed, and was closed, for the sole pur-

pose of reclaiming swamp lands. Under the power to regulate commerce, congress having forbidden the closing of any navigable water without the consent of the United States, it is very doubtful whether any navigable water of the United States, although wholly within the limits of the state, can be closed, under the exercise of the police power of the state, for any purpose whatever; but, where the purpose only is the reclamation of swamp lands, there is no doubt the police power of the state must give way to the authority of congress. *Railway Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, is an interesting case on this subject, and we quote from page 104, 158 U. S., and page 804, 15 Sup. Ct., as follows:

"Generally it may be said, in respect to laws of this character, that, though resting upon the police power of the state, they must yield whenever congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter; for that power, like all other reserved powers of the states, is subordinate to those in terms conferred by the constitution upon the nation. 'No urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confined exclusively to the discretion of congress by the constitution.' *Henderson v. New York*, 92 U. S. 259, 271. 'Definitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.' *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661, 6 Sup. Ct. 252. 'While it may be a police power, in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of federal authority as defined by the constitution, the latter must prevail.' *Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana*, 118 U. S. 455, 464, 6 Sup. Ct. 1114."

The charge as requested was properly refused, as incorrect in law as well as inapplicable to the case before the jury.

We understand that the seventh and ninth assignments of error were intended to raise this same question as to the right of the police jury of the parish of Plaquemines to close Red Pass, under the police power of the state of Louisiana, irrespective of the statutes of the United States forbidding the closing of navigable streams without the consent of the secretary of war; and for the reasons given as to the fourth assignment, if for no other, the said assignments are without merit.

The fifth assignment of error is not apparently insisted upon, and needs no consideration.

The sixth assignment of error raises the question whether the court erred in refusing the request to instruct the jury as follows:

"Unless the jury shall be satisfied, from the evidence, that Red Pass was, at the time when it was closed, as alleged in the indictment, substantially useful to some purpose of interstate commerce, the jury are instructed that any federal legislation purporting to prohibit or prevent or interfere with the closing of said stream would be beyond the powers granted to the congress by article 1, § 9, of the constitution, or otherwise vested by the constitution of the United States in congress, and would be contrary to amendment 10 of the constitution of the United States; and the jury are instructed that the defendants, claiming and being entitled to the protection of that constitution, must be acquitted."

Section 9, art. 1, of the constitution does not appear to have much bearing on the subject; but the third paragraph of section 8 of article 1 gives congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes, and is probably the provision of article 1 which was intended to be referred to. Article 10 of the amendments of the constitution of the United States is that:

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

It is well settled that the power to regulate commerce with foreign nations and among the several states comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a state other than those in which they lie. The requested instruction appears to mean that if the jury should not be satisfied, from the evidence, that Red Pass, at the time when it was closed, was a navigable water of the United States, within the proper definitions of the term "navigable water," then any federal legislation purporting to prohibit or prevent or interfere with the closing of said stream, would be beyond the power of congress. If this is what it means, the proposition must be conceded; but its applicability as a separate proposition in the present case is not apparent. The contention of the government was that Red Pass was a navigable stream when the defendants closed it, and it was only on the theory that it was a navigable stream at that time that the defendants could have been convicted at all.

The tenth assignment of error complains of the charge of the judge defining what is a navigable water of the United States. The charge in this respect, as given by the trial judge, seems to be in accord with the decisions of the supreme court of the United States, and we see no error therein. No specific error in the charge given is pointed out, but the plaintiff in error contends that Red Pass was essentially a stream wholly within the state, and wholly within the jurisdiction of the state, and therefore the state had the authority to close the same without the consent of the government of the United States.

"The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as may be necessary to insure their free navigation, when, by themselves or their connection with other waters, they have a continuous channel for commerce among the states or with foreign countries." *The Daniel Ball*, 10 Wall. 557.

The above proposition was reiterated in *Escanaba & L. M. Transp. Co. v. City of Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, in which case it was held that the Chicago river and its branches, although wholly within the state of Illinois, must be deemed navigable waters of the United States, over which congress, under its commercial power, must exercise control to the extent necessary to protect, preserve, and improve their free navigation. *Escanaba & L. M. Transp. Co. v. City of Chicago* has been frequently recognized and approved by the supreme court, and it is wholly inconsistent with the proposition that any state may close up a navigable water of the United States, with-

out the consent of the United States, although such navigable water may be wholly within the limits of such state.

In the rivers and harbors act approved September 19, 1890 (26 Stat. 426, 454, c. 907), it is provided (in section 7) as follows:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the secretary of war, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the secretary of war, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the secretary of war: Provided, that this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any state, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such state."

The tenth section of the same act provided as follows:

"Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the attorney general of the United States."

In the rivers and harbors act of 1892 (27 Stat. 88, 110, c. 158), section 7 of the act of 1890 was amended and re-enacted, so as to read as follows:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the secretary of war, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the secretary of war, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the secretary of war: Provided, that this sec-

tion shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, bridge draw, bridge piers and abutments or other works under an act of the legislature of any state, over or in any stream, port, roadstead, haven or harbor or other navigable water not wholly within the limits of such state."

The amendment relates only to altering ports and harbors, etc., and otherwise the re-enacted section is the same as the original. The intention and effect of the legislation of 1892 was to embody in the act of 1890 the amended and re-enacted section, so that the provisions of section 10 of the act of 1890 should apply to the violation of the amended and re-enacted section, the same as to the violation of section 7 as originally enacted. See Black, Interp. Laws, pp. 356, 357. We therefore conclude that the eleventh assignment of error is without merit.

At the close of the very able and ingenious brief of the learned counsel for the plaintiff in error we find:

"In conclusion, we beg again to remind the court that the issues in this case are not confined to the question of closing Red Pass only. Numerous passes of like character extend through all the swamp lands granted by congress in 1849 and 1850 to Louisiana and other states to be drained and reclaimed; and, if the power be denied to close them, or even if this power be made subject to the arbitrary control of the secretary of war, the reclaiming of millions of acres of land will be rendered impracticable, if not wholly impossible. The theory contended for by the prosecution would, if maintained, revolutionize the entire relation of the federal government to the state levee, quarantine, inspection, and other authorities, and fill the federal courts with the clamors of all those discontented with the administration of police laws. It would seriously embarrass officials charged with the execution of vitally important measures in times of great public danger through flood and pestilence. Indeed, it is hardly an exaggeration to say that the police power is the state, embracing, as it does, under the authorities, the prevention of flood and fire, disease and crime, and all other physical and moral evils. No federal statute expressly excepts state officers charged with such duties from criminal punishment for official acts; but, under the authorities, not even the constitutional amendments, much less federal statutes, were meant to subject to indictment for their official and vitally necessary actions the state's quarantine, fire, inspection, police, or levee officials, any more than its officers of justice or the judges of its courts."

We notice this merely to say that, if the picture of evils resulting from maintaining the statute of the United States forbidding the closing of navigable waters is correctly drawn, the remedy lies in congressional, rather than in judicial, legislation. It does not appear to us, however, that the enforcement of the federal statute ought to have any such disastrous and humiliating effects. It is not to be supposed that the secretary of war will refuse his approval to any reasonable closing of swamp outlets and bayous, wholly or partly within a state, whenever the same is necessary, or apparently necessary, to protect the health, morals, or general good of the community interested. It is probable that all that will be necessary will be to apply, showing the apparent need of the work proposed; and such application to the government controlling the navigable waters of the United States may well be made, and without compromise of dignity, by any state officer or board, or even by the state itself.

The judgment of the circuit court is affirmed.

HARLESS V. UNITED STATES.¹

(Circuit Court of Appeals, Eighth Circuit. February 20, 1899.)

No. 1,050.

1. CRIMINAL LAW—APPEAL—REVIEW—RULING ON MOTION FOR NEW TRIAL.

In the federal courts the granting or denying of a motion for new trial is a matter resting in the sound discretion of the trial court, and its action is not reviewable.

2. SAME—ASSIGNMENTS OF ERROR.

A circuit court of appeals will not consider an assignment of error based upon the admission of evidence or the refusal of instructions, unless the evidence objected to or the instruction refused is set out as required by rule 11 (31 C. C. A. cxlvii., 90 Fed. cxlvii.).

3. SAME—REVIEW—FAILURE TO COMPLY WITH RULES.

The court will not consider itself required, even in a criminal case, to notice assignments of error, where there has been no apparent effort to comply with its reasonable rules for the presentation of cases for review, which have been in force since the court was organized.

In Error to the United States Court of Appeals in the Indian Territory.

For opinion on motion to dismiss, see 88 Fed. 97.

Thomas Marcum and Edgar Smith (W. M. Mellette, Thomas Owens, J. H. Koogler, and John Watkins, on the brief), for plaintiff in error.

L. F. Parker, Jr., Asst. U. S. Atty. (P. L. Soper, U. S. Atty., on the brief).

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. John D. Harless, the plaintiff in error, was tried in the United States court in the Indian Territory for the Northern district of said territory, under an indictment previously returned against him which originally contained four counts, two of which, the first and third, were subsequently dismissed by counsel representing the government. One of the counts of the indictment, on which the accused was ultimately tried, charged him with stealing certain cattle, and the remaining count, on which he was also tried, charged him with the offense of receiving certain cattle into his possession and selling them, knowing them to have been stolen. The proof adduced at the trial appears to have been sufficient to warrant a jury in finding that the accused was either concerned in the larceny of the cattle, or, if not concerned in the larceny, that he had received the cattle after they had been stolen, and had sold and disposed of them knowing them to be stolen property. The jury returned a verdict of not guilty on the count charging larceny, but rendered a verdict of guilty on the fourth count of receiving stolen property knowing it to have been stolen. After a motion for a new trial had been overruled, the accused was sentenced to five years' imprisonment in the United States penitentiary at Leavenworth, Kan. From this sentence he prosecuted an appeal to the United States court of appeals in the Indian Territory, where the conviction was affirmed. 45 S. W. 133. The case was then brought to this court by a writ of error.

The assignment of errors which was filed in the territorial court of

appeals for the purpose of obtaining a review of the case by this court specifies: First, that error was committed in refusing to grant the accused a new trial because the verdict was contrary to law; second, in refusing to grant a new trial because the verdict was contrary to the evidence; and, third, in admitting incompetent testimony during the trial notwithstanding objections made thereto by the accused.

The first two of these assignments present no question which this court can notice, as it is well settled in the federal courts that the granting or the denying of a motion for a new trial is a matter resting in the sound discretion of the trial court. Railroad Co. v. Howard, 4 U. S. App. 202, 1 C. C. A. 229, and 49 Fed. 206; Railroad Co. v. Charless, 7 U. S. App. 359-388, 2 C. C. A. 380, and 51 Fed. 562; Edward P. Allis Co. v. Columbia Mill Co., 27 U. S. App. 583-593, 12 C. C. A. 511, and 65 Fed. 52. Equally unavailing is the third assignment of error above mentioned, inasmuch as it does not quote the objectionable testimony, either in full or in substance, as rule 11 (31 C. C. A. cxlv., 90 Fed. cxlv.) of this court requires, or point to the place in the record where such objectionable testimony can be found.

The fourth assignment of error is that the trial court erred "in refusing to give the special instructions asked for by the defendant, the same numbered 1, 2, 3, and 4, and made a part of the motion for new trial by exhibit." An examination of the record shows that it contains no instructions asked for by the defendant corresponding to this description. Moreover, rule 11, above referred to, required these so-termed special instructions said to have been asked by the defendant and refused to be set out in the assignment of errors. Counsel for the plaintiff in error have not complied with this regulation. Besides, as the defendant appears to have asked only two instructions, and as they are not numbered, and do not seem to have been made exhibits to the motion for a new trial, we are wholly unable to identify the instructions said to have been asked by the defendant, to which the assignment refers. Not being able to identify the alleged instructions, it goes without saying that we are powerless to consider them.

The fifth assignment of error specifies that the court erred in submitting to the jury the fourth count of the indictment, because there was no evidence to support that count. This was the count charging the offense of receiving stolen property. It does not appear, however, that the defendant asked the trial court at the conclusion of the case to charge specially as to this count that there could be no conviction for want of any evidence to support it. Counsel did ask the trial court to direct a verdict for the defendant on both counts of the indictment, which instruction was very properly refused, for, beyond all question, there was evidence to sustain the charge of larceny. But no separate request was made to withdraw the fourth count from the consideration of the jury on the ground that as to that count there was no evidence to sustain it; and, in the absence of such a request, it is at least questionable whether the point covered by the fifth assignment would, in any event, be tenable, for want of an appropriate request addressed to the fourth count, and to that count only. Vil-

lage of Alexandria v. Stabler, 4 U. S. App. 324, 1 C. C. A. 616, and 50 Fed. 689; Insurance Co. v. Unsell, 144 U. S. 439-451, 12 Sup. Ct. 671. We have examined the evidence, however, and are of the opinion that there was some evidence tending to support the fourth count of the indictment. The testimony to which we allude was pointed out at considerable length in the opinion of the territorial court of appeals when the case in hand was before that court (45 S. W. 133, 134), and we fully agree with what was said by the court on that subject. There was more evidence, we think, to sustain the charge of larceny, but there was enough evidence to warrant the trial court in permitting the jury to determine whether the accused was not guilty of the offense of receiving stolen property if they found him to be innocent of the charge of larceny.

The sixth and last specification of error is that the court erred "in charging the law with reference to accomplices." The portion of the charge here referred to is not set out in the assignment of errors so that we may know, without going over the whole charge, what is intended, as rule 11 directs shall be done when an exception to a part of the charge is relied upon, and for that reason we are authorized by the rule to disregard the supposed error. We may say generally that, inasmuch as there was no apparent effort in this case to comply with a rule of practice regulating the preparation of assignments of error which is reasonable in its requirements, and has been in force since this court was organized, we do not feel disposed, although this is a criminal case, to notice alleged errors which have not been properly assigned. The territorial court of appeals considered at some length the alleged error in the charge on the subject of accomplices, and reached the conclusion that as what was said on that head only had reference to the charge of larceny, of which the accused was acquitted, the error complained of, if there was error, was wholly immaterial, and worked no prejudice. Without pursuing the subject at any greater length, it is sufficient to say that we are satisfied that the judgment should not be disturbed. It is accordingly ordered that the judgment of the United States court in the Indian Territory and the judgment of the court of appeals in the Indian Territory be each affirmed, and that the sentence heretofore imposed be duly executed.

VIVES v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 21, 1899.)

No. 736.

1. POSTMASTER—EMBEZZLEMENT OF MONEY-ORDER FUNDS.

That a postmaster who issued money orders without receiving the money therefor, and failed to account for such money, did not intend to defraud the government, but to collect and account for the money on his settlement, constitutes no defense to a prosecution for embezzlement of money-order funds under Rev. St. § 4046.

2. SAME—VERDICT—HARMLESS ERROR.

Where an indictment against a postmaster contained two counts, one charging him with the embezzlement of money-order funds, under Rev.

St. § 4046, and one with failing to deposit the same amount of postal-revenue funds, under section 4053, and the verdict found him guilty as charged, without specifying on which count, a sentence imposing the minimum sentence under either charge renders the error, if any, without prejudice to the defendant.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was a prosecution by the United States of Camille Vives for embezzlement as an assistant postmaster. The defendant was convicted, and brings error.

F. B. Earhart, for plaintiff in error.

J. Ward Gurley, for the United States.

Before PARDEE, Circuit Judge, and BOARMAN and SWAYNE, District Judges.

PARDEE, Circuit Judge. The plaintiff in error, as assistant postmaster of the United States, was indicted for embezzling money-order funds, in violation of section 4046, Rev. St. U. S., and in neglecting, as postmaster, to deposit postal revenues, in violation of section 4053, *Id.* He was duly arraigned, pleaded not guilty, and on the trial the verdict was: "We, the jury, find defendant guilty as charged, and we find the amount embezzled to be eight hundred and thirty-two dollars and sixty-three cents (\$832.63). Strongly recommended to the mercy of the court." No motion for a new trial was made, and the plaintiff in error was sentenced to be imprisoned in the North Carolina penitentiary for the period of one year and one day, and to pay a fine of \$832.63, and costs of prosecution. There is but one bill of exceptions in the record, and that shows that, after the case had been submitted, the attorney for the defendant (plaintiff in error here) requested the following charge to be given to the jury:

"If the jury believe from the evidence that it was the purpose of the accused to return the money to the government, and that the money orders were issued with the design of accounting to the government for their proceeds when a settlement of the account of the postmaster was due, and that the accused did not intend to defraud the government of the money used by him, the jury should find the accused not guilty."

—And that the said charge was refused. This refusal to charge is the sole error assigned for a review in this court.

It is to be noticed that the bill of exceptions, as presented to the trial judge for his signature, is wholly defective in not giving some statement of the case or of the matters proved, so as to show that the charge as requested was relevant to some issue in the case, and not a mere abstract proposition for the consideration of the jury. The trial judge, in signing the bill of exceptions, appended to it the following statement:

"The indictment against the defendant contains two counts, viz.: (1) For converting to his own use, and embezzling, as assistant postmaster, \$832.63 of money-order funds, in violation of section 4046, Rev. St. U. S. (2) For willfully neglecting, as assistant postmaster, to deposit \$832.63, being part of the postal revenues of the United States, in violation of section 4053, *Id.* After the government had rested its case, the defendant took the stand in

his own behalf, and distinctly stated and admitted in his testimony in chief that he was 'short' in the sum exceeding \$600 of the money-order funds; but, in answer to a question by his counsel, the defendant said that he intended to return the funds to the government, and had no intention to defraud it. The defendant further stated and admitted in his testimony in chief that he issued postal money orders without receiving cash therefor at the time of issuance, and that he would thereafter collect the proceeds of the postal money orders."

Taking the judge's statement as supplementing the bill of exceptions in a very necessary particular, we are of opinion that the requested charge was properly refused for the reason given by the trial judge, to wit, "It is incorrect in law, and, besides, it ignored the second count in the indictment, and called for an acquittal without regard to the second count." As a matter of fact, very few embezzlements are committed without the intention of the embezzler at some future time to make good his appropriation. Counsel for plaintiff in error in this court gave little attention to the above-mentioned assignment of error, but contended that this court, under its rules, will notice a plain error upon the face of the record, although the same is not assigned; and then proceeded to argue that the verdict of the jury is ambiguous and indefinite, and deprives the plaintiff in error of a substantial right, because the jury did not find whether the \$832.63 embezzled belonged to the money-order fund or to the postal-revenue fund,—two distinct funds; and cited sections 4042, 4044, 4045, 4049, 4050, and 4051, Rev. St. U. S., and section 3, p. 406, Supp. Rev. St. U. S. Under our rule we may notice any plain error on the face of the record, although the same is not assigned. The error suggested here is by no means plain on the face of the record, but what does appear to be plain is that, as the plaintiff in error was sentenced to the minimum penalty, under sections 4046 and 4053, if any error of the kind suggested was committed,—on which we express no opinion,—the error was not prejudicial to the plaintiff in error. A satisfaction of the judgment will fully protect the plaintiff in error as to all the matters charged in both counts in the indictment. The judgment of the circuit court is affirmed.

PROCTOR & GAMBLE CO. v. GLOBE REFINING CO.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 598.

1. UNFAIR COMPETITION—PRELIMINARY INJUNCTION—REVIEW.

To justify an appellate court in reversing an order refusing a preliminary injunction against alleged unfair trade, it must be clearly apparent that the discretion of the trial court has been improvidently exercised.

2. SAME—WHAT CONSTITUTES.

The cardinal rule upon the subject of unfair competition in trade is that no one shall, by imitation or any unfair device, induce the public to believe that the goods he offers for sale are the goods of another, and thereby appropriate to himself the value of the reputation which the other has acquired for his own products or merchandise.¹

¹ As to unfair competition, see note to Scheuer v. Muller, 20 C. C. A. 165, and supplementary note to Lare v. Harper, 30 C. C. A. 376.

3. SAME—LABELS—WORDS OR MARKS USED TO INDICATE SUPERIORITY OR POPULARITY.

One cannot make an exclusive appropriation of words or marks which he puts upon his goods, and which simply indicate their superiority or popularity, or universality in use, and no more.

4. SAME—IMITATION OF WRAPPER—DESIGNS COMPARED.

Complainant manufactured soap, which it sold in packages having a yellow wrapper, on one side of which was printed in black letters the words "Every Day Soap," together with the name and location of the maker. There was also a small, circular figure containing a representation of a moon and stars on a black ground. Defendant put up its soap in packages of similar size and shape, having a yellow wrapper, on one face of which was a black ground containing only the words "Everybody's Soap," in letters formed by the yellow paper of the wrapper showing through the black field of the label. The print and figures displayed on the sides and back of the wrapper bore no resemblance to anything on complainant's, and the name and location of the maker were conspicuously shown on one side of the package. *Held*, that an order refusing complainant a preliminary injunction would not be disturbed.

Appeal from the Circuit Court of the United States for the District of Kentucky.

On the 8th day of November, 1897, the Proctor & Gamble Company (the appellant here) filed its bill in the circuit court for the district of Kentucky against the Globe Refining Company, complaining that the latter was infringing a trade-mark belonging to the complainant, impressed upon a wrapper or label used for covering cakes of washing soap alleged to be known to the trade as "Every Day Soap," by using on soap manufactured by the defendant a wrapper or label containing the words "Everybody's Soap." Certain other features wherein defendant's label was charged to be an imitation of the complainant's were stated in the bill. To this bill the defendant filed an answer, and on November 11, 1897, the complainant moved for a preliminary injunction, and the motion was heard on the bill and answer and affidavits filed by the respective parties, and some further evidence taken in open court, which latter was preserved, and is found in the record. On the 4th day of December following, the court granted a temporary injunction, as prayed for. One week thereafter, December 11, 1897, the complainant filed an amended and supplemental bill, further alleging the use by the defendant of another label which had been substituted for the first, and complaining of the new label as being an infringement of the complainant's trademark, and, independently of that, of its employment by the defendant as involving unfair competition in trade, in that it was devised and used for the purpose of inducing purchasers thereof to believe that in buying the soap of the defendant, so labeled, they were buying the complainant's soap. The defendant on December 27, 1897, filed its answer to the supplemental bill. Thereupon the complainant made a further motion for a preliminary injunction against the new label. This motion was heard on the pleadings, affidavits and testimony taken in open court as above stated. It was held by the court that the new label was not an infringement of the label of the complainant, and that the use of it was not unfair competition in trade, and complainant's motion for an injunction was accordingly overruled. From this order the complainant appeals. There was no appeal from the order allowing the injunction on the original bill, and the order denying the injunction against the use of the second label is the only matter for review.

Humphrey & Davie and Wm. Henry Brown, for appellant.
Richards, Baskin & Ronald, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

Upon this appeal the appellant relies not so much upon the infringement of its trade-mark as upon its complaint that the use by the defendant of its label is an unfair competition in trade. To the question whether it is so or not, the briefs and arguments of counsel are mainly directed. This being an appeal from an order denying a preliminary injunction, the question to be determined is whether the discretion of the court below was improvidently exercised and not whether, upon the final hearing, upon full view of all the facts in the case, this court would, upon the evidence before it, reach the same conclusion as that of the court below. Duplex Printing-Press Co. v. Campbell Printing-Press & Manufacturing Co., 16 C. C. A. 220, 69 Fed. 252; Garrett v. T. H. Garrett & Co., 24 C. C. A. 173, 78 Fed. 472. To justify this court in reversing an order of this kind, it must be quite clearly apparent that a mistake was committed by the court below. Ritter v. Ulman, 42 U. S. App. 263, 24 C. C. A. 71, and 78 Fed. 222.

By the test applicable to such an appeal, we proceed to consider what appear to us to be the material facts of the controversy, so far as they can be ascertained from the record of the proceedings before the circuit court. This involves principally a comparison of the labels of the respective parties involved in the second application for an injunction, but incidentally it will be proper to give some attention to the label used by the defendant before the injunction was granted upon the original motion; it being insisted by the appellant that, by reason of the defendant's having diverted in part the trade of the complainant by the use of its first label, the use of the second label, which it is charged is only a colorable variation of the first, enables the defendant more effectually to absorb the complainant's business. The packages in which the respective parties put up their soap for the market are similar in form and size, being about 4 inches long, $2\frac{1}{4}$ inches wide and $1\frac{1}{2}$ inches thick. The label of the complainant, printed upon the wrapper on the upper flat surface of the cakes, consisted in large part of the words "Every Day Soap"; the first two words being in large, fancy letters, in a curved line in the upper part of a rectangular space about the size of the cake, and the word "Soap," also in large, fancy letters, under the former words. In the lower left-hand corner is a circular figure about three-fourths of an inch in diameter, in the resemblance of a full moon bearing a human face within it looking to the left; the rest of the contents of the circle being a black field, with 13 white stars thereon. At the right of this, and extending across three-quarters of the length of the label, are the words "Proctor & Gamble," and under these the word "Cincinnati," all in good-sized letters. There is some additional matter of ornamentation. All the foregoing characters were stamped or printed upon the face of light-yellow paper. Upon one edge of the cake, or rather upon the wrapper where it covers the side of the cake, there were printed the words, "Manufactured at Ivorydale," "Factories conducted on the profit-

sharing plan," in two lines on a rectangular space about three inches long and half an inch wide, of the same light-yellow color. The rest of the complainant's wrapper is of a darker color, filled with an obscure, uniform ornamentation. The first of the defendant's labels (being the one the use of which was enjoined) was of the same color as the complainant's, and bore upon its face, in large letters, the words "Everybody's Soap"; the letters being in about the same style as the complainant's, and formed in a very similar manner. There was a circular figure of the same size in the lower left-hand corner, but filled with different characters. At the right hand of this, where the complainant printed the words "Proctor & Gamble," the defendant printed the words "Globe Refining Co." Underneath this was "Louisville, Ky., instead of "Cincinnati" in the complainant's label. On the wrapper along both edges of the cake was printed other matter, having no resemblance to that of the complainant's. This wrapper had been in use for a few weeks only when the original bill was filed, and was thereupon discontinued. The defendant had been previously engaged for a much longer time in the manufacture and sale of the same or similar soap. The defendant's second label (the one now in question) was adopted, as the defendant claims, to obviate the objections which had been made to the use of the first. The wrapper was of the same color as before. The label on the upper surface of the cake was black, except where lettered. It bore the words "Everybody's Soap"; the word "Everybody's" being in script; the letter "E" being a capital, and the rest in ordinary style, though all were of good size, and plainly readable at some distance. The word "Soap" was in plain type, in smaller letters, and both were arranged in a similar relation to each other and to the surface of the label as the words "Every Day" and "Soap" in the complainant's label, except that the word "Everybody's" was straight, instead of circular, running from near the lower left-hand to the upper right-hand corners, and the word "Soap" filled the space in the lower right-hand corner. The color of the letters was light yellow, and the letters appear to consist of the wrapper itself showing through the black field of the label surrounding them. There was no circle in the lower left-hand corner, as in the complainant's label and the first of the defendant's, and there was no name of the manufacturers and their place of business, as in those. There was scarcely any ornamentation, the whole being of plain style. On one side of the cake upon the wrapper was printed in black letters the words, "Everybody's Soap," "made by" "Globe Refining Co., Louisville, Ky., in three lines; and on the other, "Everybody's Soap," "Best, goes farthest," in two lines. The rest of the wrapper was filled with pictures of a cavalcade, illustrating how all classes and peoples glorify "Everybody's Soap."

Having given this somewhat minute description of the labels which make the ground of the controversy, it remains to consider whether there was fair ground for the conclusion of the court below that a preliminary injunction should be denied.

The sharp competition in business of recent years has brought about a great increase in suits of this character, and the decisions

therein have rapidly multiplied. It would be a difficult task to harmonize them upon the principles which all of them recognize. This is because of such an infinite variety in the facts and circumstances with which the courts have had to deal,—a variety perhaps not surpassed in the field of any other department of judicial labor. The decisions, however, do undoubtedly help to sharpen the judgment, and often shed a line of light which leads one on to a just conclusion. Each case depends upon its own facts and circumstances, and must be decided upon the application thereto of settled principles which have received no substantial modification in recent years. The cardinal rule upon the subject is that no one shall, by imitation or any unfair device, induce the public to believe that the goods he offers for sale are the goods of another, and thereby appropriate to himself the value of the reputation which the other has acquired for his own products or merchandise. *Canal Co. v. Clark*, 13 Wall. 311; *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966. The substance of the rule is well understood, and it is unnecessary to make extensive citation of cases which have recognized it. It sometimes happens that the labels or characteristic marks which manufacturers use upon their goods are catchwords designed to attract purchasers, and to inspire the belief that theirs excel all others in merit, or that in popular estimation they are of superior quality. It will not do to say that any one manufacturer may exclude all others from the use of labels or marks which, differing in terms and characteristics, are honestly designed and used to obtain the same advantages. In other words, one cannot make an exclusive appropriation of words or marks which he puts upon his goods, and which simply indicate their superiority or popularity, or universality in use, and no more. If he could, he might thus absorb a privilege which is common to all. *Corbin v. Gould*, 133 U. S. 308, 10 Sup. Ct. 312; *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396. There is room for a question as to whether the labels of these parties are not of that class,—a question which we do not decide. The complainant charges, and there is proof tending to show the fact, that after the defendant adopted its first label the trade of the complainant at Louisville, which prior to that time had been very large, fell off in a great degree. The second label had been in use only a few days when the supplemental bill was filed, and there could not have been an opportunity to test its effect upon the trade. But the increase, if there was any, of the defendant's business, may have been the legitimate effect of its adoption of a "taking" description of its soap, which it was entitled to put upon its goods without trespassing upon the complainant's privilege of doing the same thing.

The complainant alleges, among other things, that it has for many years put up its soap in the form, size, and color of package in which it now does, and that from these peculiarities and its label the public have thereby become familiar with its goods; and it is further charged that the defendant imitates its package, in the form and size of it, as well as the color of the wrapper. But, if it were conceded that the complainant could acquire an exclusive privilege to the use of

such characteristics, it is not shown that their practice in respect to either the form or size of the cake or the color of the wrapper was peculiar to themselves, and non constat that other manufacturers, including the defendant, were accustomed to put up their goods in the same style in respect to these peculiarities. This part of the case stands on the same footing as did the black and gold labels on the ends of the spools whereon the plaintiff's trade-mark was printed in the case of *Coats v. Thread Co.*, *supra*; such labels having become common property. Aside from these features, there are not many points of similarity. The principal one is the use in both labels of the word "Every" in the complainant's, and as a component part of the word "Everybody's" in the defendant's, upon the wrapper on the upper surface of the cake, which is the only place where it occurs on the complainant's package. But in this context it should be noted that all the letters on this surface of the package are printed in black, upon a light-yellow ground, while on the defendant's the letters are light yellow on a black ground. In the complainant's the letters are in the similitude of type-written letters ornamented, while the defendant's are in script. On the defendant's label the figure of the moon and the characters exhibited therein by the complainant's is not shown, and the name of the manufacturer, which on the complainant's label is quite plainly shown, is not printed on the defendant's. The print and characters displayed on the sides and back of the defendant's wrapper bear no resemblance to anything on the complainant's. On one side of the complainant's the place of manufacture is stated to be Ivorydale. On the defendant's it is stated as at Louisville, Ky., and the name of the manufacturer, "Globe Refining Co.," is distinctly shown. Thus, on each wrapper the name of the respective manufacturers is conspicuously shown, and this is one of the important means of identification. *P. Lorillard Co. v. Peper*, 30 C. C. A. 496, 86 Fed. 956, 959. By the sight of the package, or by hearing the distinctive appellation read, customers would in general, if not universally, identify the goods they were buying. It is hardly conceivable that any one familiar with the appearance of the complainant's packages, who looked to the article he was purchasing to see whether it was the same, could fail to notice the difference, on the defendant's package being offered to him. The retail dealer would, beyond doubt, know the difference. Both seller and buyer would know that manufacturers generally put up their goods in the same shape and style, and the slightest inspection of the other characteristics would indicate the difference. If the consumer called for "Every Day" soap, and the retailer supplied him with "Everybody's" soap, it would be a fraud for which the defendant would not be liable, as was pertinently said by Mr. Justice Brown in *Coats v. Thread Co.*, already cited. And in passing we observe that what is mainly relied on in the present case as the imitation so injurious to the complainant, namely, the use of the word "Every," is not more likely to produce confusion with purchasers than were the use of the words "Best Six Cord" on the black and gold labels of the parties in the case just referred to, where an injunction was denied. But it is said that the evidence shows that the defendant's officers studied how

closely they might approximate the complainant's label without exposing themselves to suit, and that this indicates a purpose to purloin the complainant's good will. The evidence does show that such consultations took place in reference to the first label, but it is also shown that on discontinuing that they took legal advice in regard to the making of a new one. If they were intending to devise a new label which might attract purchasers by an alluring advertisement, they might lawfully do this, if they made it in such a form and style as would not lead purchasers to think they were buying the complainant's goods. The evidence does not clearly show that there was bad faith in devising the new label. It is not inconsistent with an honest purpose. A feature of this kind existed in the well-reasoned case of *Sterling Remedy Co. v. Eureka Chemical & Manufacturing Co.*, 70 Fed. 704,—a case cited by Judge Barr in his opinion, which is found in the record,—but it was not regarded as of controlling weight. In that case the controversy was over trade-marks employed on remedies for curing the habit of using tobacco. The prominent word on the complainant's label was "No-to-bac." That of the defendant's was "Baco-curo." It was insisted that the first word in the latter was so nearly *idem sonans* with the last word or syllable in the first, and that being the significant part of the expression, it was likely to attract trade which rightfully belonged to the complainant. But the court held otherwise, in view of the other differing features of the case. This judgment was affirmed by the circuit court of appeals for the Seventh circuit. *Sterling Remedy Co. v. Eureka Chemical & Manufacturing Co.*, 25 C. C. A. 314, 80 Fed. 105.

Much reliance is placed upon the decision in the case of *Garrett v. T. H. Garrett & Co.*, 24 C. C. A. 173, 78 Fed. 472, where this court reversed an order refusing a preliminary injunction. In that case the complainants had long been in the manufacture and sale of a snuff which bore the brand and was known to the trade as "Garrett's Snuff," and had a high reputation. The defendants organized a corporation with 350 shares, and took in one T. H. Garrett, with $2\frac{1}{2}$ shares, in order to give color to the employing the word "Garrett" in their corporate name. The corporation thereupon engaged in the snuff business, and sold their product as "Garrett's Snuff." We quote from the opinion of the court, at page 474, 78 Fed., and page 174, 24 C. C. A.:

"The labels and devices used by the defendant company under its original organization were, in their general design and appearance, close imitations of complainants' labels and designs. The cans, packages, labels, and wrappers of complainants were almost literally copied by the defendant company, excepting that 'T. H. Garrett, Louisville, Ky.' was substituted for 'W. E. Garrett, Philadelphia.' The color of defendant's labels was the same as that of complainants'. The type used for the printed matter on the labels was similar in general appearance, arrangement, and general effect."

From this it appears that the only material difference between the labels of the parties, or otherwise shown upon their packages, was in the initials of the word "Garrett," and the place of manufacture. In the present case, as we have shown, the points of resemblance are few, and the differences many, and the latter exist in

important features. It has been said that it is the resemblances that should be looked at, rather than the differences. But the existence of the latter negatives the former, and it is necessary to take both into view, in order to get a correct picture of the whole. Mr. Justice Brown said in delivering the opinion of the court in *Coats v. Thread Co.*:

"The differences are less conspicuous than the general resemblance between the two. At the same time, they are such as could not fail to impress themselves upon a person who examined them with a view to ascertain who was the real manufacturer of the thread."

And see the observations of Mr. Justice Lamar in *Corbin v. Gould*, 133 U. S., at pages 312, 313, 10 Sup. Ct. 312.

Upon the whole, we are satisfied that at least there was no "plain error" in the order of the circuit court, and it is accordingly affirmed.

AMERICAN GRAPHOPHONE CO. v. NATIONAL GRAMOPHONE CO. et al.

(Circuit Court of Appeals, Second Circuit.)

PATENTS—PRELIMINARY INJUNCTION—RECORDING AND REPRODUCING RECORDS.

A preliminary injunction against infringement of claim 21 of the Bell & Tainter patent, No. 341,214, which claim covers a loosely-mounted or gravity reproducer in a machine for recording and reproducing speech, held to have been granted on a misunderstanding of the scope of a prior decision.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from an order of the circuit court for the Southern district of New York (90 Fed. 824) which granted an injunction pendente lite against the infringement of claim 21 of letters patent No. 341,214, to Bell & Tainter, for the instrument called the "Graphophone." The instrument which was found to infringe is known as the "Berliner Gramophone," and is described in letters patent Nos. 372,786 and 564,586.

Charles E. Mitchell, Howard W. Hayes, Gustav Bissing, and Horace Pettit, for appellant.

Philip Mauro and Richard N. Dyer, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The Bell & Tainter patent was before the circuit court for the Southern district of New York upon final hearing in a suit of the present complainant against Leeds and others. 87 Fed. 873. The order pendente lite was granted upon the theory that the complainant's construction of claim 21 had been positively adopted by this court in the Leeds Case, and the only question upon this appeal is whether that theory was well founded. It is therefore necessary to ascertain the scope of the decision. The history of the Bell & Tainter invention indicates that it started in experiments to improve the Edison phonograph of 1879, which resulted in the abandonment of Edison's process of indentation upon a pliable material, and the substitution therefor of the cutting or engraving the record in the form of a groove, with sloping walls, in a waxy substance, and also

in the substitution, in place of a rigid reproducer, of one so loosely mounted that, resting against the tablet by gravity, it was guided by the record, and followed the elevations and depressions in the groove. The two improvements of importance with respect to claims 19 to 22 were said to be:

"The new material for a sound record upon which vertically undulating grooves, with sloping walls, were engraved by a cutting style; and the reproducer which rested upon these grooves by gravity, and moving along them, imparted to a second diaphragm the vibrations incident to the elevations and depressions of the bottoms of the groove."

Upon the question of infringement in the Leeds Case, there was no serious controversy. The defendants insisted that sound records formed in wax or wax-like material were old,—an issue which was decided against them. Inasmuch as the court might be of opinion that claims 19, 20, and 21 related merely to the loosely-mounted reproducer, the defendants made the point that such a reproducer, capable of automatically adjusting itself to the record grooves, was also old; but this proposition was not sustained.

Upon the question of the construction of the claims, Judge Grosscup, in the Amet Case, 74 Fed. 789, did not think that the universal joint in the gravity reproducer made it a patentable invention, but that the combination which included the reproducer with the new record—that is, the grooved tablet having the record as described in the patent—was patentable. The circuit judge did not thoroughly agree with Judge Grosscup, and thought that the loosely-mounted reproducer might be patentable by itself; but the case did not call for a decision of that question, and therefore directed a decree in the form adopted in the Amet Case.

Berliner used for his original record plate a zinc plate covered with a thin, fatty film, which, after the film along the lateral line made by the stylus has been removed, is placed in an etching bath. When the groove has been etched, the zinc plate is electroplated with copper, and the plate impresses the sound record into a hard-rubber plate, which has been softened by heat. The hard-rubber plate is the tablet which contains the record. The adjudication in the Leeds Case was not an adequate basis for an order for an injunction pendente lite against the Berliner device, for it relates to the infringement of claim 21 by the use of the dual improvements of Bell & Tainter, and was not intended to go further and decide the status of a device which did not contain a tablet of their new material for a sound record. The order of the circuit court is reversed, with costs.

PALMER v. KNIGHT.

(Circuit Court, E. D. Pennsylvania. February 28, 1899.)

1. PATENTS—INFRINGEMENT.

A claim for a hammock or bed bottom of woven fabric, having suspension loops "formed of unwoven portions of the threads of the warp of the fabric, substantially as herein described," is not infringed by a hammock, in which the suspension loops are formed from the perfectly woven piece of fabric composing the body of the hammock.

2. SAME—HAMMOCKS OR BED BOTTOMS.

The Palmer patent, No. 271,510, for an improvement in hammocks or bed bottoms, construed, and held not infringed as to claims 1, 2, and 4.

This was a suit in equity by Isaac E. Palmer against Abraham C. Knight for alleged infringement of a patent for an improvement in hammocks or bed bottoms.

Dickerson & Brown, for complainant.

A. B. Stoughton, for respondent.

DALLAS, Circuit Judge. This is a suit upon letters patent No. 271,510, dated January 30, 1883, granted to the complainant for an improvement in hammocks or bed bottoms. The defendant is charged with infringement of claims 1, 2, and 4, which are as follows:

"(1) A hammock or bed bottom of woven fabric, having suspension loops at its ends, formed of unwoven portions of the threads of the warp of the fabric, substantially as herein described. (2) A hammock or bed bottom, having its end composed of doubled portions of a woven fabric, and having said doubled portions united by a series of suspension loops formed of unwoven portions of the same warps, which enter into the weaving of the doubled fabric, substantially as herein described." "(4) A hammock constructed or provided with a pocket for the reception of a pillow, substantially as herein described."

The invention covered by claims 1 and 2 relates wholly to suspension loops, and its fundamental characteristic resides in the provision for forming those loops of unwoven portions of the warps of the fabric. Loops may be said to be thus formed when they are made either of portions of the warp which have not been woven, or of fabric from which, after weaving, the weft threads have been removed. But, however obtained, the material of the loops must be unwoven threads of the warp. That of the defendant is and remains a completely woven fabric. This difference cannot be regarded as formal, for the claims, in terms, pronounce it to be substantial. It cannot be stigmatized as evasive, for it is not within the line of conflict. If the defendant attains the object which Palmer had in view, he does so by means which Palmer either did not perceive, or, perceiving, did not claim. Instead of forming his loops as described in the complainant's specification, the defendant forms them from the perfectly woven piece of fabric which constitutes the body of the hammock. Whether they are better or worse than those of the patent is unimportant. They are not made in accordance with its instructions. They are not substantially the same loops. They are not infringing.

The validity of the fourth claim need not be questioned, but the nature of its subject-matter, and the prior art as well, require its restriction to the particular pocket described; that is to say, to a pocket "made integral with the main portion of the hammock, and * * * formed by folding over the end portions of the fabric on itself, and then sewing or otherwise securing the doubled or folded portion by lines of stitching." Common knowledge and common sense repel the notion that inventive genius was required to provide a hammock with any pocket at all, whether for the reception of a pillow or of anything else; and the pre-existing devices exhibited

in the proofs show that the idea of equipping similar constructions with a receptacle for a head rest was not wholly new with the complainant. The defendant's pocket is not made integral with the main portion of the hammock, and formed by folding over the end portions of the fabric on itself, but is made of a separate piece of material, which is independently united to the main portion. In my opinion, it does not infringe.

The bill will be dismissed, with costs.

GAITLEY V. GREENE:

(Circuit Court, N. D. New York. February 27, 1899.)

No. 6,310.

1. PATENTS—INVENTION—MECHANICAL SKILL.

The idea of providing a coiled-wire handle for implements which come in contact with heat, thus permitting a circulation of air, insuring sufficient coolness of the handle to permit of ready manipulation at all times, being once embodied in practical form, the subsequent work of fitting such handles to the bails of different vessels, and adjusting them to new environments, involves mere mechanical skill.

2. SAME—KETTLE BALES.

The Gaitley patent, No. 338,506, for a bail for lifting and carrying kettles, is void for want of invention.

This was a suit in equity by John E. Gaitley against William F. Greene for alleged infringement of a patent for a kettle bail.

Nelson Davenport, for complainant.

George A. Mosher, for defendant.

COXE, District Judge. This is an equity suit founded upon letters patent, No. 338,506, granted March 23, 1886, to the complainant for a new kettle bail. The patentee's object was to provide a novel bail for lifting and carrying kettles, and similar vessels, whereby the handle of the bail will remain sufficiently cool to permit the bail to be manipulated at any time. The claim is as follows:

"A kettle bail formed with two bends to produce abutments or shoulders, and provided with a separate coiled handle or grasp bearing at its ends against the bends, and through which coiled handle or grasp the bail centrally and loosely passes, substantially as described."

The idea of providing a coiled-wire handle for implements which come in contact with heat, thus permitting the circulation of air and insuring sufficient coolness of the handle to permit of ready manipulation at all times, was a novel one, and he who first put the idea into practical form was, without doubt, entitled to the rewards of an inventor. When, however, the embodiment of this fundamental idea once became public property, the subsequent work of fitting the handle to the bails of different vessels and adjusting it to new environments, seems to be within the domain of the skilled mechanic. The prior art shows that bails for kettles precisely similar to the bail of the patent, with the single exception that they were made of a continuous piece of wire instead of two pieces as in the complainant's

structure, had long been known. It is difficult to understand how invention can be based upon the construction of the bail and handle separately. But it is not necessary to determine the question, for this feature was also old. It is shown in several patents in the prior art, notably in the prior patents to the complainant. If the claim be strictly limited to the enumerated elements, which limitation appears to have been required by the examiner as a condition precedent to granting the patent, the defendant does not infringe, for the reason that the ends of the grasp do not bear against the abutments or bends of the bail. The court prefers, however, to rest the decision upon the defense of want of invention. The bill is dismissed.

UNITED STATES PLAYING-CARD CO. v. SPALDING et al.

(Circuit Court, S. D. New York. February 24, 1899.)

PATENT SUITS—SCOPE OF INJUNCTION—PERSONS NOT PARTIES.

In a suit against dealers in an infringing article, the manufacturers thereof assumed the defense, but without becoming technical parties. The injunction granted ran against the dealers, by name, and their officers, etc., workmen, "and manufacturers." Held, that the injunction bound the latter only as agents and manufacturers of the defendants, and they were not in contempt for manufacturing for other dealers having no connection with defendants. In re Lennon, 17 Sup. Ct. 658, 166 U. S. 548, distinguished.

This was a suit in equity by the United States Playing-Card Company against A. G. Spalding & Bros. for infringement of a patent. The cause was heard on motion to punish for contempt for alleged violation of an injunction heretofore granted.

Arthur v. Briesen, for the motion.

Fred. L. Chappell and W. G. Howard, opposed.

WHEELER, District Judge. The defendants are dealers in duplicate whist trays (among other things) in New York, and sold trays made and furnished by Illing Bros. & Everard, of Kalamazoo, Mich., and by Cassius M. Paine, of Milwaukee, Wis., which have been adjudged in this cause to be infringements of a patent belonging to the plaintiff. These manufacturers assumed the defense of the suit. An injunction was issued, which ran to "you, the said A. G. Spalding & Bros., and your officers, trustees, directors, managers, servants, agents, attorneys, and workmen, and manufacturers." This is a motion for an attachment against all for contempt of the injunction. Spalding & Bros. appear to have fully respected the injunction. The manufacturers appear to have made what are alleged and claimed to be infringements, and to have sold them to dealers in other parts of the country, without relation to Spalding & Bros. in any way. The counsel for the plaintiff urges that these manufacturers, having assumed the defense of their customers, are bound by the adjudication, and liable for violation of the injunction anywhere, as if they were parties of record. This seems to be correct as to the conclusiveness of what has been decided, but that does not make them liable upon

the decree, as the parties of record would be. Execution would not run against them for profits, damages, or costs decreed. The injunction is a judicial writ, issued upon the decretal order. Notice of the order would bind those to whom the writ would run, and who would be included with them, before the writ itself should be issued; but it would not affect any one any further than the writ would. As this writ runs to the agents and manufacturers of Spalding Bros., these manufacturers are said to be everywhere, and always while it remains in force, within its terms. But they are included in the writ, not as agents and manufacturers of everybody with whom they might do business, but as agents and manufacturers of Spalding Bros.; and, as what they have now done in this behalf has no connection with or relation to Spalding Bros., they do not appear to have done any of it, within the prohibition of the writ. If they had done it in aid in any way of a violation by Spalding Bros., upon the supposition of which this proceeding may have been commenced, the question would be very different. Cases are cited in which language is used that by itself might indicate that any one, anywhere, having knowledge of an injunction, might not do what would violate it if done by those included within it; but, as understood, none of them go outside the scope of the injunction itself. That of *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658 (at page 554, 166 U. S., and page 660, 17 Sup. Ct.), is as broad as any; but it must be read, as it was used, with reference to the case, which was against a locomotive engineer, the servant of a corporation enjoined about hauling cars, who was not named in the suit or the injunction, nor served upon, but had notice. The case does not show that he would have been held if he had done the same thing, after the notice, upon another road. The proceeding itself is in nature criminal, and the foundation of it should not be extended by any doubtful construction. An amendment of the order and injunction is suggested; but that, if allowable, could not affect this question now. Motion denied.

GINNA et al. v. MERSEREAU MFG. CO.

(Circuit Court of Appeals, Third Circuit. January 25, 1899.)

No. 38.

PATENTS—CAN-MAKING MACHINES.

The Hipperling patent, No. 281,508, for an improvement in machines for double-seaming the head and bottom of rectangular shaped tin cans, must, in view of the prior Atkinson patent, No. 279,853, be confined to the particular form of construction shown; and the second and third claims are not infringed by a machine made under the Adriance patent, No. 472,284.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a suit in equity by Stephen A. Ginna and Richard A. Donaldson against the Mersereau Manufacturing Company for alleged infringement of a patent for an improvement in machines for manu-

facturing tin cans. The circuit court dismissed the bill (69 Fed. 344), and the complainants have appealed.

Rowland Cox, for appellants.

Edwin H. Brown, for appellee.

Before DALLAS, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

DALLAS, Circuit Judge. By the bill in this case, the defendant below, who is the appellee here, was charged with infringement of letters patent No. 281,508, dated July 17, 1883, issued to the appellants as assignees of William Hipperling, the inventor. The nature of the invention covered by the patent is sufficiently and accurately stated in the opinion of the learned judge in the court below, and the claims alleged to have been infringed are there set forth at length. It is needless, therefore, to restate these matters here.

Several errors are assigned, but the only point insisted upon as ground for reversal is presented in the brief of argument for the appellants, as follows:

"What we conceive to be the error of the court below is that his honor held the Atkinson patent, so called, describes a successful machine, by reason of the existence of which the patent in suit must be narrowly construed, so as to exclude defendant's machine."

This proposition properly presents the only question in the case, but we cannot affirm it. Our independent examination of the subject has brought us all to the same conclusion as was reached in the court below. The Atkinson machine was not a failure. It was susceptible of improvement, and it was improved both by Hipperling and by Atkinson himself. Hipperling may justly be accorded the credit due to an improver, but he clearly was not the first to devise a practical machine for double-seaming rectangular cans. It follows that his monopoly must be limited to his specific construction, and, being so restricted, it is clear that the appellee has not impinged upon it. The authorities are sufficiently cited in the opinion of the court below, and our views upon both the law and the facts are so well indicated in that opinion as to render further statement of them unnecessary. The language of Mr. Justice Bradley, quoted from the decision in Loom Co. v. Higgins, 105 U. S. 580, does not support the contention which the learned counsel for the appellants has based upon it. We agree that it was certainly a new and useful result to make a machine produce a much larger number of cans per day than it had ever before produced, and that the combination of elements by which this was effected would be invention sufficient to form the basis of a patent; but we cannot agree that the improvement made by Hipperling could form the basis of a patent for anything more than the particular means by which that improvement was attained. Admitting that Hipperling made it possible to double-seam, in any given time, more cans than it had been possible to double-seam in the same time with the Atkinson machine, yet, inasmuch as Hipperling's contrivance was but an improvement, he did not, by devising it, entitle himself to the pre-existing subject-matter to which it related. The decree of the circuit court is affirmed.

ROOD et al. v. EVANS et al.

(Circuit Court, E. D. Pennsylvania. March 6, 1899.)

1. PATENTS—INFRINGEMENT.

Infringement may be avoided, however nearly approached, if the subject-matter of the grant be not substantially taken; but, if the principle of the invention be appropriated, liability for infringement cannot be evaded on the ground that the mechanism employed does not, in form and structure, precisely correspond with that described in the patent.

2. SAME—MACHINES FOR SHAVING HIDES.

The Rood & Vaughan patent, No. 383,914, for improvements in machines for shaving skins or hides, covers a very meritorious invention, and the claims should be so construed as to adequately protect it. The claims therefore construed, and *held* infringed.

This was a suit in equity by John Rood and others against Robert Evans and others for alleged infringement of a patent for improvements in machines for shaving skins or hides.

Charles N. Butler and Charles C. Morgan, for complainants.

Henry E. Everding, for respondents.

DALLAS, Circuit Judge. This suit is brought upon letters patent No. 383,914, dated June 5, 1888, issued to John Rood and Ira Vaughan, for improvements in machines for shaving skins or hides. In the specification it is stated that the "present invention relates to improvements in a machine for shaving skins, such as shown in the United States patent No. 339,323, granted to John Rood, said improvements relating more particularly to the cutter cylinder, the knives of which are differently arranged from those in said patent." The prior Rood machine was not successful, and this was mainly due to the fact that it would not shave a skin or hide without leaving marks on the surface shaved. The correction of this defect was the principal object of the present invention, and accordingly the attention of the inventors was directed chiefly to the cutter cylinder, the knives of which they so arranged that in their operation the objectionable marking would not occur. In this lies the gist of their invention. As is said in the specification, they devised a cutter cylinder with its knives so arranged that "no mark will remain on the hide or skin after it has been operated on by them, and during the operation of shaving said hide or skin it will be kept in a smooth state, owing to the arrangement of the knives." This cutter cylinder is specifically claimed as follows:

"(3) The cutter cylinder having the two series of knives, as described, arranged in a spiral direction on the external surface of said cylinder, the direction of each series being opposite to or the reverse of that of the other series, and the knives of each series extending from one end of the cylinder to and beyond the middle of such cylinder longitudinally thereof until they abut each against the other, substantially as shown and described."

The cutter cylinder alone is not operative. To constitute a complete machine, other devices are requisite, and accordingly the patentees, while discarding some of the parts theretofore used, proceeded to organize the essential entire mechanism, by combining with their peculiar cylinder the pressure roller and the sharpening wheel

of the prior art; and this combination they claimed by their first two claims, which are as follows:

"(1) The cutter cylinder having the two series of knives arranged as described, in combination with the pressure roller and the sharpening wheel, arranged substantially as set forth.

"(2) The cutter cylinder having the two series of knives, as described, arranged in a spiral direction on the external surface of said cylinder, the direction of each series being opposite to that of the other series, and extending a short distance beyond the middle of the cylinder, longitudinally thereof, in combination with the pressure roller and sharpening wheel, arranged and provided with mechanism, substantially as explained, for operating such cylinder, roller, and wheel, as set forth."

There is no material difference between these claims. They are for the same combination, the elements of which, though more minutely described in the second claim, are sufficiently designated in the first. The complainants, so understanding the matter, have said, through their counsel, that they ask no decree upon the second claim.

I have examined the proofs with much care, but I do not propose to refer to them in detail. The validity of the patent, properly construed, cannot, I think, be reasonably questioned. The invention which it covers is a very meritorious one. No machine had previously existed which could acceptably do the work which the machine of the patent excellently performs. The claims should, if possible, be so construed as to adequately protect this achievement; and they may be so construed, I think, without doing any violence to their terms. Neither the pressure roller nor the sharpening wheel was specifically claimed; and no such claim, if made, could have been properly allowed. The cutter cylinder, however, was new, and for it, both separately and in combination with the pressure roller and the sharpening wheel, the inventors were entitled to a patent, and such a patent they obtained. The proofs disclose nothing in the prior art which, in my opinion, requires its restriction to a cylinder having knives extending beyond its mathematical middle; and I do not think that the terms of the claims impose any such limitation.

The proofs upon the question of infringement relate to several of the defendants' constructions as used in different factories; but these need not be separately considered. It is enough to say that it has been persuasively shown that they effect the same result as that of the patented machine, and also that they are composed of a cutter cylinder in combination with the pressure roller and sharpening wheel. If, therefore, their cutter cylinder be the same as that of the patent in suit, they infringe both its first and its third claims. If it be not, they do not infringe either of them. Hence, the identity, in the sense of the patent law, of the two cylinders, is the decisive question in the case. This question has been ably argued. It is not free from difficulty. It has been thoroughly discussed by the respective experts. Their opinions upon it are absolutely opposed. This, however, results in great measure from the different standpoints from which they have viewed the subject. If, as the defendants' expert has assumed, no cylinder can be an infringing one, the knives of which do not extend to and beyond the exact mathe-

matical middle of such cylinder, it must be conceded that the defendants do not infringe. But, although some of the language of the specification and of the claims seems to lend support to this position, it does not appear, when closely examined, to be tenable. The rule is, of course, that a patentee is to be restricted to his invention as he has seen fit to claim it; and this rule is, in my judgment, a wise and wholesome one. But is the present case one which calls for its application? I think not. The expressed object of these patentees was "to provide a cutter cylinder having its knives arranged so that it will shave a skin or hide without leaving marks on the surface shaved, and will also hold the skin from moving in a direction lengthwise of the cutter cylinder"; and it is clear to me, as I think it must have been to those skilled in the art, that, in framing their claims, they naturally had in contemplation, and intended to refer to, the normal type of cylinder, the mathematical middle and the working middle of which are the same. To attain the end they had in mind, the feature of importance was that the knives were not to be terminated until they abutted each against the other; and, that they might thus abut when attached to an ordinary cylinder, it was requisite that they should be extended beyond its middle. Consequently, the necessity for so extending them was pointed out, but without foreseeing—what there was no obligation to anticipate—that, by elongating one end of the cylinder, this necessity might be avoided, because the coincidence of the actual middle of the cylinder with its working middle would then not exist. Now, there is no difference between the body of the defendants' cylinder and that of the plaintiffs, except only that the length of the defendants' is greater in proportion to its diameter; and the only difference worthy of consideration in the arrangement of the knives is that the knives upon one of the sides of the defendants' cylinder may be, and are, made longer than those upon its other side. If the defendants' cylinder were so shortened as to make its proportions the same as the complainants', and so, also, as to make the series of knives upon each side of it of the same length, the two cylinders and the arrangement of their knives would be substantially identical. By simply lengthening one side of their cylinder, the defendants have presented a quite ingenious paradox. They have placed its middle a little to one side. In plain terms, they have slightly removed its working center from its actual center. By doing this, they have not, however, departed from the principle or mode of operation of the patented arrangement. It has been contended that they have improved upon it; but of this the proofs have failed to convince me. The weight of the evidence is decidedly to the effect that, in function, in mode of operation, and in result, the two cylinders are practically the same. I cannot but regard them as conflicting. Invasion of the rights of a patentee may be avoided, however nearly approached, if the subject matter of the grant be not substantially taken; but, if the principle of the invention be appropriated, liability for infringement cannot be evaded upon the ground that the mechanism employed by the infringer does not, in form and structure, precisely correspond with that described in the patent.

The suggestion that the elements of the first claim are merely aggregated, and not patentably combined, is, in my opinion, not well founded. The law as laid down in *National Cash-Register Co. v. American Cash-Register Co.*, 3 C. C. A. 563, 53 Fed. 367, is plainly applicable to the facts of this case.

The contention that Rood and Vaughan were not joint inventors of anything more than the cutter cylinder specifically claimed has not been overlooked, but need not be discussed. As I view the case, it cannot be sustained. Decree for complainant.

ELLIOTT et al. v. HARRIS et al.

(Circuit Court, N. D. Ohio, E. D. December 3, 1898.)

No. 5,810.

PATENTS—PRELIMINARY INJUNCTION.

When the patents sued on have never been adjudicated, a preliminary injunction will be denied, in the absence of a showing that the public has long used the inventions, and has acquiesced in the validity thereof.

This was a suit in equity by William E. Elliott and the Elliott Button-Fastener Company against Abraham M. Harris and Nicholas Flemming for alleged infringement of three patents. The cause was heard on motion for a preliminary injunction.

Taggart, Knappen & Denison, for complainants.
Albert M. Austin, for respondent A. M. Harris.

RICKS, District Judge. Counsel for the defendants very properly quote from Robinson (Pat. § 1173) the three things essential to maintaining a preliminary injunction in a patent case: (1) that the patent is valid; (2) that plaintiff is the owner of a legal or equitable interest therein; and (3) that the defendant is about to commit an act of infringement. The complainants sue upon three patents, neither one of which has ever been adjudicated. In order to entitle them to an injunction, they must therefore show that the public has long used said patents, and has acquiesced in the validity thereof, and has never undertaken by litigation to question the patentee's exclusive rights thereto, or the validity of said patents. They allege certain acts of the defendants, which, in a proper case, might be held to be contributory infringement, but which are not shown to be such by the facts in this case. The case, as made out and submitted, is deficient, and fails to establish any one of the grounds named which would entitle the complainants to a preliminary injunction. Such an injunction is not issued, unless the rights of the complainant thereto are clearly established. They are certainly not so established in this case. The motion for preliminary injunction is therefore disallowed.

RISDON IRON & LOCOMOTIVE WORKS v. TRENT.

(Circuit Court, N. D. California. January 23, 1899.)

No. 12,293.

1. PATENTS—INFRINGEMENT—CONSTRUCTION OF CLAIMS.

Infringement cannot be avoided by reading into a broad claim specific devices claimed in narrower claims of the same patent.

2. SAME.

A change of form does not avoid infringement, unless the patentee has specified a particular form as the means by which the effect of the invention is produced, or otherwise confines himself to a particular form of what he describes. Even when a change of form somewhat modifies the construction, the action, or utility of the patented thing, noninfringement will seldom result from such a change.

3. SAME—INFRINGEMENT—PARTIES LIABLE.

Defendant was a member of a firm of architects which advertised by circulars, etc., to furnish ore-crushing mills; but, having no manufacturing plant of their own, on receiving orders, contracted with others to furnish the machinery, according to plans and specifications furnished by them. They thus furnished designs for an infringing machine, which was made mainly by the owner, at his own factory; and they erected and fitted it for operation at his mine, receiving therefor a commission. *Held*, that the firm was a contributory infringer, so as to make a member thereof liable.

4. SAME—ORE CRUSHERS.

The Schierholz patent, No. 538,884, for an ore-crushing mill, in which the principal feature is the combination of a fixed vertical central shaft with flexible intermediate mechanism between the gear and the crushing rolls, covers a pioneer invention, and is entitled to the application of the doctrine of equivalents to suppress later combinations of the same elements or of mechanical equivalents therefor. *Held*, therefore, that claim 4 was infringed by the Bingham or Trent and the Bradley machines.

This was a suit in equity by the Risdon Iron & Locomotive Works against L. C. Trent for alleged infringement of a patent for an ore crusher.

Wheaton & Kalloch, for complainant.

N. A. Acker, for respondent.

MORROW, Circuit Judge. This is a suit for the infringement of letters patent No. 538,884, dated May 7, 1895, for an ore crusher. The inventor was August H. Schierholz, whose application for the patent was filed in the patent office February 5, 1895. By an assignment made after the application, and before the granting of the letters patent, Schierholz transferred all the property in the invention to the complainant.

The invention relates to improvements in ore-crushing machines, in which crushing rolls are caused to travel within the circumference of a pan, upon suitable dies arranged around the periphery, and which have a fixed central post, and consists of novel means for driving the rolls, and allowing for the irregularities of movement caused by the ore over which the rolls pass, without interfering with the vertical shaft or its gear and connections. The details of construction are explained by reference to the accompanying drawings:

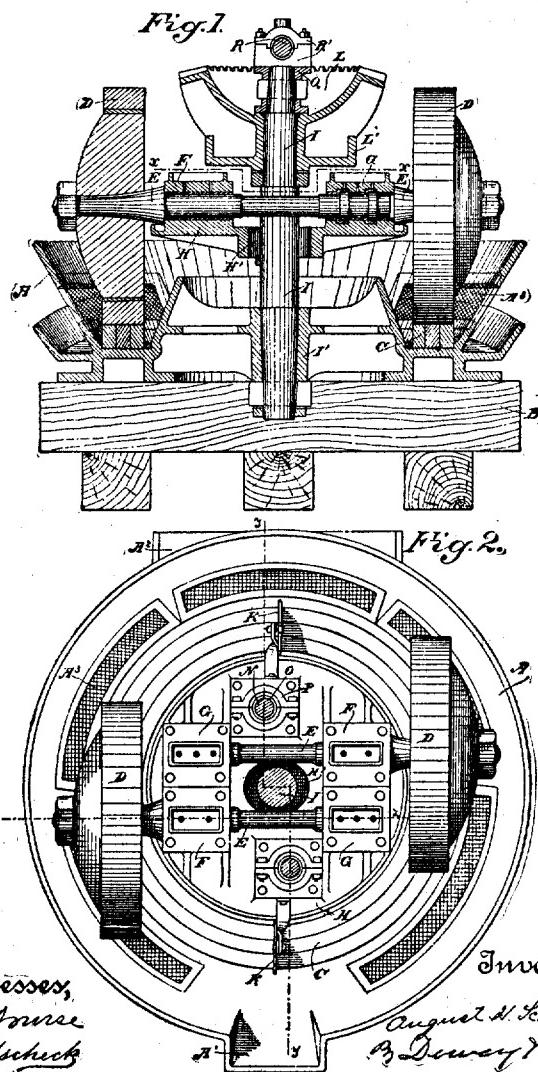
(No Model.)

A. H. SCHIERHOLZ.
ORE CRUSHER.

3 Sheets—Sheet 1.

No. 538,884.

Patented May 7, 1895.



Witnesses,
Dr. Moore
J. F. Olscheck

(No Model.)

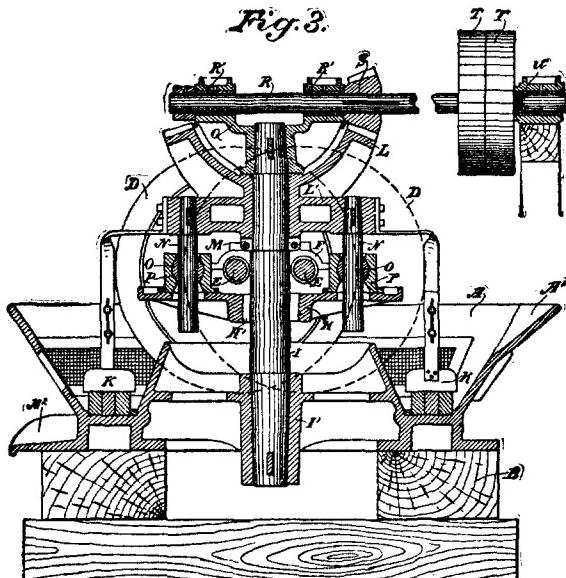
A. H. SCHIERHOLZ.
OBE CRUSHER.

8 Sheets—Sheet 3

No. 538,884.

Patented May 7, 1895.

Fig. 3.



Witnesses,

J. Stone
H. F. Aschuck

Inventor,

August H. Schierholz
By Dewey & Co

Attn:

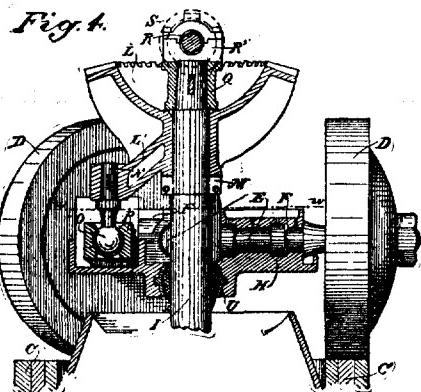
(No Model.)

A. H. SCHIERHOLZ.
ORE CRUSHER.

3 Sheets—Sheet 3.

No. 538,884.

Patented May 7, 1895.

*Fig. 5.*

Witnesses,

John W.
J. F. Ascheck

Inventor,

August H. Schierholz
B. Devery & Co. 1895

The drawings are explained as follows:

"Figure 1 is a vertical section taken through the center of the pan, and showing, also, a section on the line, z z, of Fig. 2. Fig. 2 is a plan view of the pan and rollers, with horizontal section of the vertical shaft and driving pins, on line, x x, of Fig. 1. Fig. 3 is a vertical section taken through the line, y y, of Fig. 2. Fig. 4 is a vertical section taken through the line, v v, of Fig. 5, showing a modification of the drivers where three rolls are used. Fig. 5 is a horizontal section of the same on line, w w, of Fig. 4."

The inventor says in his specification:

"The object of my invention is to provide a means intermediate between the driving gear upon the fixed vertical shaft and the table or carrier upon which the horizontal roller shafts are journaled, by which the rollers are caused to travel upon the dies, this intermediate connection being of such a nature that it will compensate for all irregularities of movement and vertical rise and fall of the rollers as they pass over the material to be crushed, without in any way conveying these motions to the driving mechanism. This makes the mill self-containing, all parts being supported from the pan and vertical shaft, and resting upon one foundation, and it also equalizes the wear upon the dies."

That part of the specification which relates to the claim alleged to have been infringed is as follows:

"The driving mechanism consists of a gear wheel, L, turning loosely upon the vertical shaft, I, this shaft being stepped and fixed immovably in the hub or center, I¹, at the bottom of the pan. R, is a horizontal driving shaft turning in journal boxes, R¹, which are fixed upon a table or support, Q; this table being firmly keyed to the top of the shaft, I. A bevel pinion, S, upon this shaft, R, engages the gear, L, and causes it to rotate. The shaft, R, is driven by power from any suitable source, through fast and loose pulleys, T, T, or other suitable device, upon the shaft, R, by which the machine may be set in motion or stopped in the usual manner. If the shaft, R, is of considerable length, an outside journal or bearing box, u, may be employed to support its outer end, but if set close to the inner journal boxes, R¹, this may be dispensed with. The gear, L, is made of any suitable shape, and the lower part of it is formed with a frame or carrier, L¹, which projects outwardly from the gear, L, or its hub. This gear and disk, turning loosely, as previously described, upon the shaft, I, are supported by a collar, M, resting upon a shoulder turned upon the shaft, I, or otherwise supported, in such a manner that it may be adjusted to compensate for any wear of the parts. N, N, are two stout pins fixed to the carrier, L¹, and projecting downwardly therefrom through openings made in the table, H. This table, H, has a central space or opening, H¹, surrounding the shaft, I, and this opening is of sufficient size to allow the table, H, to tilt to either side whenever the rolls, B, pass over any material obstruction large enough to cause them to rise. This allows of all the movement of the rollers and table that may be necessary, without the table coming into contact with the permanent and stationary shaft, I. In order to allow of this movement of the table while at the same time maintaining the connection between the pins, N, and the table, I have shown universal joints, consisting of globular shaped attachments, O, loosely fitting the pins. These attachments, O, fit in correspondingly shaped boxes, P, so that they may turn within these boxes, and they fit loosely upon the pins, N, so that the latter may slide through them if the table, H, is tilted to either side by irregular masses of ore beneath the rollers, D. The pins, N, are of such a length as to allow for the wear of the rollers and dies, without affecting their connection with, and action upon, the ball joints which connect them with the table. It will be seen from this construction that, if either of the rollers should lift up, its shaft, E, would be correspondingly tilted, and as the shaft is journaled in boxes, F and G, fixed upon the table, H, the latter will also be tilted, the opening, H¹, allowing it to

tilt without coming in contact with the shaft, I. When this tilting takes place, the driving pin, N, will slide through the ball, O, and the latter will turn correspondingly in its box, P, thus yielding to any irregular movement of the rollers, while at the same time continuing the application of power to rotate the table, H, and cause the rollers to travel around upon the dies."

The patent contains five claims. The claim charged to have been infringed by the respondent is claim 4, which reads as follows:

"In a rotary crusher having an annular pan and dies, and rollers propelled and traveling upon the dies, a fixed vertical central shaft, journal boxes fixed and supported thereon, a horizontal shaft turntable in said boxes and carrying a pinion through which power is transmitted, a gear wheel turning loosely upon the fixed shaft and engaging the pinion, and mechanism intermediate between the gear and the crushing rollers by which they are driven."

The particular elements in controversy in this case are: (1) The fixed vertical shaft; (2) the mechanism intermediate between the gear and crushing rollers adapted to the driving of the latter.

The defendant in his answer sets up the defenses of anticipation and want of invention, and denies the charge of infringement. He relies upon the following prior patents to support the first defense:

Number.	Date.	To Whom Issued.	For What Issued.
253,476	Feb. 7, 1882.	William E. Harris.	Ore-Grinding Mill.
296,096	April 1, 1884.	J. C. Wiswell.	Ore Crusher.
455,677	July 7, 1891.	J. H. Yeaton.	Crushing Mill.
459,657	Sept. 15, 1891.	A. H. Schierholz.	Ore Crusher.
531,068	Dec. 18, 1894.	A. H. Schierholz.	Ore Crusher.
551,560	Dec. 17, 1895.	A. H. Schierholz.	Ore Crusher.

The earliest form of rotary crusher was the Mexican arrastra, consisting of a circular bed of evenly-surfaced stones, upon which were dragged around other evenly-surfaced heavy stones, the ore being ground between these upper and nether millstones. Then came the Chilian mill, a single heavy roller of stone, like an immense grindstone, with a wooden pole passing through its center attaching at one end to a revolving shaft and at the other end to some motive power. The mill has been modified and improved upon until at the present time the type of rotary crusher commonly known as the "Chilian Mill" consists of a pan or mortar, crushing rolls, table or frame carrying them, and driving mechanism for the rollers. The particular style of Chilian mill in controversy here was originated by a man by the name of Bryan, since which time that class of mills manufactured by the complainant has been termed "Bryan Mills."

The patent issued to William E. Harris, February 7, 1882, No. 253,476, for an ore-grinding mill, is shown, sufficiently for the present purpose, by the following drawing:

(No Model.)

2 Sheets—Sheet 1,

W. E. HARRIS.

ORE GRINDING MILL.

No. 253,476.

Patented Feb. 7, 1882.

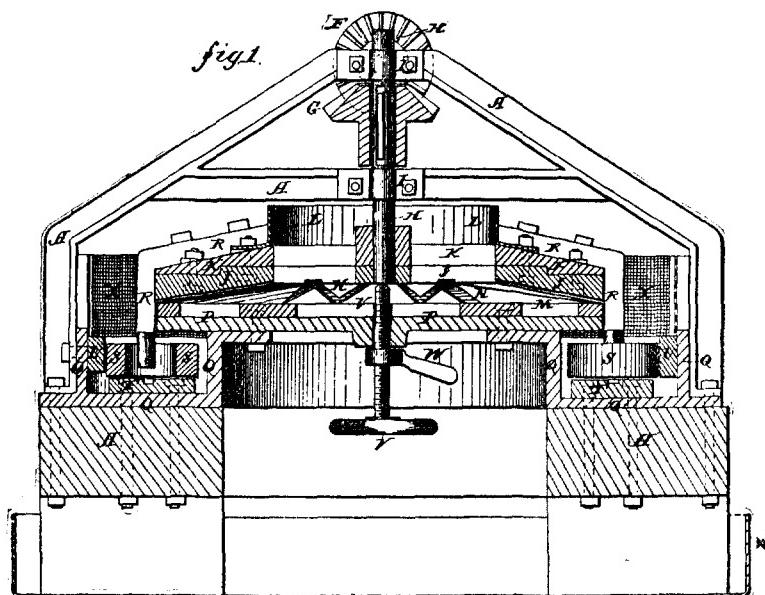
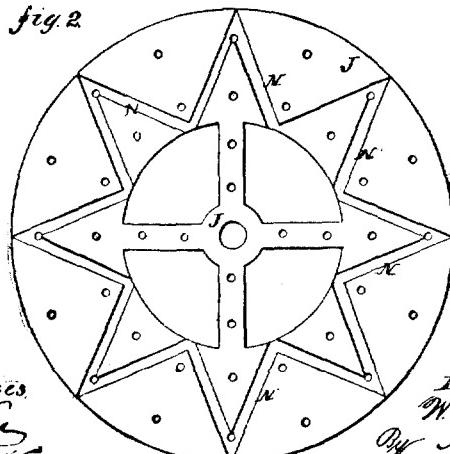


fig. 2



witnesses
Chas. N. M.
A. Sedgwick

Inventor:
W. E. Harris
By Munro & Co.
Attorneys

(No Model.)

W. E. HARRIS.

2 Sheets—Sheet 2.

ORE GRINDING MILL.

No. 253,476.

Patented Feb. 7, 1882.

Fig. 3.

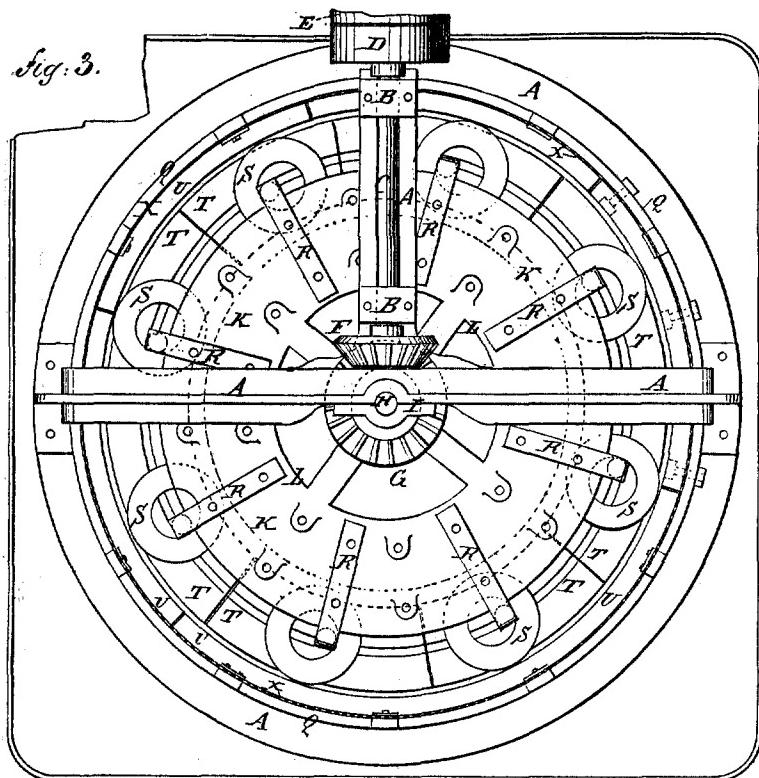
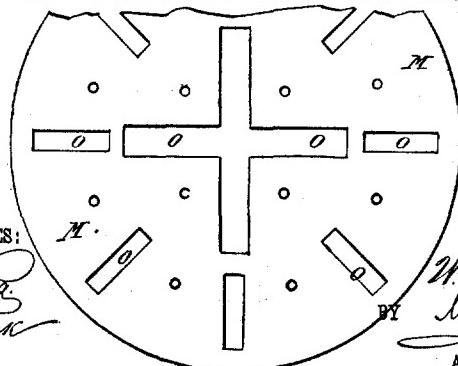


Fig. 4.



WITNESSES:

Chas. Nott
C. Sedgwick

INVENTOR:

W. E. Harris
Munn & Co.
BY
ATTORNEYS.

This mill is designed for the crushing or grinding of finely-broken ore. The massive crushing rollers contained in the subsequent roller crushers are not found in this mill, the work of crushing the ores being performed by two grinding plates, between which the ore is fed; and it is claimed by the respondent that the hand screw, V, and the rotary shaft, H, in this patent, are the same elements as the fixed vertical shaft, I, and the mechanism intermediate between the gear and crushing rollers in the complainant's patent. In the latter patent the vertical shaft, I, is fixed immovably in the hub or center at the bottom of the pan, and at the top there is firmly keyed to it a yoke or table, carrying journal boxes, in which turn the horizontal driving shaft. The driving mechanism consists of a gear or wheel turning loosely upon the vertical shaft. A bevel pinion upon the horizontal shaft engages the gear, and causes it to rotate, and between this gear and the crushing rollers is the intermediate mechanism which constitutes one of the elements of claim 4 of complainant's patent. In the Harris patent the hand screw, V, which is claimed to be the same element as the fixed vertical shaft of complainant's patent, is an adjustable spindle or shaft, upon which the central revolving shaft, H, rests or is supported. It is designed to raise or lower the rotating shaft which carries the upper grinding plate, so that this grinding plate can be adjusted at any desired distance from the lower grinding plate, as the character of the ore may require. Clearly, this is not the fixed vertical shaft of the complainant's patent. It is not the same mechanism, and does not perform the same function. The revolving shaft, H, in the Harris patent, is claimed to be the same element as the intermediate mechanism between the gear and crushing rollers in the complainant's patent. But the fact that the revolving shaft of the Harris patent carries the grinding plates adjusted by a hand screw, while complainant's mechanism carries self-adjusting crushing rollers, indicates such a difference of mechanism and function as to remove it from the field of anticipation.

The patent issued to Jacob C. Wiswell, April 1, 1884, No. 296,096, is next in sequence after the Harris patent, and consists in improvements in mills for crushing ores. The invention claimed is a combination of a series of crushing rollers having V-shaped peripheries, and horizontal shafts on which said rollers are mounted, with a carriage in which said shafts are journaled at their outer bearing points, a vertical shaft in which the inner ends of said horizontal shafts are journaled, springs which are interposed between said carriage and said horizontal shafts, and a stationary bed having a circular V-shaped groove, in which said rollers travel. The device contains an overhead drive mechanism consisting of a horizontal cross shaft, a pinion, and a gear, by means of which rotary motion is transmitted to the central shaft to drive or propel the crushing rollers. Each roller and its axle is permitted vertical movement by means of springs, while the vertical shaft is journaled in a bearing supported by a horizontal beam in such manner as to be capable of a certain amount of vertical slip. The fixed vertical shaft is not found in this patent.

In its place is a rotating shaft, and the mechanism between the driving gear and the crushing rollers consists in a carriage with axles or journals held down by springs which permit to each roller and its axle a vertical movement. It is difficult to understand how this mechanism, either in detail or in construction, can be said to anticipate complainant's patent.

The Yeaton patent, No. 455,677, discloses a mill designed for the crushing of quartz or other materials, having a mortar in which the crushing is performed by heavy, cast-iron, rotating wheels. These wheels rotate upon their own axles, and travel around upon a die. They are mounted upon journals, which in turn are each supported upon an independent sleeve, the sleeve being splined, by means of guides, to a tubular spindle, in order that each wheel may have vertical movement, in passing over a large piece of material, independent of the movement of the other wheel. The spindle is hollow, permitting ore to be fed through it into the mortar. Secured to the spindle is a gear wheel, to which motion is imparted through a bevel pinion upon a shaft, in connection with a band wheel for the attachment of any suitable power. The absence of the fixed central shaft in this invention, as in the Harris and Wiswell patents, places it in a separate and distinct class of ore crushers having revolving central shafts, which carry in their revolutions crushing rollers with operating mechanisms adjusted to such devices.

Schierholz, the inventor of the device in controversy, next entered the field, and on September 15, 1891, obtained letters patent No. 459,657, for an ore crusher, relating particularly to improvements upon what is known as the "Bryan Ore Crusher," consisting principally in so connecting the crushing rollers as to prevent binding thereof when thrown upward by unusually large pieces of ores. Respondent claims that the fixed vertical central shaft was used in this mill, but not claimed to be new, by Schierholz at that date. In describing his invention, it is stated:

"My invention has relation to certain new and useful improvements in rotary ore crushers, which consist in the details of construction and arrangement of parts as will be hereinafter more fully set forth in the drawings, described and pointed out in the specification and claims. The invention relates more specifically to certain improvements upon what is known as the 'Bryan Ore Crusher'; and it consists in so connecting the crushing rollers as to prevent binding thereof when thrown upward by unusually large pieces of ores, which has heretofore been the objection to crushers of this class. Referring to the drawings forming a part of this application, wherein similar letters of reference are used to denote corresponding parts throughout the entire specification, figure 1 is a side view in elevation, partly broken away, of the mill; and Fig. 2 a top plan view, with the weight-driving pan removed. The letter A is used to indicate the stationary ore-receiving pan, which is provided with the feed chute, B, through which the ore to be crushed is fed into the ore-receiving or grinding pan, and C is the discharge chute for the ground or pulverized ore. The vertical shaft, D, extends centrally through the grinding pan, and is securely fastened thereto by means of key, a. Upon this shaft works the sleeve, E, upon which works the laterally extending arms, e, e₁, e₂, which have secured therein and projecting therefrom axles, f, f₁, f₂, upon which work the grinding wheels or rollers, F, F₁, F₂. The driving pan is represented by the letter, E¹, which is provided with the downwardly extending wall, E², by means of which the driving pan is secured to

the laterally extending arms, e, e¹, e², through the medium of bolts, g. The pan, E¹, is rotated by any suitable machinery,—as, for instance, by means of a power belt working thereover,—thus converting said pan into a hollow drive wheel. The connection between the laterally extending arms and sleeve, E, form a universal joint for the purpose of preventing binding on shaft, D, as hereinafter more fully set forth. In order to give the necessary crushing power to rollers, F, F¹, F², I fill the interior of drive pan, E¹, with pieces or iron, large stones, or the like. Inasmuch as pan, E¹, rests on, or is bolted to, arms, e, e¹, e², it is obvious that the full weight thereof is brought to bear upon the crushing rollers through the medium of axles, f, f¹, f². As the driving pan is caused to rotate, the laterally extending arms, connected thereto and working upon the sleeve secured upon the vertical shaft, are moved thereby, which carry therewith the grinding rollers, secured to axles, f, f¹, f², and causes the crushing of the ore. It is obvious that, in case the rollers contact with extra large pieces of ores, the same will uplift and roll thereover; but, by reason of the universal joint connection between the laterally extending arms and sleeve, E, no binding will take place upon the vertical shaft, D, as heretofore, thus allowing the roller to lift at an incline while passing over the extra-size pieces of ore. It will be seen that the periphery of sleeve, E, is convex, and engages the depending slightly concave portions of the arms, thus forming practically universal joints. The sleeve, E, is self-adjustable upon the vertical shaft.

"Having thus described my invention, what I claim as new, and desire to secure protection in by letters patent of the United States, is: (1) In an ore crusher, the combination of a receiving pan, a vertical stationary shaft extending therein, a sleeve working on said shaft and having a convex periphery, laterally extending arms provided with depending slightly concave portions engaging the convex surface of the sleeve, crushing rollers connected to the arms, and drive mechanism, substantially as set forth. (2) In an ore crusher, the combination of a receiving pan, a vertical stationary shaft extending therein, laterally extending arms secured to said shaft, so as to turn freely therearound, axles secured within the arms and carrying crushing rollers upon their outer ends, and a rotatable driving pan provided with a downwardly extending wall secured to the laterally extending arms, so as to cause said arms to rotate therewith, substantially as set forth."

It will be sufficient to say, with respect to this patent, that the central vertical shaft in the mill here described is not fixed, but is revolved with the driving pan.

The drawings referred to in the foregoing specification are given on the next page.

(No Model.)

A. H. SCHIERHOLZ.
ORE CRUSHER.

No. 459,657.

Patented Sept. 15, 1891.

Fig. 1.

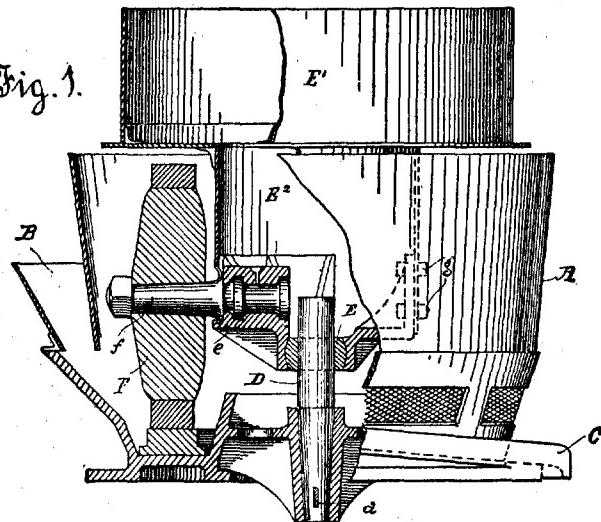
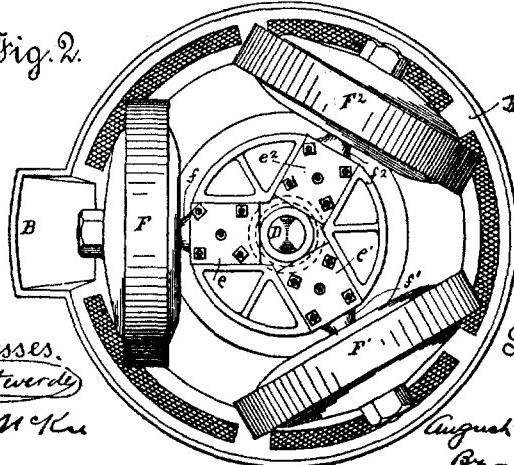


Fig. 2.



Witnesses.

*G. Hoffmeyer
J. C. McKee*

Inventor

*August H. Schierholz
By [unclear]*

Schierholz later applied for and received three other patents for ore-crushing devices, the one in controversy in this suit being the last applied for, though granted at an earlier date than the letters patent on a previous application. Considering them in the order of application, we come to letters patent No. 551,560. The invention consists principally of a pan, crushing rollers adapted to travel in the said pan, a frame in which the rollers are journaled, and a driving arm engaging blocks held vertically adjustable on the said frame to permit the rollers to move up or down, according to the amount of material under treatment. No invention is here claimed for a fixed vertical shaft, the central vertical shaft being described merely as a driving shaft, and shown to be a rotating one.

The next invention of Schierholz is described in letters patent No. 531,068 as an improved ore crusher, in which a uniform wear of the grinding surfaces is obtained, and the centrifugal strain on the thrust bearings of the crushing rolls is greatly reduced, to permit of driving the machine with considerably less power and without decreasing the capacity of the machine. This mill has an under-drive mechanism, in contradistinction to the overhead drive mechanism illustrated in the former patents, using the horizontal shaft, which carries a pinion that meshes with the gear wheel upon the central shaft. The central shaft possesses rotary motion, as in the last patent mentioned, while the crushing rolls are given a flexibility of motion upward or downward by the axle or journal of each roll being fulcrumed to the horizontal table or head. This appears to be the first departure by Schierholz from a rigid connection between the crushing rollers and the horizontal head or table carrying the same.

We now come to the patent sued upon, No. 538,884, the specification and drawings of which have already been given.

It is clearly shown that the type of ore crusher involved in the patent in controversy was originated by Schierholz. The prior art does not disclose the combination of a fixed vertical central shaft with the flexible intermediate mechanism between the gear and the crushing rolls. Schierholz is therefore a pioneer, and is entitled to invoke the doctrine of equivalents to suppress a later combination of the same elements or of mechanical equivalents therefor. This feature of the patent having been determined, it follows that the decision of the court must depend upon the question of infringement, and particularly whether the ore crushers known as the "Bingham" or "Trent" and "Bradley" machines, respectively, infringe claim 4 of the letters patent sued upon.

Claim 4 specifies the following elements in combination in a rotary crusher: (1) An annular pan; (2) dies; (3) crushing rollers; (4) a fixed vertical shaft; (5) journal boxes fixed and supported on the vertical shaft; (6) a horizontal shaft turntable in said journal boxes; (7) a pinion carried by the horizontal shaft; (8) a gear wheel turning loosely on the fixed shaft and engaging the pinion; (9) mechanism intermediate between the gear and crushing rollers adapted to the driving of the latter. Every element of this claim, considered separately, is admitted to be old. The invention is found to be in the combination of the parts.

Examining, first, the so-called "Bingham" or "Trent" machine, represented by complainant's model Exhibit D, we find: (1) The annular pan; (2) the dies; (3) crushing rollers; (4) a fixed vertical shaft, in the sense that it does not revolve, and around which the rollers and driving mechanism revolve; (5) journal boxes supported on the fixed central shaft; (6) a horizontal shaft turntable in said boxes; (7) a pinion carried by the horizontal shaft; (8) a gear wheel turning loosely on the fixed shaft and engaging the pinion; (9) intermediate mechanism between the gear and rolls for driving the latter.

It is contended by respondent that, to infringe claim 4 of the patent sued upon, it is necessary that the alleged infringing device contain an absolutely fixed central shaft, and that a specific form of flexible or elastic connection be interposed between the gear and horizontal table. Infringement cannot be avoided by reading into a broad claim of a patent specific devices claimed in narrower claims of the patent.

In the case of *Mast, Foos & Co. v. Dempster Mill Mfg. Co.*, 27 C. C. A. 191, 82 Fed. 327, infringement was claimed of a patent for improvements in windmills. The claim alleged to have been infringed was the combination, with a windmill driving shaft and a pinion thereon, of an internal toothed spur wheel, mounted adjacent to the said shaft, and meshing with said pinion, a pitman connected with the spur wheel, and an actuating rod connected with the pitman. In defense, the principle was invoked that there could be no infringement of a combination if any element of the combination was absent from the infringing device, and the absence from appellee's apparatus of the pivoted pitman and the pitman bar was insisted upon as fatal to appellant's claim of infringement. Upon this point the court, through Sanborn, Circuit Judge, says:

"This invention consists essentially, as the inventor declares at the beginning of his specification, in the combination, * * * and that he has broadly claimed this combination in the first claim of his patent. There is not an element in this combination which is not found in the windmill of the appellee, and it cannot be permitted to read other elements into this claim, and then to defeat it, because it does not use the elements it interpolates."

In *National Cash-Register Co. v. American Cash-Register Co.*, 3 C. C. A. 559, 53 Fed. 367, invention was claimed for a cash-registering apparatus having a series of keys to designate certain amounts in combination with the cash drawer and drawer holder, a mediate connection between said keys and the drawer holder, not specifically described, and a spring to throw the drawer open when released by the drawer holder. It was admitted that all the specific devices entering into this combination were old, but it was claimed that a patentable invention was disclosed of a new and useful combination. Dallas, Circuit Judge, in considering the claim involved, said:

"This claim, as we read it, is, distinctly, exclusively, and broadly, for a new combination; and we know of no authority or principle of law which, so reading it, would warrant us in converting it, by construction, into a claim for details merely."

And with reference to lack of infringement because of different "mechanism of mediate connection" in the two devices in controversy (one of respondent's claims in the case at bar), the court stated:

"The correct inquiry, from our point of view, is not whether this appellee uses, in its mechanism of mediate connection, the same devices which are used by the appellants, or equivalents thereof, but whether the mediate connection employed by the appellee is not itself an equivalent of the mediate connection of the Campbell (patentee) combination. * * * Though some of the corresponding parts of the machinery are not the same, and, separately considered, could not be regarded as identical or conflicting, yet, having the same purpose in the combination, and effecting that purpose in substantially the same manner, they are the equivalents of each other in that regard."

As to the Bradley mill, the result accomplished, and intended to be accomplished, is precisely the same as in the Bingham machine. A few additions are made in the Bradley machine. The journal boxes carrying the horizontal shaft are supported on timber framework forming a part of the building, instead of being fixed and supported on the top of the vertical central shaft, but it is obvious that the power transmitted through the gear wheel and pinion causes the rotation of the crushing rollers, and the parts adjacent to the rollers, around a fixed vertical central shaft. In the Bradley mill the overhead stringer upon which the journal boxes rest, with the V bents or side pieces, and the timber upon which the entire mill stands, together serve to attach the journal boxes to the central vertical shaft as rigidly as the journal boxes are attached to the top of the shaft in the Bingham mill or the Bryan mill.

A change of form does not avoid an infringement of a patent, unless the patentee specifies a particular form as the means by which the effect of the invention is produced, or otherwise confines himself to a particular form of what he describes. Even where a change of form somewhat modifies the construction, the action, or the utility of a patented thing, noninfringement will seldom result from such a change. Walk. Pat. § 363; Strobridge v. Lindsay, 6 Fed. 510; O'Reilly v. Morse, 15 How. 123.

The case of Winans v. Denmead, 15 How. 330, involved a patent "for making the body of a car for the transportation of coal," etc., "in the form of a frustum of a cone." The infringement claimed was the construction by defendants of cars for the same purpose having rectilinear bodies. Mr. Justice Curtis delivered the opinion of the court, and, in passing upon the construction of plaintiff's claim, said:

"Patentable improvements in machinery are almost always made by changing some one or more forms of one or more parts, and thereby introducing some mechanical principle or mode of action not previously existing in the machine, and so securing a new or improved result; and, in the numerous cases in which it has been held that to copy the patentee's mode of operation was an infringement, the infringer had got forms and proportions not described, and not in terms claimed. If it were not so, no question of infringement could arise. If the machine complained of were a copy, in form, of the machine described in the specification, of course it would be at once seen to be an infringement. It could be nothing else. It is only ingenious diversities of form and proportion, presenting the appearance of something unlike the thing patented, which give rise to questions; and the property of inventors would be valueless if it were enough for the defendant to say: 'Your improvement consisted in a change of form; you describe and claim but one form; I have not taken that, and so have not infringed.' The answer is: 'My improvement did not consist in a change of form, but in the new employment of principle or powers; in a new mode of operation, embodied in a

form by means of which a new or better result is produced; it was this which constituted my invention; this you have copied, changing only the form.' * * * Where form and substance are inseparable, it is enough to look at the form only. Where they are separable; where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention,—for that which entitled the inventor to his patent, and which the patent was designed to secure. Where that is found, there is an infringement; and it is not a defense that it is embodied in a form not described, and in terms claimed, by the patentee. * * * The patentee, having described his invention, and shown its principles, and claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms."

Having determined that the so-called Bingham or Trent machine and the Bradley machine are infringements, the question arises: Is L. C. Trent, respondent herein, responsible, as the manufacturer, user, or seller thereof, as an infringer?

Respondent denies the making, using, or selling of any mill like the Bingham mill, claiming to have acted in the capacity only of an architect and contractor in erecting the Bingham mill for the owner, C. J. Hodge, of Houghton, Mich. The testimony shows that the firm of L. C. Trent & Co. furnished the plans for the mill; that the machinery was principally made by the owner at his manufactory in Michigan, substantially in accordance with the plans furnished by Trent & Co.; that the mill building was erected at the North Last Chance mine at Bingham, Utah, by L. C. Trent & Co., and the machinery placed therein by them and fitted for operation, they receiving for such services an added percentage to the cost of material and labor supplied. It is claimed by respondent that no charge was made for the plans, they being furnished as an act of courtesy between two firms having considerable business dealing with each other.

It is also shown that the firm of L. C. Trent & Co., of which respondent is and was a member, advertised, by means of circulars and otherwise, to furnish crushing mills of a design similar to the one erected at Bingham, and, later, of the Bradley design; that the firm has sold and erected Bradley mills; that, while never having had a foundry or machine shop or iron works of their own, they have advertised to furnish mills, and, when the orders were secured, have invited bids from various manufacturers for the making of the required machinery, in accordance with plans and specifications designed and furnished by themselves. Thus far has the respondent been a maker of the infringing machines.

With regard to the Bingham mill, respondent's position, in the most advantageous light in which his own statements place him, is that of an active contributor to the infringement. By reason of the long experience of 25 years in that line of business, he was fully aware of what he was doing, the selection of the form of the crushing mill and its designing was by respondent's firm, and he profited by the adoption of his plans at least to the extent of a commission received for services rendered as contractor and builder. The Bradley and Bryan mills are so similar as to be regarded as one and the same by

many purchasers. Thus respondent has reaped pecuniary benefit in the sale of Bradley mills, by reason of the established merit of the Bryan mill, the patent in controversy. A decree will therefore be entered in favor of the complainant.

UNIVERSAL WINDING CO. v. WILLIMANTIC LINEN CO.

(Circuit Court of Appeals, Second Circuit. January 25, 1899.)

No. 15.

1. PATENTS—INVENTION—PROCESS AND PRODUCT—PATENTS FOR COPS.

The Wardwell patents, No. 480,158, for a method of winding cops, and No. 486,745, for a cop which is the product of such process, *held* void for want of patentable novelty.

2. SAME—MACHINE FOR WINDING COPS.

The Wardwell patent, No. 480,157, for a machine for winding cops, construed, and *held* not infringed.

Appeal from the Circuit Court of the United States for the District of Connecticut.

Edwin H. Brown and Edward N. Dickerson, for appellant.

Chas. E. Mitchell and John P. Bartlett, for appellee.

Before WALLACE and LACOMBE, Circuit Judges, and WHEELER, District Judge.

PER CURIAM. The discussion of all the material questions involved in this cause in the opinion by Judge Townsend in the court below (82 Fed. 228) is so full and satisfactory that we do not deem it necessary to go over them again in an opinion by this court. We do not mean to be understood, however, as indorsing his conclusion that the product patent is void because of the prior process patent. The applications by the patentees for both patents were pending in the patent office concurrently, the application for the product patent being the earlier. As we are of the opinion that the product patent is void for want of novelty, for the other reasons assigned by Judge Townsend, it is unnecessary to consider whether it is void in view of the earlier issue of the process patent, and do not intend to pass upon that question. The decree is affirmed, with costs.

TRIPP GIANT LEVELLER CO. v. BRESNAHAN et al.

(Circuit Court, D. Massachusetts. February 9, 1899.)

No. 321.

1. PATENTS—VALIDITY—EFFECT OF FORMER DECISIONS.

Where a patent has been declared valid after protracted litigation, it raises a very strong presumption in its favor, and new alleged anticipatory matter must clearly convince the court that the former decisions were wrong. If any doubt exists, the former adjudications should stand.

2. SAME—ANTICIPATION—MACHINE FOR BEATING OUT SHOE SOLES.

The Cutcheon patent, No. 384,893, for improvements in machines for beating out the soles of boots and shoes, was not anticipated by either the Collyer patent, No. 178,598, nor by the De Forest patent, No. 270,936, for an improvement in presses for pressing material of a spongy nature, such as cotton or tobacco.

This was a rehearing on supplemental bill filed by defendants. For former opinion, see 61 Fed. 289.

Causten Browne and Alex. P. Browne, for complainant.

Fish, Richardson & Storrow and William Quinby, for defendants.

COLT, Circuit Judge. This is a rehearing of the suit of the Tripp Giant Leveller Company against Bresnahan and others, brought for infringement of the Cutcheon patent, No. 384,893, for improvements in machines for beating out the soles of boots and shoes. On March 15, 1894, after hearing upon pleadings and proofs, this court ordered a decree in favor of the complainant, adjudging the first claim of the patent valid, and infringed by the defendants, and referring the cause to a master for an account of profits and damages. The rehearing is upon the original record and additional proofs brought in by supplemental bill filed January 24, 1898. The ground of the rehearing is the alleged discovery, since the original hearing and decree, of two prior patents,—the Collyer patent, No. 178,598, dated June 13, 1876; and the De Forest patent, No. 270,936, dated January 23, 1883. The supplemental bill prays that the defendants “may be permitted to interpose the said prior patents to Collyer and De Forest in defense of said original suit, as anticipations of the invention of the said Cutcheon patent, and as material to the true construction of the first claim thereof, and to the question of infringement, with the same force and effect as though said Collyer and De Forest patents had been pleaded in their answer to the bill of complaint in said original cause.”

The Cutcheon patent has been strenuously contested for the past seven years. The validity of the first claim has been four times sustained by this court,—twice on final hearing, once on motion for preliminary injunction, and once on petition for contempt. It has been twice sustained on appeal by the circuit court of appeals,—in one case on final hearing, and in the other on motion for injunction. 52 Fed. 148; 8 C. C. A. 475, 60 Fed. 80; 61 Fed. 289; 70 Fed. 982; 19 C. C. A. 237, 72 Fed. 920. Where a patent has been declared valid after protracted litigation, it raises a very strong presumption in its favor, and the new alleged anticipatory matter must clearly convince the court that the former decisions were wrong. If any doubt exists on this point, the former adjudications should stand. In Heaton-Peninsular Button-Fastener Co. v. Elliott Button-Fastener Co., 58 Fed. 220, 223, Mr. Justice Brown said:

“Assuming it to be a question of doubt whether the changes made in the McGill patent did involve invention, the fact that the patent has already been sustained in two other cases is sufficient of itself to turn the scale in favor of the patent.”

See, also, Vulcanite Co. v. Willis, 1 Flipp. 388, Fed. Cas. No. 5,603; Office Specialty Mfg. Co. v. Winternight & Cornyn Mfg. Co., 67 Fed.

928; Manufacturing Co. v. Spalding, 35 Fed. 67; Paper Co. v. Elsas, 65 Fed. 1001.

The first claim of the Cutcheon patent is as follows:

"(1) A machine for beating out the soles of boots and shoes, provided with two jacks, two molds, and means, substantially as described, having provision for automatically moving one jack in one direction while the other is being moved in the opposite direction, whereby the sole upon one jack will be under pressure while the other jack will be in a convenient position for the removal of the shoe therefrom."

The meaning of this claim to my mind is free from doubt. It seems to me to cover this: In a machine of this type, or a direct pressure machine, the combination of two jacks and two molds, and means, substantially as described, or their known equivalents, for automatically moving one jack in one direction while the other jack is being moved in the opposite direction, whereby the sole of the shoe upon one last will be under pressure while the other jack will be in a convenient position for the removal of the shoe therefrom. The Cutcheon machine is limited to two pressing mechanisms working automatically, in which only one pressing mechanism operates at a time to press. In the art of beating out the soles of shoes, this conception was new with Cutcheon. Any machine which makes use of this simple mechanical movement, namely, the simultaneous motions of pressure and clearance by two pressing members in opposite directions, and employs substantially the same or known equivalent means to accomplish the same result, is an infringement. Any machine which uses a different mechanical movement, or which employs substantially different means, or means which were not known equivalents at the date of the patent, does not infringe. The single section machine of Pray, and the so-called "gang machines," which were old in the art at the date of the Cutcheon invention, are not anticipations.

The circuit court of appeals, in the case of Bresnahan v. Leveller Co., 19 C. C. A. 237, 241, 72 Fed. 920, 923, in affirming the decision of this court, said:

"Claim 1 of the patent in suit is a very broad one, and, as we held it valid, it would seem that no method of making the connection between the actuating jacks and the crank shaft, by means well known in the arts at the date of the patent, would evade it."

The Collyer patent, which is now brought forward as an anticipation of the Cutcheon, is a gang machine. It was for an improvement on a former patent. It describes six sets of beating-out mechanisms arranged in a common frame. The improved device substitutes, for the cam which operated upon the pressing mechanisms successively, another form of cam, which operated upon two or more of the pressing mechanisms simultaneously. The single claim of the patent is as follows:

"The frame and reciprocating jack rods and molds or dies, in combination with a cam adapted to operate the jack rods simultaneously two or more, as the frame and cam change position with relation to each other, substantially as described."

Collyer, in describing how he would beat out two shoes on his machine after the manner of the Cutcheon patent, testifies:

"I would put the first one on the first jack which was out from pressure. I then start the machine, and that passed the shoe under pressure. I then put the second sample shoe on the following last. I then start the machine, and that puts the second shoe under pressure. I then can revolve the machine having two shoes under pressure. When the machine comes to a stop, I take the first shoe from the jack. I start the machine again, and the other shoe comes out from pressure. Then the machine remains as I started it at first."

In the Collyer machine, operated with two shoes, one shoe is first moved into pressure; then the second shoe is moved into pressure, the first shoe still remaining under pressure; then both shoes are moved under pressure; then the first shoe is removed out of pressure; and finally the remaining shoe. In the Cutcheon machine, one shoe is moved from the position of removal to the position of pressure while the other shoe is being moved from the position of pressure to the position of removal; in other words, the first claim of the Cutcheon patent is for a combination of mechanism "for automatically moving one jack in one direction while the other is being moved in the opposite direction." The two machines are different in construction and mode of operation, and therefore Collyer is not an anticipation of Cutcheon. The Collyer machine was old in the art, and presumably known to the trade. The fact that it is not shown to have gone into use while the Cutcheon machine, with its more simple mechanism, has proved commercially successful, tends to show that the two machines are different, and that the Cutcheon machine possesses patentable novelty.

Upon its face, the De Forest patent is closer to Cutcheon than Collyer. It relates to an improvement in presses for pressing materials of a spongy nature, such as cotton and tobacco, and more especially of plug tobacco. The specification says:

"The presses now in use for making plug tobacco consist of a mold in which the loose tobacco leaves are pressed, and the attendant, by means of a lever, causes the plunger to compress the same. It is necessary to hold a newly-pressed plug a short space of time under pressure, for, if relieved immediately after it has the greatest pressure, its spongy nature would cause it to swell, and it would then require more surface of leaf to suitably cover it. This time of the attendant is consequently lost to the manufacturer, and, as within this time another plug could be made, a machine so constructed as to enable the attendant to make use of this time would produce double the quantity. This object is accomplished by my invention; and it consists—First, in the employment of two or more reciprocating molds mounted on one frame, and operated by cams firmly secured to a common shaft in reversed position; second, in the peculiar construction of and devices forming the molds, whereby an automatic movement of the end plate is secured; third, in the means of adjusting the mold to form plugs of various sizes; fourth, in arresting the cams at each half revolution, and also in the peculiar devices by which this is accomplished, for the purpose of discharging and recharging the mold not under pressure, and permitting the material under pressure to attain compactness; and, fifth, in the use in the mold of a removable bottom block, which has a hinge bearing groove for the edge of the front or apron of the mold."

The De Forest patent is for a machine for compressing spongy materials. The Cutcheon patent is for a machine for beating out leather soles. The two arts are not the same. The objects to be accomplished and the materials to be operated upon are different. Beating out means leveling, shaping, or bending to a certain predetermined

shape. Neither compression nor compacting is the main result which is sought. From the nature of the material, it is apparent that you cannot compress sole leather in the sense that you can compress loose fibers or leaves of spongy substances, like cotton or tobacco. The fundamental purpose of the De Forest machine is to compress loose tobacco leaves or like "spongy" material. The fundamental purpose of the Cutcheon machine is to shape and set into proper curvature and form the leather sole of a shoe.

The two machines are different in mode of operation and mechanical construction. In the De Forest machine the material is being pressed from the time the machine starts until it stops; in other words, there is only one motion, namely, motion with pressure. In a beating-out machine, like the Cutcheon, the last carrying the shoe must be moved a substantial distance without pressure; in other words, there are two motions, the motion of clearance and the motion of pressure, and the clearance motion is several times greater than the pressure motion. Both machines have two throw crank shafts, but the Cutcheon machine must be so organized that the jacks and molds will perform the proper clearance motion in addition to the pressure motion. A machine in which the whole of the throw is devoted to the pressure motion, like the De Forest, is all that is needed for compacting spongy material, such as tobacco, but it would be inoperative and useless as a beating-out machine. The De Forest machine is a duplex pressing machine, but it is not a duplex clearing and pressing machine. Whether a pressing machine presses the whole or a part of the time during its operation may, theoretically speaking, seem an unimportant matter; but to take from another art a De Forest machine for pressing spongy substances, where the pressure motion is continuous, and reorganize it into a practical and useful beating-out machine, with its motions of clearance and pressure, is quite another question. It is not denied that the actuating mechanism of the De Forest and Cutcheon machines is different. With the Cutcheon machine before us, it may seem easy to produce it by reorganizing De Forest, and borrowing from Pray; but this does not prove anticipation by De Forest, or lack of invention in the Cutcheon patent. In the beating-out art, Cutcheon was the first to produce an automatic direct pressure duplex machine. The sale of beating-out machines to-day is practically limited to the Cutcheon machine. It is fast supplanting the use of the old single section and gang machines.

In devising his machine, Cutcheon not only employed the lasts and molds for beating out shoes (which were old) in place of the plungers and molds of De Forest, but, in addition, he combined his lasts and molds with his two-throw crank-shaft in a different manner and for a different purpose than the plungers and molds were combined by De Forest with his two-throw crank-shaft. We are not prepared to say that this did not constitute invention. Nor are we prepared to hold that De Forest makes the first claim of the Cutcheon patent void, or narrows the construction already given to it by this court and the court of appeals. But, however this may be, we are at least satisfied that the new evidence introduced by the defendants in support of their supplemental bill is not of such a clear and convincing character

that, under the rule prevailing in cases like the present, it should induce the court to reverse or modify its former decisions. The interlocutory decree of March 19, 1894, stands confirmed. Decree confirmed.

THE ORANMORE.

(Circuit Court, D. Maryland. December 15, 1885.)

1. ADMIRALTY—LOSS OF CATTLE—NEGLIGENCE—LIBEL—DISMISSAL.

Where cattle died in transit because of the negligence of the shipper in failing to provide sufficient bedding and ropes with which to tie them in the stalls provided by the ship, a libel against the ship to recover for such loss will be dismissed.

2. BILL OF LADING—CONSTRUCTION—FOREIGN LAW—APPLICATION.

A bill of lading of an English ship provided that all questions arising thereunder against the ship or her owners should be determined by English law in England. *Held*, that such provision was valid, and that the English law governed a libel in admiralty for the loss of property under such bill of lading by the shipper, who was a resident of the United States.

Appeal from the District Court of the United States for the District of Maryland.

Libel by Edward Morris, by August Rieser, his next friend, against the British steamship Oranmore, to recover for 67 head of cattle which died and were thrown overboard, and for depreciation in value of others, during their transportation from Baltimore to Liverpool in 1885. The libelant, a citizen of the United States, shipped on the steamship 320 head of cattle, to be carried on the upper between-decks, and received through his agent a bill of lading which recited that the shipment was made under, and subject to the conditions of, a "live-stock freight contract," dated Baltimore, November 19, 1884, and signed by libelant and his father, by which they agreed, on the terms therein expressed, to ship as many cattle as could be carried on the upper between-decks of five of the Johnson Line steamers, plying between Baltimore and Liverpool, of which the Oranmore was one, for two consecutive voyages of each of the five steamers, commencing with the voyage in question. The sixteenth clause of the contract provided that "any questions arising under this contract or bill of lading against the steamer or her owners shall be determined by English law in England." The bill of lading also contained the following exceptions: "* * * or any other perils of the sea, rivers, navigation, or of land transit, of whatsoever nature or kind, and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, pilot, master, officers, crews, stevedores, or other persons whomsoever, in the service of the ship, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the commencement of the voyage (provided all reasonable means have been taken to provide against such unseaworthiness), or otherwise, howsoever excepted. The shipper provides fodder and attendance for the live stock, and takes all responsibility in their shipping, carriage, and discharge, and for the accidents, damage, and mortality that may happen to them, from whatever cause arising, in loading, discharging, and during the voyage. * * * The steamer provides fittings as customary upon steamers of this line, and also provides a condenser for distilling water; but the steamer is not to be held responsible for any defect or insufficiency in said fittings or in the condenser, or any of its appurtenances, or in the ventilation of the ship, the same being hereby approved of by the shipper; nor for any claim, notice of which is not given before the delivery of the live stock by the steamer." The libel alleged that the loss occurred by reason of the insufficient

fittings of the stalls, which the steamer contracted to provide for the cattle. The defense is that the fittings were sufficient, and that the cattle were injured and lost by the negligence of the cattlemen sent by libelant to feed and care for them on the voyage, and by the insufficient amount of bedding put under them by the cattlemen, and by the weakness of the head ropes furnished by the shipper; also, that the exceptions in the bill of lading are to be interpreted according to the English law, and that by the English courts such exceptions would relieve the ship from liability, though the losses occurred by reason of the insufficiency of the cattle fittings. From a decree dismissing the bill (24 Fed. 922), libelant appeals. Affirmed.

Sebastian Brown and John C. Richberg, for appellant.

Brown & Brune, for appellee.

Findings of Fact.

BOND, Circuit Judge. (1) Edward Morris, of Chicago, the libellant below, under and in pursuance of the live-stock freight contract and the bill of lading (Exhibits A and B) filed with the libel in this case, shipped alive, and in apparently good condition, 320 head of cattle, to be delivered at Liverpool or Birkenhead, England, as provided by said contract and bill of lading. (2) By the said contract and bill of lading the shipper was to provide sufficient attendants, ropes, bedding, food, and necessaries for the care and use of the cattle, and the steamer was to provide stalls or pens for the cattle. The steamer provided stalls or pens for the cattle, and fittings, as required by the contract and bill of lading. The shipper did not provide a sufficient number of men for the care of the cattle, nor a sufficient quantity of bedding, nor sufficient or proper ropes, for the safe transportation of the cattle. (3) By the negligence and inefficiency of the foreman of the cattlemen and his assistants, and by the want of proper and sufficient bedding and ropes, 67 of said cattle died in the course of the voyage to Liverpool. (4) The cattle fittings on the Oranmore on the said voyage were properly constructed, in accordance with the provisions of the contract and bill of lading, and were approved and passed as good and sufficient by the inspector of underwriters interested in the ship and all the cargo, except Morris' cattle. Morris did not insure his cattle for said voyage, and Morris accepted the fittings then on the steamer. (5) The sixteenth article of the live-stock freight contract contained the provision that any questions arising under that contract or the bill of lading against the steamer or her owners were to be determined by English law in England. (6) By the English law, all the provisions of the live-stock freight contract and the bill of lading were lawful and valid.

Conclusions of Law.

1. The loss having been caused by the default of the libelant and his agents, the libel must be dismissed, with costs.
2. The English law governs the case.
3. Under the provisions of the live-stock freight contract and the bill of lading, the steamer and her owners are free from liability for the losses sustained by the libelant, and the libel must be dismissed, with costs.

HASTORF v. MOORE.

(District Court, S. D. New York. February 20, 1899.)

SHIPPING—INJURY TO SCOW—LIABILITY OF CHARTERER.

Defendant's employés, who, under the charter, had control of the movements of a scow hired from plaintiff, for convenience in unloading swung the stern inshore, where she grounded on some spiles and was injured. *Held*, that the presence of a boatman or scowman employed by plaintiff did not relieve defendant from liability, where such man exercised no authority as to the movement of the scow, and had no knowledge of the presence of the spiles.

In Admiralty.

This is a libel in personam to recover damages from respondent, as charterer, for an injury to a scow.

Louis B. Adams, for libellant.

Benedict & Benedict, for respondent.

BROWN, District Judge. The damage done by getting the stern of the scow aground on the spiles above the abutment of the bridge, arose from hauling her stern back and inshore by the men who were unloading her; and this was done no doubt for their convenience in unloading. By the charter or hire of the scow, she was under the direction and control of the respondent in discharging the stone. It was the respondent's duty to give her a safe berth, and any change of position for the purpose of unloading, was within the control of the respondent or of the person or persons with whom the respondent might leave the work of unloading. The plaintiff's man, who was on board the scow, could have had no object in hauling her back and inshore; and he had no previous knowledge of the ground. In view of his contradiction of Mr. McKenzie's statement, I do not feel satisfied to charge him with knowledge of any danger from a little change in the scow's position by the workmen in course of unloading. It is in the highest degree improbable that he would have given any assent or remained silent while the stern of the scow was moved inshore and back, if he had received any proper notice of danger from doing so. Had the scowman not been on board, there could be no question that the respondent would be answerable for the damage done by grounding her on the spiles through change of position in unloading, whether she was moved back by the orders of Mr. McKenzie; or in his absence, by the act of the men in respondent's employ who were unloading her. Story, Bailm. § 400; Schouler, Bailm. 145; Smith v. Bouker, 49 Fed. 954; Gannon v. Ice Co., 91 Fed. 539. The respondent would be responsible for their acts. The presence of the scowman, in my opinion, could make no difference in this responsibility, unless the removal were under his direction or with his acquiescence with clear knowledge of the bottom. It was not his duty to examine the ground, nor was a removal by defendant's men, in the ordinary course of unloading, a change of place for which the scowman or the libellant was responsible.

The libellant is, therefore, entitled to recover the natural and proper damages from grounding. The pumping, I am satisfied from the evi-

dence, was needlessly and irrationally long continued and useless. I think from the evidence \$75 would be a liberal allowance for all pumping that was reasonably necessary. I allow a decree, therefore, for the libelant for that amount for pumping with interest, and for the other items of repair, towage and demurrage \$110, with interest; with liberty, however, to either party to take a reference on the last-named items, such party paying the cost of the reference, unless a more favorable judgment is obtained.

THE LADY WIMETT.

(District Court, N. D. New York. February 27, 1899.)

1. TUG AND TOW—LIABILITY OF TUG FOR INJURY OF TOW—MEASURE OF CARE REQUIRED.

A tug is neither a common carrier nor an insurer, and is bound only to the exercise of ordinary care for the safety of a tow, and when using such care she is not liable for the sudden sheering of the tow.

2. SAME—BURDEN OF PROOF.

The burden is on a libellant seeking to recover damages from a tug for an injury to a tow to prove that the tow was not handled with that degree of skill which prudent navigators usually employ in similar circumstances.

3. SAME—SHEERING OF TOW—USE OF BRIDLE.

The Lady Wimett, a steam canal boat, undertook to tow another canal boat from Black Rock Harbor to Buffalo Harbor through the Erie Basin. The vessels met another tug and tow when about entering the basin, which compelled them to keep near the right side of the channel; and when close to a pier the tow took a sudden sheer to starboard, the chock and cleat gave way when the tug attempted to overcome the sheer, and the tow struck the pier and was sunk. There was nothing unusual in the undertaking of the tug, nor in the state of the wind or water, to render it more than usually hazardous. The hawser was of the usual length, and the chock and cleat were, so far as was or should have been known by the Wimett, in good condition. Both vessels were properly manned and managed. *Held*, that there was nothing in such evidence to show that the tug was in fault, nor could fault be imputed to her because of a failure to use a bridle, which was not usual, nor required for the towing of a single canal boat.

This is a libel, filed by the Deering Harvester Company and Emile Thiele, as owners of the cargo of the canal boat Niobe, to recover damages for the loss of the cargo alleged to have been occasioned by the negligence of the steamer Lady Wimett while towing the canal boat from Black Rock Harbor to the harbor of Buffalo.

On the morning of August 10, 1897, the Lady Wimett, a steam canal boat, with her consorts, the Niobe and two other canal boats, was lying at Black Rock Harbor, having arrived the previous evening. She was destined for Buffalo. The canal was closed between Black Rock and Buffalo, owing to repairs which were being made. It was, therefore, necessary for the boats, in order to reach the port of Buffalo, to take the outside course through Black Rock Harbor and the Erie Basin. When the fleet had reached a point near the southerly end of Bird Island pier the two tow boats were taken in charge by a tug, and the Niobe was uncoupled from her position as push boat and taken in tow by the Wimett. The line was of the ordinary size, was about 35 feet in length and was fastened to the boats in the usual way. There was a fresh breeze, about 10 or 12 miles an hour, blowing down the lake, which

caused a choppy sea for a short distance in the open space between the ends of the piers. As the Wimett approached the Erie Basin the tug Little with two mud scows in tow was seen coming out of the basin bound down the river. The Wimett passed the Little about 50 or 75 feet to the right, the Little hugging the shore side of the channel and actually passing over the buoy which marks the edge of the channel at that point. When a short distance from the Erie Basin pier the Niobe sheered to starboard. Immediately the Wimett starboarded her helm and opened her engine endeavoring by these means to overcome the sheer. While in this position, the Niobe sheering to starboard and the Wimett pulling to port, the chock on the Niobe broke and immediately thereafter the cleat gave way, leaving the Niobe helpless. She continued her sheer towards the pier, struck against the rocks and sank soon afterwards.

The faults charged by the libelants against the Lady Wimett are as follows: First. Taking a course too close to the end of the breakwater. Second. Not securing the assistance of a tug. Third. Towing with too long a line and no bridle. Fourth. Not having a competent crew. Fifth. Not clearing the breakwater. Sixth. Not noticing the sheer of the canal boat in time. Seventh. Turning and going ahead too suddenly in attempting to correct the sheer. Eighth. Not taking proper steps to keep the Niobe on her course. Ninth. Not approaching the breakwater with sufficient caution.

John W. Ingram, for libelants.

George S. Potter, for claimant.

COXE, District Judge (after stating the facts as above). A tug is neither a common carrier nor an insurer. She is bound to use reasonable skill and care and is liable when the absence of these is established. *The Margaret*, 94 U. S. 494; *Milton v. Steamboat Co.*, 37 N. Y. 210; *The Webb*, 14 Wall. 406. A tug, using ordinary care, is not liable for the sudden sheering of the tow. *The Stranger*, 1 Brown, Adm. 281, Fed. Cas. No. 13,525. The burden is upon the libelants to prove that the tug failed to tow the canal boat with that degree of skill which prudent navigators usually employ in similar circumstances. *The Hercules*, 55 Fed. 120; *Pederson v. Spreckles*, 31 C. C. A. 308, 87 Fed. 938; *The MacCaulley*, 84 Fed. 500. The libelants have failed to prove any of the accusations against the steamer. The fleet, which depended upon the Wimett for propulsion in the canal, consisted of the Niobe, which was pushed ahead, and two other boats which were towed behind. Arriving at the end of Bird Island pier this fleet was broken up. The Niobe was taken in tow by the Wimett and the other boats were given in charge of a tug. This indicated rather unusual care and prudence on the part of the master of the Wimett. A more reckless navigator would have undertaken to handle the entire fleet. The tow-line was of the usual length, about 35 feet, and was made fast in the ordinary way. It was broad daylight. There was nothing unusual in the condition of the wind or water. The trip was a short one, most of the distance being through channels well guarded by breakwaters and offering no unusual impediments to safe navigation. There was a fresh breeze blowing down the lake and for a short distance between the ends of the piers there was a choppy sea, but there is an entire absence of proof that the conditions were such as to warrant a moment's hesitation in the mind of a prudent navigator as to the safety of the journey. The course which the Wimett took was the usual one, except that the presence of the Little and

her tow compelled the Wimett to keep to the right of the channel. When the Niobe encountered the return current near the end of the Erie Basin pier she took a decided sheer to starboard. The Wimett endeavored to overcome this sheer by every means in her power and would, in all probability, have succeeded had not the chock and cleat given way in succession, leaving the Niobe helplessly adrift. The libelants' witnesses are of the opinion that the chock and cleat did not break until the Niobe struck the pier, but the great preponderance of evidence is the other way. The libelants' witnesses were several hundred feet distant, while those of the claimant were on the Niobe and the Wimett or in the immediate vicinity of the disaster. If the collision with the pier were caused by the breaking of the chock on the Niobe it is plain that the Wimett is not liable. The evidence is uncontradicted that both the chock and cleat were staunch and strong, and even if insufficient there is not the slightest proof that the master of the Wimett knew or should have known of any defect.

The court has read the entire testimony, having in mind the allegations of fault against the Wimett, and is forced to the conclusion that none of them has been established. Some of these accusations are of the most vague and general character, others are unsupported by the testimony and others still are positively disproved. The Wimett's course was not too close to the breakwater. It was the course followed by all vessels coming out of or going into the Erie Basin. There was no occasion for the assistance of a tug. The Wimett was entirely capable of towing a single canal boat to Buffalo and there is no reliable testimony to the contrary. The line was the ordinary length, and the pretense that a bridle was necessary seems wholly without support. During an experience of 15 years the court has never known of an instance where a single canal boat was towed with a bridle and has never known or heard of a case where its absence was imputed as a fault. Indeed, the principal reason for using a bridle would seem to be absent in such circumstances.

There is nothing to sustain the proposition that the Wimett and Niobe were improperly manned. On the contrary, the crew was composed of men of more than ordinary experience and intelligence. Two men were at the Niobe's tiller and everything which could be done to overcome the sheer was done on both boats. The proposition that the Wimett turned and went ahead too suddenly after the Niobe began to sheer is not sustained by the evidence. Indeed, it is a matter of common knowledge that a steam canal boat has none of the characteristics of a tug in this respect. They are built to traverse a sluggish waterway at a slow rate of speed and are incapable of executing the swift and powerful maneuvers often required of tugs.

In short, it seems to the court that an impartial mind on reading this record must reach the conclusion that the libelants have failed to establish any fault on the part of the libeled vessel. It follows that the libel must be dismissed.

FLOOD et al. v. CROWELL.

(Circuit Court of Appeals, Fifth Circuit. January 24, 1899.)

No. 730.

SHIPPING—DEMURRAGE FOR DETENTION OF VESSEL—CONSTRUCTION OF CHARTER PARTY.

A charter party fixed the demurrage for each day's detention of the vessel "by the default" of the charterers or their consignees. It made no provision for "dispatch" or "quick dispatch" in loading or discharging the cargo, but fixed the minimum amount to be loaded or discharged each day, and provided that the lay days should commence "from the time the captain reports himself ready to receive or discharge cargo." Held, that under the latter provision the lay days did not commence until the vessel was ready and in position to receive or discharge cargo, and that the contract did not bind the charterers for demurrage for a delay of the vessel in obtaining a wharf at which to discharge, notwithstanding a notice of readiness to discharge from the captain, where, as the owners knew or should have known, all the wharves at the port of destination were public, and under the exclusive control of a harbor master, who directed the movements and position of all vessels thereat, and by the rules of the port each vessel was required to wait her turn.¹

Appeal from the District Court of the United States for the Eastern District of Texas.

The libel was filed December 2, 1896, alleging that the schooner Horace W. Macomber in October, 1896, at Newport News, took on board 1,600 tons of coal, to be delivered at Galveston, Tex., to respondents, Flood & McRae, under a charter party duly signed, stipulating for a discharge of 250 tons of coal per day, and for \$90 per day for every day's detention; that on the 4th day of November, 1896, at 9 o'clock a. m., the master of the schooner notified Flood & McRae of arrival and readiness to discharge, and that on said day Flood & McRae directed the captain of the schooner to report to the harbor master for a berth, and that the harbor master told him there was none at the wharf, and that he would have to lie alongside the schooner Swann, which he did until November 8, 1896, when the Swann sailed, and the Horace W. Macomber took her place at the wharf; that his cargo was not discharged until noon of November 16, 1896. Libelant alleged that, by the terms of the charter party, $6\frac{2}{5}$ days from the notice of readiness to discharge were allowed, and that they terminated at noon on November 11, 1896, wherefore he is entitled to 5 days' demurrage, at \$90 per day. The respondents filed an answer and an amended answer, and denied that the vessel arrived on the 3d of November, 1896, and that she was ready to discharge on that date. They denied that they accepted the said cargo on November 4, 1896. They alleged that the vessel was discharged within the time contemplated by the terms of the contract, and therefore no demurrage was due. Answering further, respondents alleged that the master of the Macomber did give notice of his arrival on the 4th of November, 1896, but that in truth and fact he had not arrived, for that he was neither able nor ready to discharge; that his vessel got aground after his notification; that they had no control of any wharf of the city, but that the harbor master had absolute and entire control of the wharves, and that they notified him that they did not and would not accept his notice of arrival until he was berthed alongside the wharf and ready to discharge; and that they were ready at all times to receive the cargo whenever he was ready to deliver it to them, but were prevented from doing so because of the inability of the master of said vessel to deliver it to them. The respondents further answered that the libelant had frequent dealings with the port of Galveston, and had frequently contracted concerning the chartering of his vessel with respect to the port of Galveston, and that he knew at

¹ On question of demurrage, see note to Randall v. Sprague, 21 C. C. A. 337.

the time of making said charter that the vessel would be subject to the regulations of said port, and that it should take all the risks of delay incident to the harbor municipal regulations of the city of Galveston. They also alleged that the ordinances of the city of Galveston and the regulations of the port were part of the contract between the libelant and respondents, and by an ordinance of said city Flood & McRae had no power to provide any berth at the wharves, but that the same was entirely under the control of the harbor master. The amended answer set out in full the ordinance of the city, which provides that the harbor master shall have power to regulate and station all ships and other vessels at the wharves, and to move any and all ships from one place to another, in his discretion, and gives said harbor master the power to remove such vessels himself, in case of refusal of the master, and making such refusal to obey the harbor master a misdemeanor, punishable by fine and imprisonment, and providing for recovery of all expenses incurred by such refusal of the master of any vessel at the port of Galveston. The respondents further alleged the custom of the port that the harbor master shall place the vessel according to his discretion, and that, as soon as the harbor master did place the Horace W. Macomber, respondents immediately unloaded said cargo at a greater rate than 250 tons per day, as specified by the charter party, and received her cargo within a shorter time than was allowed by its terms; that they had no power to get a berth for said vessel, which was known to the owners of said vessel, and actually known to the master of said vessel; and that such was not the custom of the port.

The libelant introduced a charter party signed September 22, 1896, by Samuel R. Crowell, for the vessel, and the Chesapeake & Ohio Coal Agency, charterers, of which the following are the parts bearing upon the case: "The said party of the second part doth engage to provide and furnish to the said vessel, at Newport News, a full and complete cargo of coal, and pay to said party of the first part, or agent, for the use of said vessel during the voyage aforesaid, (\$1.65) one dollar and sixty-five cents per ton of 2,240 pounds, delivered; freight payable on proper discharge of cargo, free of discount or commissions. It is agreed that the lay days for loading and discharging shall be as follows, commencing from the time the captain reports himself ready to receive or discharge cargo: Time for loading and to be discharged, rate of not less than (250) two hundred and fifty tons per day, Sundays excepted. Consignees to discharge cargo at 27½ cents per ton of 2,240 pounds. And that for each and every day's detention by default of said party of the second part, or agent, (\$90) ninety dollars per day, day by day, shall be paid by said party of the second part, or agent, to said party of the first part, or agent. The cargo or cargoes to be received and delivered alongside, within reach of vessel's tackle. The dangers of the seas mutually excepted. It is also agreed and understood vessel is now at Boston, and is to proceed direct to Newport News, to enter on this charter."

Edwin Bray, master, testified by deposition: That the Horace W. Macomber arrived at Galveston, Tex., November 3d, at 6 p. m. That he notified Flood & McRae that she was in port, and ready to discharge, Wednesday, November 4th, at 9 a. m., and that they instructed him to notify the harbor master for a berth to discharge. He saw the harbor master about 10 a. m. the same day, and learned that there was no berth for discharging, and was ordered to haul alongside the schooner William H. Swann. That he hauled alongside said schooner at 11:30, November 5th. His vessel got aground, but he said she would not have gotten aground, if she had gotten a berth when Flood & McRae were notified. The consignees notified him when he reported his arrival that they had no control of any wharf, but that the city, through its harbor master, had absolute and entire control of the wharves and all berths for vessels; but he insisted on the terms of the charter party,—250 tons per day from the time of reporting that the vessel was ready to discharge. Flood & McRae began taking cargo as soon as the vessel was berthed, but he said they did not furnish enough drays to keep the vessel working her full capacity for delivery according to charter party. E. O. Flood, of the firm of Flood & McRae, testified that he (his firm) had chartered three vessels from the owners of the Macomber before this charter, and produced a book entitled "Port Charges of the World,"—a standard work, and

one in general use,—which contained the ordinance relating to the exclusive power of the harbor master over berthing of vessels in the port of Galveston. This was agreed to by counsel as an ordinance of the city of Galveston now in force, and at the time of the arrival of the Macomber. The vessel was brought in by the pilot on November 4th, at 4:30 p. m., and entered in the custom house on November 4th. The captain gave verbal notice of arrival on the morning of the 5th, whereupon witness denied that he had arrived until he got into a position to discharge. He was not then ready to discharge. On the day of his arrival he got aground, and did not get his vessel off until about 1 o'clock p. m. the following day, November 5th. He was in no position to discharge until then, even if a berth had been open to him. There was no berth open for him at that time in the city. They were all occupied by other vessels. Respondents hastened the discharge of the Swann in order to get the Macomber a berth. Upon Flood & McRae notifying the master of the necessity of applying to the harbor master, he did so, and did not demur. The harbor master instructed him to place his vessel alongside the William H. Swann. It is the custom of the port of Galveston for the harbor master to get vessels' berths in their turn, and the consignee must accept the vessel without regard to what pier she may be placed by the harbor master. On Sunday, November 8th, a berth became vacant, and she took position alongside the dock. On Monday, November 9th, at 7 a. m., he began discharging at the earliest moment possible. If demurrage were calculated from the time she got off the ground, it would be \$311.25. The vessel went aground because a norther had sprung up. Flood & McRae finished discharging at 10 a. m., November 16th. Capt. John E. Chubb, harbor master, testified that there was no open berth for the Macomber, with water sufficient for her. He is the only person vested with the power to regulate the shipping in this harbor, and no one had power to designate a place for the Macomber without his consent. The custom of the port is to place vessels in berths in their order as they arrive. If all the available berths are occupied, and a coal vessel arrives, she would be outside of another vessel, and wait till the other vessel discharged. He acts under the ordinances of the city of Galveston, which vest him with the power to regulate the shipping,—to designate berths for vessels upon arrival, which must report to the harbor master for berths.

The district court gave a decree for the libelant for \$333.35 demurrage, and Flood & McRae sued out this appeal. The record shows that counsel for libelant below (appellee here) filed a cross assignment of errors in the court below, but the record shows no other steps taken which would perfect a cross appeal.

John C. Walker, for appellants.

W. B. Denison, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

This is a suit brought by the owners of the ship Horace W. Macomber for demurrage under a charter party which provided that, for each and every day's detention by default of the consignees, they should pay owners \$90 per day. The demurrage claimed is for the delay between the ship's arrival at the port of Galveston and the securing of a wharf for discharge, and the narrow question is whether the consignees are in default for such delay. The charter party provides that "lay days for loading and discharging shall be as follows, commencing from the time the captain reports himself ready to receive or discharge cargo: Time for loading and to be discharged, rate of not less than two hun-

dred and fifty tons per day, Sundays excepted,"—and also provides that "the cargo or cargoes shall be received and delivered alongside, within reach of vessel's tackle." We do not find in the charter party any express provision that the consignees shall select, furnish, or provide a wharf for the ship to discharge, nor any provision guarantying "dispatch," "quick dispatch," or that the lay days shall commence on arrival of the ship, from which can be implied a contract to furnish a wharf for discharge. The provision that "the lay days shall commence from the time the captain reports himself ready to receive or discharge cargo" means no more than that the lay days shall commence from the time the ship is ready to discharge cargo, within the meaning of the charter party; and the provision that "the ship is to be discharged by the consignees at a rate of not less than two hundred and fifty tons per day" means no more than that the consignees shall discharge the ship at that rate after the ship is ready to be discharged. The ordinances regulating the assignment of ships to wharves in the port of Galveston for loading and unloading, and the custom prevailing in the port of Galveston, requiring, when the wharves are all occupied, that ships shall be assigned in their turn, were, or should have been, known to the owners of the ship, who, it appears, had sent previous cargoes, under charter parties similar to the present one, to the port of Galveston; and they did know, or should have known, that all the wharves in Galveston were public, and could not be controlled by consignees. Being charged with this knowledge, if the owners desired to make consignees liable for delays in obtaining a wharf, and relieve themselves from delays of the kind, they could and should have provided for the same in their contract. Having failed to make such provision, and the consignees not being bound, under our construction of the charter party, to immediately furnish the ship a wharf at which she could discharge without delay, we cannot find that for the delay in this case the consignees were in any wise in default. If not in default, they were not liable for demurrage. We have examined the many cases cited by counsel for appellee as supporting his contention as to the liability of the consignees, and, while in many of them detached expressions can be found which appear to support the contention, we do not find any of them to be in conflict with the construction we have given to the present charter party. The other cases we have examined, mainly cited by counsel for appellants, are to the effect that, where there is no express contract on the part of the consignees to furnish a wharf, yet, where the consignees have contracted for dispatch in discharge, or for quick dispatch, or that the number of lay days shall commence on the arrival of the ship in port, there results an implied contract that the consignees shall be responsible for the delays occasioned by failure to promptly secure a wharf for loading or discharging. In these decisions we mainly concur, but they cannot be applied to any advantage in the instant case. As the proof in this present case shows that, when the vessel obtained a wharf and was ready to discharge, the consignees discharged and received the goods as rapidly as the contract called for, we are of opinion that they fully complied with the charter party, were not in default, and cannot be held liable for demurrage. The

decree of the district court is reversed, and the cause remanded to the district court, with instructions to set aside the decree appealed from and dismiss the libel.

THE THOMAS PURCELL, JR.

(Circuit Court of Appeals, Second Circuit. December 7, 1898.)

No. 17.

TOWAGE—LOSS OF TOW—LIABILITY OF TUG FOR NEGLIGENCE.

A tug is responsible for the loss of a tow, a barge laden with coal, which she anchored in the evening in an exposed place, proceeding to another port, where, by reason of not keeping a watch during the night, her master was not advised of an approaching storm in time to reach and save the barge before it was sunk.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here on appeal from a decree of the district court, Southern district of New York, holding the appellants, as owners of the steamtug Thomas Purcell, Jr., responsible for damages sustained by the sinking of libellant's barge F. B. Morris and her cargo of coal, laden on board about noon on the 19th day of March, 1896, in Stamford Harbor. The Purcell arrived at Stamford Harbor between 6 and 7 o'clock on the evening of the 18th, and, the tide being too low to admit of taking the Morris up the dugway, she anchored her near the lighthouse, and proceeded with her other three tugs to Wilson's Point, where she arrived a little before midnight.

The following is the opinion of the district judge (BROWN, District Judge):

The evidence shows it is not customary to leave boats off Stamford in stormy weather; but to take them in to Wilson's Point, four miles further on.

In threatening weather the same rule would require the tug to keep a lookout on the weather, and to return to Stamford to take along a boat left there, in time to prevent damage.

It is plain from the proofs that when the Purcell arrived at Wilson's Point, about 12, a storm was threatened; and it was her duty to go at once, and bring the libellant's boat from Stamford to Wilson's Point. She could have done so easily in 1½ hours. But the master was ill; and the pilot, who was in charge, turned in, kept no watch on the weather; and when he got on deck, at 8 a. m., he found the weather too bad to be able to go to Stamford for the boat he had left there. He cannot take advantage of his own negligence. Had a watch been kept, it would have been plain by daylight—at 5 a. m.—that he should go at once for the Stamford boat, as he might even then have done, and been back by 6:30 a. m., when it was only half a gale. I must hold the tug, therefore, liable. The Governor, 77 Fed. 1000; The American Eagle, 54 Fed. 1010; The Battler, 55 Fed. 1006.

I do not think I should hold the boatman negligent in not beginning earlier to throw coal over, so as to get on the hatches. He had a right to expect the tug to come for him for a time; and later the storm became too fierce for him to get the covers on alone; and I doubt whether the covers, if on, would have saved the boat.

Decree for libellant.

Samuel Park, for appellants.

Le Roy Gove, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Concededly, no attention was paid to the weather by those on the tug from the time she anchored at Wilson's Point

till her pilot turned out, at 8 a. m. the next morning. In view of the evidence from the weather bureau that the wind from midnight until 11 a. m. was southwest, and the testimony of the disinterested witness from the Pennsylvania barge as to the indications of a storm at Wilson's Point, when he got up, at 4 a. m., we concur in the conclusion of the district judge that, had a watch been kept, the master of the tug would have been advised of the necessity of returning to care for the Morris in ample time to have saved her from disaster. The decree of the district court is affirmed, with interest and costs.

THE ROBERT R. KIRKLAND.

(District Court, D. New Jersey. March 1, 1899.)

ADMIRALTY—JURISDICTION.

A court of admiralty has no jurisdiction to try the title to a vessel, where the petitioner's claim is based on an equitable interest merely, and not on the legal title, especially where the parties holding such title are not parties to the suit.

Benedict & Benedict, for libelant.

Foley, Wray & Taylor, for respondents.

KIRKPATRICK, District Judge. The libel in this action sets out that in the year 1892 the steamtug Robert R. Kirkland was owned by the National Dredging Company of Wilmington, Del., and that on October 12th of that year the said dredging company entered into an agreement to sell the said tug and other property to certain parties, whose names are not given; that the libelant and one Schermerhorn were the agents of said parties, with the power to make payments, and receive the said property, and receive bills of sale therefor; that afterwards the said tug was delivered to libelant and said Schermerhorn, and has since remained in their possession; that afterwards Petze, the claimant herein, and others, the respondents, were made the agents of the unnamed parties who had contracted with the dredging company for the purchase of the tug; and that on July 13, 1896, in fraud of the duties as such agents, they accepted, and there was delivered to them by the dredging company above mentioned, an absolute bill of sale of said tug, which was on July 10, 1898, recorded in the custom house at New York. The libelant further alleges that in February, 1898, he purchased the said tug from the parties who originally agreed to buy her from the dredging company, for the sum of \$1,600, agreed to be paid by him, and took possession of the tug, and caused repairs to be made upon her. The libel also sets out that, after the execution and delivery of the bill of sale to the respondents, as aforesaid, the respondents requested the delivery of the tug to them by the libelant, and that libelant agreed to give a transfer and release upon the payments of bills of repair, but the offer was refused. The libelant alleges that he is the true owner of the tug, and offers to pay the purchase price for same on receipt of bill of sale from respondents, and asks the court to decree that he is such true owner, and has title superior to respondents, and that

respondents may be decreed to execute to him a bill of sale of said boat. Henry H. Petze, intervening for himself as part owner of the tug, excepts to the libel, upon the ground that, from the facts set out therein, it clearly appears that the court is without jurisdiction in the case.

A careful consideration of the matters set out in the libel shows that neither the libelant nor those under whom he claims ever had any legal title to the tug. The libelant says that he has agreed to purchase the tug from certain persons who had a contract to buy her from the dredging company, at one time the undisputed owner. He admits that he himself has not paid the price agreed, but tenders himself ready to do so, and fails to show that the contract made by his principals with the dredging company was ever consummated by the payment of the purchase money.

The libel asserts that the respondents are the holders of the legal title to the tug by bill of sale executed by the dredging company prior to the date of the agreement under which they claim, for which they may have paid, so far as the libel shows anything to the contrary, a valuable consideration. What the libelant calls his "title" seems to be no more than the right to compel the persons with whom he says he made a contract to purchase the tug to specifically perform their agreement. These contractors are not parties to this suit, nor are the respondents parties to the contract; so that, if the court had equitable jurisdiction, it is difficult to see how the decree prayed for could be made. At most, it is "an attempt to enforce an equitable interest as against a legal title. This a court of admiralty does not undertake." The *Amelia*, Fed. Cas. No. 275. This case was an affirmation of a decree of the district court (*Id.* 6,487), in which Blatchford, district judge, had said: "A petitory suit to try the title to a vessel must be confined to, and based in, a legal title,"—citing *Kellum v. Emerson*, *Id.* 7,669. The exceptions will be sustained, and the libel dismissed for want of jurisdiction.

THE MARY POWELL.

(Circuit Court of Appeals, Second Circuit. January 25, 1899.)

No. 42.

COLLISION—CROSSING STEAMERS—DUTY TO REVERSE.

A steamer, when the privileged vessel, in crossing, is not required to reverse to avoid a collision until it becomes evident that the other vessel will not or cannot keep out of the way.¹

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by William H. H. Curtis, as master, etc., against the steamboat *Mary Powell*, for collision. The libel was dismissed by the district court.

¹ For signification of signals of meeting vessels, see note to *The New York*, 30 C. C. A. 630.

The following is the opinion of the court below (BROWN, District Judge):

"There can be no doubt of the extreme negligence and carelessness of the man in charge of the naphtha launch. Crossing the North river off Thirty-Fifth street, where large steamers are in the habit of passing, he sat on the side of his boat facing down river, and manifestly gave no attention to any large vessels that might be coming down from above. To the repeated whistles of the Powell he gave no heed, and he was not aware of her near presence until she was within about 50 feet of him, when he was startled by the shouts of the captain from the steamer's bows. The launch, only about 30 feet long, was going probably about 5 miles an hour, and could be turned in a length or two. Whatever might be the faults of the steamer, it is almost impossible that such a launch could be run down, without gross inattention and carelessness on her part.

"If, however, the Powell was an overtaking vessel, and as such bound by the rules of navigation to keep out of the way of the little launch, I should be obliged to find the steamer also to blame; because it is plain that she did not take timely and efficient measures to keep out of the launch's way. She considered and treated the launch from the first as a crossing vessel, that, having the steamer on her own starboard hand, was bound to keep out of the way of the steamer in accordance with the ordinary rule. The chief controversy in the case has been whether the situations of the two boats were such as to make them crossing vessels within the meaning of the rules of navigation, or such as to make the Powell an overtaking vessel, as claimed in behalf of the libelant.

"In the case of *The Aurania*, 29 Fed. 98, it was held that a vessel coming up from a position more than two points abaft the beam of a vessel ahead of her, should be treated as an overtaking vessel, and not as a crossing vessel. This construction had been previously adopted in the English case of *The Franconia*, 2 Prob. Div. 8, and it has now been embodied in article 24 of the new rules of navigation which went into effect the 1st of July, 1897. In the latter rule it is further provided that in case of doubt, in the daytime, the steamer astern should assume that she is an overtaking vessel and keep out of the way.

"The present case illustrates forcibly the great difficulty that attends the application of this rule in the daytime, upon contradictory testimony as to the positions and courses of the two vessels. There are here four different elements, each in dispute, a change in any one of which would affect the determination whether the Powell was an overtaking or a crossing vessel: (1) the distance of the launch from the dock when first seen; (2) the amount of the launch's heading down river; (3) the distance of the Powell from the New York shore, whether 300 or 500 yards; (4) the distance of the Powell above the launch at the time when the launch was first seen, or when the Powell ought to have noticed her, and begun to maneuver with reference to her.

"According to the testimony of the Powell, the launch was first seen about 200 feet off the piers at Thirty-Fourth or Thirty-Fifth street, heading, as it appeared to her officers, nearly straight across the river. That would make her a crossing vessel bound to keep out of the way of the Powell. The Powell was then off Fortieth or Forty-First street, heading nearly straight down river and going with the ebb tide at a speed of about 18 miles an hour; and in my judgment upon the whole testimony, she was then about 400 yards from the New York shore. Though the launch was then not over 600 yards further down river, it is not claimed that the Powell was in fault for not observing her sooner; nor would inferences be drawn as to the intended course of the launch, if she had been seen less than 200 feet outside of the piers.

"The launch belonged to the yacht *Nourmahal*, which was at anchor not far from the Jersey shore, abreast of the long dock a little above the Erie Railroad oil depot, and the launch was intending to return to her. The direction of the *Nourmahal* from a point 200 feet off from the docks at Thirty-Fourth or Thirty-Fifth street was about three points to port of a line drawn

straight across the river. If the launch was headed from that point straight for the Nourmahal, the Powell, if only 825 feet distant from the New York docks, the nearest distance claimed for her by the libellant, would be within the range of the launch's green light by three-quarters of a point, and would therefore be at that time in the position of a crossing vessel. If the Powell was further from the New York shore and as I judge from all the testimony about 400 yards off shore, she would have been nearly two points forward of the aft range of the launch's green light.

"For the libellant, however, it is contended upon the testimony of the launchman, that the heading of the launch was kept all the time a point below the yacht. The tide was strong ebb, which runs there about $2\frac{1}{2}$ knots an hour. In the ordinary practice of boatmen, if no circumstances called for a roundabout course, the heading of the launch, intending to make the yacht, would have been at least a point above her, instead of a point below. The launchman said he headed thus because the water was rough, to get an easier crossing and thus to avoid the spilling of acid from the launch's batteries. The respondent contends that the river was not rough, nor in any such condition as to call for such precautions. If headed at first a point below the yacht in such a tide, a constant port helm would have been required, and a constantly changing direction of the launch to starboard in a curvilinear course would have been necessary in order to prevent the launch from falling far astern of the yacht she was aiming at. If the launch had started from Thirty-Fifth street heading a point below the yacht, by the time she was 500 feet out, in order to preserve that heading, she would have been obliged to be hauled about one-half a point to starboard; and when 200 or 500 feet out, if the Powell was 1,000 feet or upwards from shore as I have no doubt she was, she would still have been, according to my measurements of the angles, within the range of the launch's green light at night, and therefore a crossing vessel. It is not necessary, therefore, to discuss the credit to be given to the different witnesses who have testified directly as to the apparent course of the launch, nor the reasons assigned by the launchman for heading a point astern of the yacht, rather than a point ahead of her. The testimony as to the heading of the launch by witnesses outside of the Powell is mostly by those who had no call to observe her heading accurately, and who were not in a position to do so. There is no doubt that the launch was heading somewhat down the river at first, and afterwards drew more to the westward as she would naturally do even if her heading was at first directly for the yacht and not below it. But taking the Powell as at least 1,100 or 1,200 feet from the New York docks, the launch at all times after she was 200 feet out was, as I make the courses, a crossing vessel.

"I do not find that the speed of the two vessels creates any difficulty in the above findings. The collision occurred off Thirtieth or Thirty-First street. The Powell, therefore, traversed about 2,600 feet. The estimates of time and distance testified to are as usual, very inaccurate. But to enable the launch to get abreast of Thirtieth or Thirty-First street at collision, on the heading she had, and going at a 5 knot speed with the tide $2\frac{1}{2}$ knots, the interval must have been very nearly two minutes, which would give the Powell an average speed of 13 or 14 knots in going 2,600 feet. At Fortieth street she signaled and slowed, and when about 300 feet from the launch, she stopped her engines. From her light draft, powerful engines and broad paddles, she is handled comparatively quickly; and the behavior of ocean steamers furnishes no analogy. The circumstances of the collision and the launchman's saving himself by clinging to one of the steamer's guard braces make a speed of 7 to 9 knots at collision most probable, and this speed is sufficiently in accord with the previous findings.

"The order to reverse was given, but countermanded to avoid causing loss of life from the revolving paddles. Ordinarily the Powell would be held in fault for not reversing sooner. But against the privileged vessel, this rule is applied only when it becomes evident that the other vessel cannot or will not keep out of the way. Here the launch was a small craft, capable of such quick handling that the officers of the Powell had a right to rely on her keeping out of the way down to a time so near collision that it was then impossible for a steamer like the Powell, so much larger, to avoid collision.

I cannot find, therefore, any blame to attach to the Powell, and the libel must therefore be dismissed with costs."

E. L. Baylies, for appellant.

R. D. Benedict, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decree affirmed, with costs, upon opinion of the court below.

THE PATRIA (two cases).

(District Court, S. D. New York. February 18, 1899.)

COLLISION—STEAM AND SAIL—FOG—INSUFFICIENT LOOKOUT—EXCESSIVE SPEED—FOG HORN NOT HEARD—PRIVILEGED VESSEL TO GIVE WAY—MANEUVERING POWER.

Upon a collision at sea in thick fog about 20 miles off Fire Island between the steamer P., going at "half speed," and a four-masted schooner, close-hauled, going at a speed of about 3 knots, it being found upon the testimony, as well as upon the maneuvering power of the steamer, that her speed was about 7 knots, or about two-thirds of her full speed, *held* excessive, when the schooner could be seen only 600 or 700 feet distant, and not justified by her failure to hear the schooner's horn earlier; and that a lookout on the bridge, without any at the bow, was insufficient. It further appearing that the steamer was approaching upon the schooner's lee beam, and that the master of the schooner had notice of the imminence of collision and that the steamer was backing, about two minutes before collision, *held*, that it was his duty to luff, as he might have done in order to aid in avoiding collision; since this was clearly a safe maneuver and could not possibly do harm, and was one of the "ordinary practices of seamen" within articles 21, note, 27 and 29, and that the damages should therefore be divided.

Carver & Blodgett, for the Francis M.

Cowen, Wing, Putnam & Burlingham, for cargo owners.

Benedict & Benedict, for the Patria.

BROWN, District Judge. The above libels were brought to recover for the damages to the four-masted schooner Francis M. and for the loss of her cargo, through collision with the steamship Patria, off Fire Island, about 18 or 20 miles S. by W. from Shinnecock Light, a little before 2 p. m. of September 5, 1898, in thick fog.

The schooner, 205 feet long, two-thirds loaded with a cargo of ice, was bound from Kennebec river to Baltimore, and was going in a light wind from the westward on the starboard tack at the rate of about three knots an hour, heading S. W. by S., but making leeway about $1\frac{1}{2}$ points, as her master states, so that her true path was about S. by W. $\frac{1}{2}$ W.

The steamer, 340 feet long, bound from the Mediterranean to New York with passengers and cargo, was proceeding upon a course due west. Her full speed was about $11\frac{1}{2}$ knots an hour. At 1:30 p. m. she ran into a low fog, which became thick at 1:45. At that time, according to her testimony, her engines were put at "half speed," and her fog whistle was thereafter sounded regularly at intervals of not over one minute. The schooner's witnesses say that her mechan-

ical fog horn was also sounded properly, and that the steamer's whistles were heard several minutes before collision. But no fog horn from the schooner was heard on the steamer until about the time when the schooner herself began to loom up in the fog, probably from 600 to 700 feet distant; whereupon the steamer's engines were immediately reversed and three blasts of her whistle sounded, to give notice of that fact to the schooner, about two minutes before collision. The steamer, under reversed engines and a port wheel, swung from two to three points to starboard and struck the schooner about midway between the foremast and mainmast, at about right angles, making a hole in her side from two to three feet deep and wide, so that she soon filled and capsized.

The steamer contends that her speed was "moderate" and only about $5\frac{1}{2}$ knots, and that the collision arose (1) from the fact that no fog signals could be heard from the schooner until the latter was very near; and (2) because the schooner when the steamer's backing signals were given did not luff and aid in keeping off. There is much contradiction in the testimony concerning the density of the fog, the distance at which vessels could be seen, and as to the whistles heard.

The fog was low and dense upon the water and lighter above; so that the sky was nearly clear, and the sun visible. The schooner should have been seen somewhat sooner than the steamer, both from her white sails on which the sun was shining, and also because the lookout on the steamer was much higher than the lookout on the schooner. Most of the seamen from the schooner, however, testify, that the steamer was seen a long distance off,—from a third of a mile to a mile; and that several blasts of her whistle were heard before she was seen. If vessels could be seen at any such distance apart, the steamer's speed was sufficiently "moderate" whether her speed was $5\frac{1}{2}$ knots or 7, as I think it was. But the testimony of these seamen is so grossly untrue, that I can give them little credit, even in their testimony about the whistles. The master of the schooner says that after hearing the steamer's whistle he was watching for her, and that he first saw her about 200 yards off, and about two minutes before collision; and this for reasons below stated is doubtless not far from correct. He also says that he heard the steamer's fog signals five or six minutes before collision; but his inability to give any account of what he did to occupy any such interval, in connection with the mate's testimony, leads me to believe that he did not hear the steamer's whistle more than one or two minutes before the steamer was seen. When he heard her first whistle he was on the main deck forward, fixing a fishing reel. The blast he then heard was doubtless the same as the first distinct blast which was heard by the mate, who was in charge on the quarter-deck. The mate was listening, because he had previously thought he heard a whistle which was so faint as to be doubtful and could not be located, and which the wheelsman did not distinguish at all. The next whistle heard, as the mate and wheelsman testify, was but a moment or two before the steamer was seen. I have no doubt that this is the true account as to the whistles heard on the schooner, and that only one

whistle was distinctly heard from the steamer until about the time she was seen, and that this was only about a minute prior to seeing her. The schooner's fog horn would naturally be heard later than the steamer's whistles, both because it was not so powerful as the steam whistle, and also because the blasts of a fog horn, unlike those of a steam whistle, are more specially operative along a particular axis, which much diminishes their penetration outside of the limited arc towards which the horn happens to be directed. If, therefore, the steamer's whistle was not distinctly heard until about one minute before she was seen, the failure to hear any signal from the schooner until about the time she was seen, is explained naturally, without finding any dereliction in the schooner as to the manner or frequency of sounding her horn, or in the attention given by the lookout and officers on the steamer. I pass, therefore, without further comment, those passages in the testimony of the mate, and as to the conversations with the master, from which it is claimed that the horn was sounded irregularly and at longer intervals than one minute. That neither vessel should hear the fog signals of the other until they were near each other, is not uncommon in fogs of variable density. See *The Niagara*, 77 Fed. 330, affirmed in 28 C. C. A. 528, 84 Fed. 902; *The Lepanto*, 21 Fed. 656, 657. The liability to surprises in such fogs, makes necessary the use of all available precautions against disaster, as regards speed, lookout and preparations for emergencies on the part of both vessels.

Speed. The engineer states the steamer's revolutions under her reduced speed to have been 29 per minute, equivalent at that time to a speed of about $5\frac{1}{2}$ knots. This does not appear to have been more than the engineer's estimate. It is less than half of full speed; and from the following circumstances I think it too low, and that her speed was not less than 7 knots: (a) There is no doubt that on entering the fog the order given was "half speed," which in all vessels of this class usually gives about two-thirds of full speed; while a reduction to one-half of full speed, requires the order "slow"; (b) in the master's two subsequent experiments with the *Patria*, made, as he says, under "similar conditions," at "full speed" and at "half speed," the revolutions stated in the memorandum are given respectively as 60 for "full speed" and 36 for "half speed," which with a pitch of 23 feet and a slip of $1/7$, gives about $11\frac{3}{4}$ knots for "full speed" and 7 knots for "half speed"; (c) the master says that when he first saw her she was coming fast, and from the rush of water at her stem, as fast as 7 or 8 knots; (d) the engineer says the engine undoubtedly was reversing for a minute and a half before collision; his log shows two minutes; in that time, had her speed been only $5\frac{1}{2}$ knots, she would have been fully stopped at collision; (e) the master's experiments also show that it takes 12 seconds after the orders to stop and reverse are given for the engine to begin backing, and that she stops from "full speed" in 2 minutes 48 seconds thereafter, and from "half speed" (that is, about 7 knots) in 1 minute 58 seconds; from $5\frac{1}{2}$ knots speed she would therefore have been stopped in going about 450 feet (*The Normandie*, 43 Fed. 162); so that there would have been either no collision, or much less damage.

The comparatively slight wound, however, made in the schooner, and the fact that the paint of the Patria's stem was not scratched, show that the Patria must have been moving but slowly at collision, and that the rate of the approach of the two vessels could not have exceeded 2 or $2\frac{1}{2}$ knots at the moment of impact. Of this rate, $\frac{7}{8}$ of a knot should be ascribed to the sagging of the schooner in making a leeway of $1\frac{1}{2}$ points ($16\frac{7}{8}^{\circ}$) while moving forward about 3 knots per hour ($\sin. 16\frac{7}{8}^{\circ} \times 300 = 87$), leaving probably about $1\frac{1}{2}$ knots as the steamer's headway at collision. A reduction from 7 knots to $1\frac{1}{2}$ upon the above data, allowing 12 seconds for the engine to begin backing, would occupy by computation about two minutes, as the engineer's log states; while the distance traversed by the steamer would be about 100 feet before reversal and 550 afterwards, thus agreeing closely with the master's estimates of time and distance.

From the above considerations, being persuaded that the reduced speed of the steamer was at least seven knots, I am not warranted by the authorities in holding that speed to be such "moderate speed" as is required by the rules of navigation in a fog so thick that a vessel can be seen only a few hundred feet distant. The Colorado, 91 U. S. 692; The Nacoochee, 137 U. S. 330-339, 11 Sup. Ct. 122; The Martello, 34 Fed. 74, affirmed in 153 U. S. 70, 14 Sup. Ct. 723; The Umbria, 166 U. S. 413-418, 17 Sup. Ct. 610; The Bolivia, 1 C. C. A. 221, 49 Fed. 171; The Orizaba, 57 Fed. 247; Donnell v. Towboat Co., 32 C. C. A. 331, 89 Fed. 757.

Besides this, I think the steamer is further to blame for not having a lookout stationed forward at the bow. Nor was the lookout doubled. The Colorado, 91 U. S. 698. There was but one seaman acting as lookout, and he was stationed on the bridge, some 75 feet or more from the bow, and was also attending to blowing the whistle once a minute. The only other person upon the bridge, besides the wheelman, was the mate, who was in charge of the navigation, the master having gone to his cabin for a change of clothing. If on account of the lighter fog above, it was desirable to have a lookout as high above the deck as possible, a lookout might have been stationed in the crosstrees or crow's nest, as is often done in thick fog; but neither that, nor a lookout on the bridge, would be a justification of the omission to keep a good lookout at the bow, which it has been repeatedly held should be maintained wherever possible. The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860; The Wanata, 95 U. S. 600, 609, 610; The Michigan, 11 C. C. A. 187, 63 Fed. 280. The master states his opinion, that if he had had 10 seconds more time, the collision would have been avoided. Had a lookout been stationed at the bow with no divided duties, and reported the schooner at the same distance it was seen from the bridge, the steamer would have had much more than this additional time for coming to a complete stop and backing away from the schooner.

2. The schooner was, I think, very greatly to blame for doing nothing to avoid the collision; since the circumstances show that without the least risk to herself she might have ported her helm and luffed, and thereby have averted this disaster. No doubt there is great reluctance to find a sailing vessel in fault for keeping her course as respects a

steamer that is bound to keep out of her way. This is the ordinary rule; and as was said by this court in *Haight v. Bird*, 26 Fed. 541, prior to the recent amendment of article 21:

"No exception to this rule can be allowed, except where it is entirely clear not only that by changing her course she would in fact have avoided the collision, but that under the circumstances of the moment, as they appeared to the sailing vessel, escape by that means was so easy and obvious to a person of ordinary nautical judgment, that it was clear negligence to omit it."

Where this is clear, the authorities are abundant, new and old, to the effect that it is the duty of the privileged vessel to give way. In *Peck v. Sanderson*, 17 How. 178, 182, it is said:

"But where, as in the present case, they [steamer and sail vessel] are brought suddenly and unexpectedly close to each other, and the ordinary rules of navigation will not prevent a collision, it is the duty of each to act according to the emergency, and take any measure that will be most likely to attain the object."

In the case of *The Sunnyside*, 91 U. S. 208, 222, in reference to the obligation in such circumstances "not to neglect any of the precautions required by the ordinary practice of seamen" (old article 20, present articles 27, 29), Mr. Justice Clifford in delivering the opinion of the court, says:

"Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained not to promote collisions, but to save life and property by preventing such disasters."

See, also, *The New Champion*, 1 Abb. Adm. 208, Fed. Cas. No. 10, 146; *The Cornelius C. Vanderbilt*, 1 Abb. Adm. 361, Fed. Cas. No. 3,235; *The A. Denike*, 3 Cliff. 117, 122, Fed. Cas. No. 8,045; *The Anglo Indian*, 2 Marit. Law Cas. 239; *The W. C. Redfield*, 4 Ben. 227, 234, Fed. Cas. No. 17,305; *The America*, 92 U. S. 432, 438; *The Columbia*, 23 Blatchf. 268, 25 Fed. 844, and cases there cited; *The Minnie C. Taylor*, 52 Fed. 326; *The R. H. Waterman*, 82 Fed. 482; *The George S. Shultz*, 28 C. C. A. 476, 84 Fed. 508, 512.

New emphasis has been given to this well-settled rule by the act of congress, approved May 28, 1894 (2 Supp. Rev. St. p. 189), by which article 21, requiring the privileged vessel to keep her course and speed, was amended as follows:

"Note. When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See articles twenty-seven and twenty-nine.)"

The facts leave no doubt that this was precisely the situation of the schooner in this case. From the moment the steamer was seen, collision was apprehended. The master says he saw the steamer was coming rapidly towards him. He had notice that the steamer was backing, by her backing signals. There was no doubt as to what she was trying to do. She was approaching at nearly right angles and on the lee beam—the best position for a safe maneuver by the schooner. The situation was such that it was instantly self-evident, when the backing signal was given, that porting by the schooner could not possibly do any harm, and that it would certainly give the steamer more time and space for stopping. During the interval of

about two minutes between this and collision, the schooner advanced about 600 feet. She was sagging down towards the steamer; and by porting she would have luffed at least some three points, and thereby not only have prevented this sagging, but by her momentum would have run to windward and thus have drawn to the westward much more than the 50 or 75 feet that would have sufficed to enable the steamer to back away from her.

The present case is wholly different from those in which the sailing vessel is approaching the steamer nearly head on, when it is uncertain on which side of her the steamer may be designing to go. In those cases the sailing vessel must keep her course, since any change might thwart the steamer's maneuvers. *The Farnley*, 8 Fed. 629; *The Dorian*, 68 Fed. 1018; *The Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. 468; *Donnell v. Towboat Co.*, 32 C. C. A. 331, 89 Fed. 758. Here there was no doubt, either as to what the steamer was trying to do, or as to the aid which the schooner might give without the least risk to herself, nor as to the necessity for this aid in the sudden emergency. I can hardly conceive of a situation in which the obligation of the privileged vessel to aid by her own maneuver was more obvious, or which more plainly falls within the very letter, as well as the spirit, of the amended rule.

The only excuses given by the master for not porting are, (1) that he had "no time to tack"; and (2) that the steamer should have starboarded and gone ahead of him at full speed. The latter, however, would have been not only a dangerous, but a forbidden maneuver. In the short time and space available to the steamer, she could not possibly have avoided collision in that way. It is certain that had she attempted it, a more dangerous collision would have resulted. She made no such attempt. Her backing signal was heard by the master, and from this he knew or ought to have known, that she was reversing. His duty under these circumstances was not a question of tacking, but only of porting and luffing two or three points, and running by the schooner's own momentum a length or a length and a half to windward. No attempt to do this or any preparation for it, was made by the master. Complete tacking was not necessary; though the ship tacked two hours before in a lighter breeze, and again immediately after collision. If more effective tacking had been required than was in fact needed in this instance, the men should have been properly stationed for the purpose of quickly handling the sails as soon as the steamer's whistle was heard near. The schooner was not in extremis; or if so, only by her own lack of preparation. *The Elizabeth Jones*, supra. The slight aid needed by porting was the simplest, the easiest and the most natural of all maneuvers in the "ordinary practice of seamen." Article 20. For the schooner's failure in this regard she can recover but half damages.

Decree accordingly.

WEAVER V. KELLY.

(Circuit Court of Appeals, Fifth Circuit. February 21, 1899.)

No. 754.

1. JURISDICTION OF FEDERAL COURTS — ACTION BY RECEIVER OF NATIONAL BANK—TRANSFER OF PLAINTIFF'S INTEREST.

When the jurisdiction of a federal court in an action by the receiver of a national bank depends solely on the official character of the plaintiff as such receiver, such jurisdiction is lost by a sale and transfer by the plaintiff of all his interest in the subject-matter of the litigation.

2. DISMISSAL—WANT OF ACTUAL CONTROVERSY—PURCHASE OF PLAINTIFF'S INTEREST BY A DEFENDANT.

A receiver of a national bank brought an action in a federal court to recover land against defendants, each of whom claimed a separate interest in the land. The defendants made a compromise of their claims between themselves, and entered into a written contract by which they agreed to consolidate their interests, join in the defense of the suit, and, if successful, to divide whatever land was recovered on a basis therein fixed. Afterwards one of them purchased the interest of the plaintiff in the land, and immediately conveyed the same to a third person, who claimed to hold it adversely to the other defendants. Held that, on such facts being shown, the court should have refused to permit the suit to continue for the benefit of one of the original defendants, or of his grantee *pendente lite*, who stood on no better ground, against his co-defendants.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

W. B. Gano, for plaintiff in error.

M. L. Morris, W. M. Crow, and W. F. Armistead, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

McCORMICK, Circuit Judge. This case was before us on a writ of error at the November, 1895, term of this court. Our decision (*Short v. Hepburn*) is reported in 41 U. S. App. 520, 21 C. C. A. 252, and 75 Fed. 113. James B. Simpson had acquired the land in controversy December 9, 1889, and owned and held it until July 21, 1891. His title thereto at that time is not disputed. Under him both the plaintiff and the defendants claimed as the common source of title. By a deed dated July 21, 1891, he purported to convey the land to Kennett Cayce. This deed was not filed for record in the proper county until January 19, 1892. Between July 21, 1891, and January 31, 1892, Simpson, as grantor, individually and as owner of the lands, by deeds duly executed and recorded, conveyed portions of the land in controversy to Farber, Morris, Reynolds, Hopkins, Hereford, and numerous other parties. Simpson was indebted to the Bankers' & Merchants' National Bank of Dallas. On February 20, 1892, it brought an action against him on its debt, and procured to be issued an attachment, which on February 22, 1892, was levied on the land in controversy as the property of Simpson. Before that time, on

January 14, 1892, one Sam Thurman had obtained a judgment against Simpson, and an abstract of the same was recorded and indexed in Camp county, Tex., on February 20, 1892, on which judgment execution issued and was levied upon the land in controversy as the property of Simpson, under which execution the land was duly sold and conveyed to the Bankers' & Merchants' National Bank of Dallas, July 5, 1892. In its action against Simpson, the bank obtained judgment, with a foreclosure of its attachment lien on the land in controversy, and under due process the land was sold and conveyed to the bank by the sheriff of Camp county, by deed dated February 6, 1894. On August 15, 1890, William Kelly, dealing with Simpson, who claimed to be acting as agent of Kennett Cayce, conveyed to Cayce certain lands, subject to a vendor's lien, for which Kelly was bound, and which, as stipulated in the deed, Cayce was to pay, which transaction resulted ultimately so that Kelly had a claim of debt against Cayce. On this debt Kelly brought suit, March 3, 1892, against Cayce and Simpson, and procured attachments to issue, which were on March 4, 1892, levied on the land involved in this suit as the property of Cayce, and also as the property of Simpson, to the extent of his interest or equity therein. Before the trial, Kelly's suit was dismissed, without prejudice, as to Simpson, and thereafter, October 10, 1893, judgment was taken, with a foreclosure of the attachment lien, against Cayce, on which judgment process was duly issued and executed against the land, which was sold by the proper officer, and conveyed by him to William Kelly as the purchaser, by deed dated January 2, 1894. By a deed bearing date March 2, 1892, M. L. Robertson, a son-in-law of Simpson, acting under a writing purporting to be a power of attorney from Cayce, conveyed all the land in controversy to U. F. Short. This deed, though bearing date March 2d, was not acknowledged until May 25th, and was filed for record in Camp county on the 27th of May, 1892. Kelly, having learned that Short set up a claim to the land in controversy, derived through purchase from Cayce, and in conflict with the title acquired under Kelly's attachment and sheriff's deed, went to work (before the filing of this suit) to compromise with Short their conflicting claims, and thereby save the expense of litigating issues between them, and leave to be contested only the issue of title as between Kelly and Short, on the one side, and H. S. Hepburn, receiver of the bank, on the other. After the matter of compromise had been considered and agreed on between Kelly and Short, the latter made it known that he had conveyed his title and interest in and to a part of the land to William D. Simpson, Jr., a son of James B. Simpson; and thereupon the compromise and agreement was reduced to writing as it had been made, except that a large interest in the land which was to have gone to Short was, by the written agreement, to go to William D. Simpson, Jr.; and these three, Kelly, Short, and William D. Simpson, Jr., contracted in writing, in triplicate form, of date April 5, 1894, duly signed and executed by each of the parties, each taking a copy thereof. The agreement is in the following words:

"This agreement, entered into between William Kelly, U. F. Short, and Wm. D. Simpson, Jr., witnesseth that whereas, said parties are jointly inter-

ested in a certain tract of land, as hereinafter described, and in the proportion as hereinafter stated; and whereas, a suit is now pending in the district court, Camp county, Texas, for part of said tract of land, and it may be necessary to bring or defend other suits in reference to said lands, as described as follows: A tract of land situated in the counties of Camp and Upshur, Texas, known as the 'Dickson Lands,' containing 7,630 $\frac{8}{10}$ acres, as fully described in a deed of Amanda Dickson and others to Jas. B. Simpson, dated 19 and 21 days of December, 1889, and recorded in Vol. G, pages 247, 248, 249, and 250 of the records of deeds of Camp county, Texas, to which reference is here made for a full and complete description of said tract of land. Therefore it is agreed, by and between the parties hereto, that we will make common cause, and work in each other's interest, in prosecuting and defending suits in reference to said land; and if successful, and said property is awarded to either of the parties hereto, then Wm. Kelly shall first have 2,000 acres, undivided, of said land; and, if over 2,000 acres is recovered, then U. F. Short shall have 200 acres, undivided, of said land; and after Wm. Kelly has received his 2,000 acres, and U. F. Short his 200 acres, all the balance of said land, supposed now to amount to about 3,000 acres, shall belong to, and be the property of, Wm. D. Simpson, Jr., and an equitable partition and division of same shall be made between all the parties hereto in the proportions hereinbefore stated. It is further agreed that, in all litigation in reference to said land, each party hereto shall furnish his attorney, at his own expense, but the court costs shall be shared pro rata in proportion to the interest in said land, as herein indicated; that is, for every dollar of cost U. F. Short shall pay, Wm. Kelly shall pay ten dollars and Wm. D. Simpson, Jr., fifteen dollars."

Before the execution and delivery of the foregoing agreement, Hepburn, as receiver of the bank, brought suit against Kelly and Short in the state court, in Camp county, to try the title and recover possession of the land. He afterwards, on December 28, 1894, brought this action in the circuit court of the United States, at Jefferson, against the same defendants, Kelly and Short, who made common cause in defending against the same. As appears in the report of our former decision, supra, plaintiff obtained a judgment in the circuit court against both of the defendants, which judgment we reversed, and the cause was remanded to the circuit court, with instructions to award a new trial. The case again came on for trial in the circuit court on January 29, 1898, on which date it was, on motion of the plaintiff, ordered that the suit be dismissed as to the defendant Short. On the same day the defendant Kelly moved the court to dismiss the suit for want of authority of the receiver to further prosecute the same. On this motion the court took time to consider, and on January 31st (the intervening day being Sunday) the court, being sufficiently advised, overruled Kelly's motion. The trial proceeded, and on February 4, 1898, resulted in a judgment in favor of the defendant William Kelly, to review which this writ of error was sued out.

On the trial U. F. Short testified, in substance, that, when our former opinion was given out, in which we referred to "charges of fraud against persons more or less reputable," he resolved that he would not be mixed up in this transaction any further; that the receiver of the bank had been ordered by the comptroller of the currency to close out these assets, and in obedience thereto the receiver came to the witness, and asked if he could not make a sale of the lawsuit; that the witness spoke to Judge Morris (Kelly's attorney) about

it, and said to him that, if they could raise the money, they could buy the receiver's title, and thus own the land; that both Morris and witness knew that the property belonged to Simpson, and that this purchase would settle it; that witness spoke to Simpson about it, but the latter thought he could beat the receiver; that Morris thought that he could raise \$1,000 on the \$2,500 which they proposed to offer to effect the purchase, and that the witness could raise the balance, but neither of them were able to raise it; that, before witness knew that he and Morris could not raise the money, he made a proposition to the receiver to pay \$2,500 for the bank's interest in the suit, which proposition had been submitted to the comptroller and accepted by him; that, when the witness found that Morris and he could not raise the money, he induced a Mr. Bartlett to buy the land, rather than disappoint the receiver; that the negotiation with the receiver had been conducted in the name of witness, and the deed was finally executed and delivered directly to him, and he immediately executed and delivered to Bartlett a warranty deed to the land; that Bartlett furnished the money, and witness had no interest whatever in the transaction; that the purchase was made with Bartlett's money, but that witness received \$1,000 for executing the warranty deed and for his services.

M. L. Morris, attorney for Kelly, testified, in substance, that the receiver of the bank told this witness that he wished to compromise the litigation; that he wanted to wind up the bank's affairs, and asked him (Morris) to make a proposition to buy the lands in behalf of Kelly; that witness asked a day or two to consider the matter; that Judge Short afterwards came to witness' office, and told witness that the receiver wanted to sell out and close up the litigation, and desired to act at once; that Short said that he was in a better position to buy the receiver out than witness was; that the original cross bill of Kelly, setting up the agreement of April, 1894, between William Kelly, U. F. Short, and William D. Simpson, Jr., was first filed in the state court, at Pittsburg, Tex., in March, 1897, after the plaintiff, H. C. Weaver, as receiver of the bank, had conveyed the land in controversy to Short; that in his negotiations with Short, in the summer of 1896, with reference to buying out the plaintiff, he stated to Short that he represented William Kelly, and, as Kelly's attorney, he made an oral agreement with Short to buy out the plaintiff; that he and Short even went further, and decided that, after Kelly and Short bought out the plaintiff, Short and witness would then buy out Kelly, and thus own the land, but that this was not to be considered until the deal with the receiver was consummated; that Short and Kelly did not have the money to pay the receiver, but Short agreed that, when the deal was ready to be consummated, the title would be cleared up, and he (witness) and Short expected then to borrow the money (\$2,500) to pay the plaintiff; that the sale was to be confirmed by the circuit court, at Dallas, in January, 1897, but on November 23, 1896, U. F. Short, or some one, without the knowledge of witness, slipped off to Waco, Tex., and had the sale to Short confirmed at a session of the circuit court then in session there, and, without the knowledge of witness, the deed of plaintiff, as receiver

of the bank, to Short, was executed December 8, 1896, and on the same day it and the deed of Short to Bartlett (both for the land in controversy) were sent to Camp county for record, and the first the witness knew of the two deeds was when he saw them in the recorder's office in Pittsburg, Tex., whither he had gone on business.

Where it had been made to appear that one party to a suit had sold out to the other, and that the suit was prosecuted by the purchasing party, for his own benefit, the supreme court, on its own motion, after notice and hearing, dismissed the case. *East Tennessee R. Co. v. Southern Tel. Co.*, 125 U. S. 695, 8 Sup. Ct. 1391. In a later case the supreme court said:

"We cannot consent to determine a controversy in which the plaintiff has become the dominus litis on both sides. * * * The litigation has ceased to be between adverse parties, and the case, therefore, falls within the rule applied where the controversy is not a real one. If the writ of error be dismissed, the judgment will remain undisturbed, and the plaintiff in error might be cut off from submitting the questions involved for the determination of the appellate tribunal; while, if the judgment be reversed, the minority of the stockholders of the defendant in error would be deprived of the benefit of the litigation in its favor. But, although the latter might be thereby subjected to the delay and expense of further litigation, they would still be free to vindicate whatever rights they are entitled to. Without considering or passing upon the merits of the case in any respect, we deem it most consonant to justice to reverse the judgment and remand the case for further proceedings in conformity to law." *South Spring Co. v. Amador Co.*, 145 U. S. 300, 12 Sup. Ct. 921.

Some of the earlier cases, announcing and illustrating the rule above referred to, are: *Lord v. Veazie*, 8 How. 251; *Cleveland v. Chamberlain*, 1 Black, 419; *Paper Co. v. Heft*, 8 Wall. 333; and *Dakota Co. v. Glidden*, 113 U. S. 222, 5 Sup. Ct. 428.

It is clear that the receiver of the bank has had no interest in the matter involved in this litigation since the 8th of December, 1896. Short continued to figure as a defendant in the litigation from December 8, 1896, when he acquired all of the plaintiff's title, until January 29, 1898, when the case came on for trial, and the suit, which he plainly then controlled, was dismissed as to him.

The jurisdiction of the circuit court depended wholly on the character of the original plaintiff (*Short v. Hepburn*, *supra*); and it continued to depend on the like character of his official successor, Weaver, who duly qualified as receiver, and, as such, became the party plaintiff in this litigation. By the compromise and sale of the bank's interest to Short, the control of this litigation passed fully to the defendants. The agreement between them and William D. Simpson, Jr., is one which a court of equity would enforce and charge Short as trustee for the benefit of the other parties thereto. Bartlett, if in fact he was a purchaser, and not merely a lender of the money, is charged with notice by the *lis pendens*, and could not take or hold a better position than Short occupied. Under the conditions which are shown to have existed, the circuit court should not have suffered the litigation to proceed for the benefit exclusively of the original defendants.

As was done in *South Spring Co. v. Amador Co.*, *supra*, we deem it most consonant to justice to reverse the judgment of the circuit court,

and remand the cause, with direction to that court to dismiss the case, without awarding costs in the circuit court to either party; and it is so ordered.

THOMAS v. COUNCIL BLUFFS CANNING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 13, 1891.)

No. 1,016.

1. EQUITY—JURISDICTION OF FEDERAL COURTS—ADEQUATE REMEDY AT LAW.

A federal court of equity is without jurisdiction of a suit by a stockholder of a corporation brought on behalf of himself and all the other stockholders, who are named, and the amount of stock held by each set out in the bill, to enforce a contract by which the defendant agreed to purchase, at its par value, all of the stock of the corporation, and to take and pay for a certain proportion of it each year, where the only cause of action alleged is a breach of the contract by a failure to make the required payments, and the only relief asked is a judgment for the contract price of the stock, as such cause of action is of legal cognizance, and the remedy at law is plain, adequate, and complete.

2. SAME—MULTIPlicity OF SUITS.

The fact that the defendant might be subjected to a number of legal actions affords no ground for a resort to equity by a complainant, where but a single action would be required to which he would be a party or in which he would have any interest.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

Warren Switzler (Charles G. Ryan, William A. Prince, Jacob Sims, and George H. Thummel, on the brief), for appellant.

John N. Baldwin, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree which dismissed a bill in equity that was brought to compel a debtor to pay some of its creditors the amounts due them under a written contract. In March, 1887, the Council Bluffs Canning Company, a corporation, and one of the appellees, made a written agreement with the Grand Island Canning Company, another corporation, to the effect that the Grand Island Company would procure from its stockholders and furnish \$22,000 for the purpose of purchasing a site for and constructing a factory at Grand Island, in the state of Nebraska, and that the Council Bluffs Company would pay an annual rental of \$2,200 for the use of this factory, and would pay back to the stockholders of the Grand Island Company the \$22,000 they were to advance, on or before 10 years, in annual installments of not less than \$2,200 per annum. The stockholders of the Grand Island Company furnished the money. The factory was completed and delivered to the Council Bluffs Company about July 10, 1887. That company paid the rent reserved for several years, and paid the first annual installment of the principal due to the stockholders, and then refused to pay them any more. The appellees Daniel W. Archer, George A. Keeline, and Samuel Haas guarantied the performance of

this contract by the Council Bluffs Company. After the factory was completed, the stock of the Grand Island Company was increased to about \$40,000. On March 6, 1895, Claudius W. Thomas, the appellant, and one of the stockholders of the Grand Island Company, exhibited a bill in equity in the court below, on behalf of himself and the other stockholders of that company, some of whom he named in his bill, offered to surrender their stock to the Council Bluffs Company, and prayed that that company might be ordered to receive it, and to pay to these stockholders the installments due under its contract for the years 1889, 1890, 1891, 1892, 1893, and 1894, and that, if it failed to do so, a judgment might be entered against the appellees therefor. In the briefs and arguments of counsel, the question of the power of the Council Bluffs Company to purchase stock in another corporation is exhaustively considered. The view we have been compelled to take of the appeal in this case renders it unnecessary to consider this question, but the thought occurs that perhaps that company had the power to borrow money and to agree to pay it back, and that it may be soon enough to consider whether it can acquire the stock when it has performed that agreement. Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America, 49 U. S. App. 523, 540, 544, 27 C. C. A. 73, 82, 85, and 82 Fed. 124, 133, 135.

The all-sufficient answer to this bill, however, is that the complainant had a plain, adequate, and complete remedy at law in this case. When the pleadings in this suit are stripped of immaterial averments and unnecessary verbiage, this is nothing but an action for a judgment for the installments of money due to the stockholders of the Grand Island Company, under the contract of March 18, 1887, masquerading in the garb of a suit in equity. The bill contains no allegation of any fraud, mistake, or of any other fact which might confer jurisdiction upon a court of equity. There is, indeed, a prayer for an accounting; but it is a futile prayer, for no accounting is necessary, and none could be had, because the amount which the Council Bluffs Company owes is written in the contract, and the amount which each stockholder is entitled to recover is measured by the number of shares of the original stock which he owns. The amount each stockholder is entitled to receive is not even an unliquidated amount.

If the appellant suggests that this suit may avoid a multiplicity of actions at law, the answer is that it cannot avoid a multiplicity of actions against him, and the fact that the appellees may be subjected to them is no ground for a resort to equity by the appellant. An action at law will yield him as complete and adequate relief as a court of equity can grant, and there is no danger that he will be subjected to any other action. If many actions are brought against the appellees, the appellant will not be subjected to the expense, delay, or vexation of those suits. The multiplicity of suits which confers jurisdiction in equity is a multiplicity of suits to which the complainant will be a party. A multiplicity of suits against the defendants to which he will not be subjected, and in which he has no interest, furnishes no ground for his resort to equity. Schulen-

berg-Boeckeler Lumber Co. v. Town of Hayward, 20 Fed. 422; Dodd v. City of Hartford, 25 Conn. 232, 238.

It is true that, where numerous and unknown parties are interested in, and necessary to the determination of, one's rights, he may sometimes bring a suit in equity on his own behalf, and on behalf of all others similarly situated, because the enforcement of their rights at law would be impracticable and impossible. But the stockholders on whose behalf this appellant brought his suit are not unknown. They are named in his bill. The amount of stock which each one holds is there stated. The bill contains the averments that the appellant brings this suit by their authority; that he tenders their stock, and asks to recover under the contract the very definite sum of \$21,525. We can conceive no reason why the appellant and each of the stockholders he names did not have a plain, adequate, and complete remedy by an action at law upon this agreement. If they desired to avoid several actions, it is not perceived why assignments of their various claims to one of their number would not have enabled him to maintain an action at law upon them, while it would have perfectly preserved the constitutional rights of the appellees.

The seventh amendment to the constitution of the United States provides that "in suits at common law, where the value in controversy exceeds twenty dollars, the right to trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined by any court in the United States than according to the rules of the common law." Congress has enacted that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." Rev. St. U. S. § 723. In Hipp v. Babin, 19 How. 271, 278, the supreme court declared that "whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." The only remedy the complainant seeks in this suit is a judgment for \$21,525 on the written contract. An action at law upon the contract is certainly as plain a way to a judgment for money due upon it as the devious and circuitous path which the appellant is trying to blaze out by means of this suit in equity, and, since the ultimate relief he seeks is the same that he would obtain at law,—that is to say, a mere judgment for money due,—the remedy at law is certainly as adequate and as complete as in equity. When the only remedy sought is the recovery of a judgment for a specified amount, and no discovery or accounting is requisite, and no fraud, mistake, or other fact conferring jurisdiction in equity is alleged, the remedy at law is as plain, complete, and adequate as it is in equity, and a suit in equity cannot be maintained in the national courts. Mills v. Knapp, 39 Fed. 592; Frey v. Willoughby, 27 U. S. App. 417, 11 C. C. A. 463, and 63 Fed. 865; Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276. The decree below is affirmed.

SHARKEY v. PORT BLAKELY MILL CO.

(Circuit Court, D. Washington, N. D. March 4, 1899.)

REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—JOINDER OF SEPARATE CAUSES OF ACTION.

The right of a sole defendant sued in a court of another state by a citizen of such state on a cause of action existing in favor of the plaintiff, upon which he claims more than \$2,000, to remove the cause into a federal court, is not defeated because the plaintiff, as permitted by a state statute, has joined in his complaint a separate cause of action held by him as assignee of a third person, whose citizenship does not appear, and of which the federal court would not have jurisdiction; and in such case the removal carries the entire suit, so that the defendant is not required in his petition to set forth the existence of a separable controversy.

On Motion to Remand.

Fred H. Peterson, J. D. Jones, and Ballinger, Ronald & Battle, for plaintiff.

W. H. Gorham, for defendant.

HANFORD, District Judge. This case has been argued and submitted upon a motion to remand to the state court, in which it was originally commenced. The defendant's petition for removal shows that the plaintiff is a citizen of the state of Washington, and the defendant is a California corporation. The complaint sets forth two distinct causes of action, the first being a claim for damages for breach of a contract of affreightment made by and between the plaintiff and the defendant, the amount of damages claimed being \$18,000; the second cause of action being a similar claim for damages for breach of a contract of affreightment made by and between one Patterson and the defendant, which Patterson assigned to the plaintiff. The record is silent as to the citizenship of Patterson. If the action was founded upon the first cause of action only, the right of the defendant to remove the case into this court would be free from any question. Under the authorities, it is equally clear that, if the action were to recover upon the assigned claim only, the case would not be removable. Therefore the following problems are involved: First. Does the jurisdiction which the court has of the first cause of action necessarily expand by reason of the joinder of a second cause of action, which by itself would not be within the jurisdiction of the court, so as to comprehend both? Second. Does the joinder of a cause of action of which jurisdiction is not given necessarily defeat the jurisdiction as to a cause of action which by itself would be cognizable in a circuit court of the United States? Third. Where two separate causes of action accruing to different persons are united in one action, brought by a single plaintiff, does the defendant have the right to remove the case into a circuit court, on the ground of there being a separable controversy between himself and the plaintiff; and, if so, does he forfeit the right of removal by failure to set forth the separable controversy in his petition for removal? Fourth. In an action founded upon two distinct causes of action, one of which is within the jurisdiction of the circuit court, and the other

not, does the removal necessarily sever the case, so as to leave one cause of action still pending in the state court?

Counsel for the plaintiff have argued that the case is in the same situation that it would be if prosecuted by the plaintiff and his assignor jointly. Their contention is that, as to the first cause of action, the plaintiff is suing in his individual capacity, as to the second he is suing as the representative of another, and, as the court could not take jurisdiction of the action in its entirety, if no assignment of the second cause of action had been made, unless it appeared affirmatively on the face of the record that both plaintiffs were citizens of this state, the court must of necessity hold, in deciding the question of jurisdiction, that the case has not been brought within the jurisdiction of the court by the assignment. While this position seems to be strong, I do not regard it as tenable. The first cause of action is complete in itself, and all the conditions exist which are essential to the jurisdiction of this court, and to the right of the defendant to remove it from the state court into this court. As to that cause of action, no fraud upon the court has been attempted by the making of a collusive assignment for the mere purpose of transferring a lawsuit into a federal court which could not be so transferred without resorting to such subterfuge. The joinder of a second cause of action does not, in my opinion, impair the right of a defendant to choose the forum. The statute defining the jurisdiction of the circuit courts of the United States is not so narrow as to exclude all cases, except those in which the issues are wholly made up of questions in dispute between citizens of different states. The words of the statute appear to have been carefully chosen to express an intent to confer jurisdiction of "all suits of a civil nature, at common law or equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars, * * * in which there shall be a controversy between citizens of different states. * * *" 25 Stat. 434. These words imply that cases of which complete jurisdiction is given may involve other controversies and matters besides a controversy between citizens of different states; and there is no provision in the law for dividing a case into parts, so that a distinct controversy in the case may be removed from a state court into a circuit court of the United States, and other controversies in the same case be left pending in the court of original jurisdiction. Where a plaintiff brings a suit originally in a circuit court of the United States, and sets forth in his complaint a cause of action of which the court has jurisdiction, and also other causes of action not cognizable in a circuit court of the United States, the authorities hold that he is entitled to proper relief as to the cause of action of which the court has jurisdiction; but, as to the causes of action not cognizable in the court, relief must be denied. *Mississippi Mills v. Cohn*, 150 U. S. 202-209, 14 Sup. Ct. 75. In such a case, the court, by granting relief to the extent of its jurisdiction, and refusing to assume jurisdiction not conferred by law, necessarily severs the different causes of action from each other. This case, however, does not come within the rule of the decision of the supreme court just cited, for the reason that the plaintiff commenced his action in a court which has jurisdiction of all the

causes of action set forth in his complaint, and his right to unite several distinct causes of action in one complaint is expressly given by the Code of this state, and the law gives him the right to have them all adjudicated at the same time. He may, if he elects to do so, dismiss as to the second cause of action without prejudice, and in that way effect a practical severance. But the defendant is not authorized to deprive him of his right to have both causes of action disposed of in one trial. *Morrison v. Trading Co.*, 85 Fed. 802.

The same section of the statute which gives jurisdiction to circuit courts of the United States of cases in "which there shall be a controversy between citizens of different states" also provides that the circuit and district courts of the United States shall not "have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." 25 Stat. 434. If this clause is applicable to the case under consideration, it is necessarily repugnant to the preceding clause, which requires the court to take cognizance of the case in its entirety, and has the effect to create an exception of cases in which there is a controversy between citizens of different states, and in which the plaintiff unites, with a cause of action in his own favor, another cause of action against the same defendant, which he may have acquired by an assignment thereof. It is manifest, however, that the only purpose of the clause last quoted is to prevent the transfer of choses in action for the mere purpose of diverting litigation into the federal courts. Considering the purpose of the rule and the intent of congress, I am led to the conclusion that this clause of the statute cannot be applied to a part of a lawsuit, so as to deprive a defendant of the right to remove a case which is removable simply because the plaintiff has united an assigned cause of action, nor to interfere with the complete adjudication of all controversies in a case of which the court has jurisdiction, nor to deprive a defendant of the right to plead a debt assigned to him before the commencement of an action, as a set-off. In such cases it is impossible to give effect to the prohibitory clause, without depriving one or other of the parties of a substantial right, and to that extent defeating justice. This is not a suit to recover the contents of a promissory note or other chose in action in favor of an assignee. The main object of the suit is to recover \$18,000 which the plaintiff claims to be due to him for the breach of a contract to which he is a party. By claiming the privilege which the Code of this state allows to a plaintiff of uniting an additional cause of action, he can require the defendant to submit both causes of action to adjudication at the same time; but the privilege cannot be so extended as to obstruct his adversary, in the exercise of his right to remove the case into this court, nor diminish the power of the court to determine all the issues involved, and dispose of the whole case.

The clause of the statute which provides that "when in any suit mentioned in this section there shall be a controversy which is wholly

between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district" (25 Stat. 434), has reference to cases in which several persons are joined as defendants, and authorizes one or more of them actually interested in a separable controversy to remove the suit into the circuit court of the United States for the proper district, without the consent of his or their co-defendants; and in every such case the petition for removal must necessarily specify the separable controversy, and claim the right of removal on the ground of a separable controversy, wholly between citizens of different states; and such a case cannot be properly removed or brought within the jurisdiction of a circuit court of the United States, if the petition fails to set forth the separable controversy. But the words of the statute exclude the idea that a case like this, in which one individual is the sole plaintiff, and a corporation is the sole defendant, can be removed on the ground that there is in the case a separable controversy. Therefore I hold that the defendant's right to remove the case into this court has not been forfeited by failure to allege a separable controversy in the petition for removal. Motion to remand denied.

SIOUX CITY, O. & W. RY. CO. v. MANHATTAN TRUST CO.

SIOUX CITY, O. & W. RY. CO. et al. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1893.)

Nos. 505 and 661.

1. RAILROADS—SUIT TO FORECLOSE MORTGAGE—ISSUES.

In a suit by a trustee to foreclose a railroad mortgage, the question of the ownership of the bonds secured properly comes up for consideration on distribution of the proceeds of the sale, and not before; and allegations in the answer of the mortgagor seeking to raise such question are properly stricken out by the court.

2. SAME—VALIDITY OF ISSUE OF STOCK AND BONDS—NEBRASKA CONSTITUTION.

Stock and bonds of a railroad company, issued in exchange for the stock and bonds of a former company, not shown to have been invalid, in pursuance of a reorganization scheme, which, so far as appears, was entered into in good faith by the issuing company, are not invalid, under Const. Neb. art. 11, § 5 (Consol. St. Neb. 1891, p. 72), which provides that a railroad company shall not issue stock or bonds except for money, labor, or property actually received, and that fictitious issues of stock or bonds shall be void, because at the time of the exchange the cash value of the physical property and franchises acquired by the reorganized company was not equal to the par value of its securities.

Appeals from the Circuit Court of the United States for the District of Nebraska.

On October 30, 1893, the Manhattan Trust Company, the appellee, as trustee in a deed of trust or mortgage executed by the Sioux City, O'Neill & Western Railway Company, one of the appellants, exhibited its bill of complaint in the circuit court of the United States for the district of Nebraska, against the mortgagor, for the purpose of foreclosing said mortgage. The mortgage sought to be foreclosed covered the railroad of the Sioux City, O'Neill &

Western Railway Company in the state of Nebraska, from Covington, in that state, to a point one mile west of O'Neill, Neb., a distance of about 130 miles, and also certain shares of stock in the Pacific Short-Line Bridge Company, which the mortgagor professed to own, and was given to secure the payment of the mortgage bonds of the defendant company to the amount of \$18,000 per mile on the line of road last aforesaid, or, in the aggregate, to secure mortgage bonds to the amount of \$2,340,000. A receiver of the mortgaged property was appointed on the day said complaint was filed, and on December 29, 1893, the defendant company filed its answer. At a later date, February 28, 1894, the defendant also filed a cross bill, in which it sought to make the firm of J. Kennedy Tod & Co., of the city of New York, a party to the foreclosure suit, both in its own right, and as trustee for certain other persons whom it was supposed to represent. At a later date, to wit, May 12, 1894, E. H. Hubbard, as assignee of the Union Loan & Trust Company, an insolvent Iowa corporation, which had previously done business at Sioux City, Iowa, asked leave to intervene in the foreclosure suit for the protection of his interest, as assignee, but such leave was denied by the trial court without prejudice. The answer and cross bill thus filed, which were very lengthy, contained, in substance, the same allegations. For present purposes it will suffice to say that by its answer and cross bill the defendant company sought to show the following facts: That, prior to the organization of the Sioux City, O'Neill & Western Railway Company, there had been a corporation called the Nebraska & Western Railway Company, which had constructed the line of road now in controversy, and had issued mortgage bonds to the amount of \$2,583,000, which bonds were held by the Union Loan & Trust Company of Sioux City, Iowa, as collateral security for the payment of certain notes which the trust company had itself indorsed and sold to investors in various parts of the United States; that the Sioux City, O'Neill & Western Railway Company was the successor of the Nebraska & Western Railway Company, and had come into existence in pursuance of a scheme to reorganize the latter company after it had become involved in debt; that in the course of such reorganization, and to effectuate that object, the new company had issued its bonds to the amount of \$2,340,000, being the bonds now in controversy, in exchange for the bonds of the old company, and that, when so issued, they took the place of the old securities, and were in equity subject to the same pledge; that, prior to said reorganization, one A. S. Garretson, who was connected with the Union Loan & Trust Company, and was also engaged with some other parties in various railroad enterprises in and about Sioux City, had wrongfully withdrawn the old securities of the Nebraska & Western Railway Company from the possession of the last-named trust company, and had hypothecated them with J. Kennedy Tod & Co., of New York, as security for a loan of \$1,000,000, subsequently increased to \$1,500,000, which loan was made to said Garretson to assist him in the various enterprises in which he and his associates were engaged; that, when the reorganization took place, the new securities, being the bonds in suit, had passed into the possession of J. Kennedy Tod & Co., in exchange for the old securities; and that the last-named firm had received both the old and the new securities under circumstances that were set out at great length in the pleadings, which affected that firm with knowledge of the prior rights of the various note holders for whose benefit, as it was claimed, the old securities had originally been deposited with the Union Loan & Trust Company. Both the answer and the cross bill pleaded further facts which were intended to show that the new securities issued by the Sioux City, O'Neill & Western Railway Company were void, under the provisions of section 5 of article 11 of the constitution of the state of Nebraska (Consol. St. Neb. 1891, p. 72), which reads as follows: "No railroad corporation shall issue any stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created, and all stock, dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void. * * *"

Exceptions were filed to the aforesaid portions of the answer which we have stated, in substance. A demurrer was also interposed to the cross bill, and, on the hearing of the exceptions to the answer and the demurrer to the

cross bill, both were sustained, whereupon the objectionable allegations were expunged from the answer, and the cross bill was dismissed. From the order denying E. H. Hubbard, assignee, leave to intervene in the foreclosure suit, and from the last-mentioned orders expunging a part of the answer, and dismissing the cross bill, all of which were made on May 12, 1894, the first of these appeals appears to have been taken, being case No. 505. A decree of foreclosure was entered on December 7, 1894, from which decree the second appeal was taken, the same being case No. 661. Both of these appeals were before this court at a former term, and were heard in connection with the case of *Hubbard v. Tod*, which latter case came on appeal to this court from the circuit court of the United States for the Northern district of Iowa, and involved the question which was sought to be raised in the case now in hand,—whether Hubbard, assignee of the Union Loan & Trust Company, or J. Kennedy Tod & Co., had the superior lien on the mortgage bonds of the Sioux City, O'Neill & Western Railway Company. On the former occasion, when the appeals were heard, the decree below was in all things affirmed, but the order of affirmance was subsequently set aside, for reasons which are fully stated in 40 U. S. App. 154, 22 C. C. A. 606, and 76 Fed. 905. The Iowa case above mentioned eventually went to the supreme court of the United States on a writ of certiorari, and was recently decided by that court adversely to the claim of the assignee, the decree of the circuit court, which was affirmed by this court, being also affirmed by the supreme court. 171 U. S. 474, 19 Sup. Ct. 14. Since the last affirmance by the supreme court of the decree in the Iowa case, a motion has been made in the case at bar for an affirmance of the decree of foreclosure, which motion is based on the ground that, by proceedings duly taken in the circuit court of the United States for the Northern district of Iowa since the mandate of the supreme court was there filed, E. H. Hubbard, assignee of the Union Loan & Trust Company, has been forever barred and foreclosed of all of his rights in or to the bonds of the defendant company which are involved in the present foreclosure proceedings. The case has been again heard upon its merits, as well as upon the aforesaid motion.

John C. Coombs and Henry J. Taylor (Charles H. Hanson, on the brief), for appellants.

John L. Webster (George W. Wickersham, on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is manifest, we think, that the appeals which were taken in this case are without merit, in so far as they are predicated upon the action of the lower court in refusing to permit E. H. Hubbard, assignee of the Union Loan & Trust Company, to intervene in the case, and in so far as they are predicated upon the action of the lower court in striking out those allegations of the defendant's answer which attempted to show that the assignee above named had a better title to the bonds in controversy than J. Kennedy Tod & Co., who claimed to own them. The facts alleged in the motion for affirmance which has recently been filed in this court by the appellee are not disputed, and must be taken as conceded. From this source it appears that the assignee of the trust company has not exercised his right to redeem the bonds in controversy from the superior lien of J. Kennedy Tod & Co. by the payment of \$1,500,000 and interest, which right of redemption was secured to him by the decree rendered in the Iowa case (*Manhattan Trust Co. v. Sioux City & N. R. Co.*, 65

Fed. 559-568), which decree was recently affirmed by the supreme court of the United States (171 U. S. 474, 19 Sup. Ct. 14); that, under the provisions of said decree, the assignee is at the present time barred of all interest in the bonds; and that the controversy heretofore existing between him and J. Kennedy Tod & Co. as to their respective rights to the bonds has been settled finally in a suit between them, where that was the sole question at issue. It results from these facts that the action of the lower court in refusing to permit the assignee to intervene in the case at bar is now immaterial. Such leave was sought by the assignee for no other purpose than to inject into the foreclosure suit, to which the firm of J. Kennedy Tod & Co. was not a party, the same controversy between the assignee and the last-mentioned firm concerning the ownership of the bonds which was then pending in the Iowa case, and has since been determined adversely to the claim of the assignee. Besides, the order refusing the assignee leave to intervene was not a final order, from which an appeal would lie, as this court has recently decided. Credits Commutation Co. v. U. S., 91 Fed. 570. It is equally clear that, by reason of the adjudication in the Iowa case, the defendant company cannot be heard at the present time to complain because the trial court expunged those parts of the defendant company's answer in which it attempted to inject into the foreclosure suit the pending controversy between the assignee of the Union Loan & Trust Company and J. Kennedy Tod & Co., concerning the ownership of the bonds. That issue having been determined as between the parties who are primarily interested in its determination, it cannot be relitigated in the case at bar by the defendant company.

Moreover, we are of opinion that the lower court properly expunged that part of the defendant's answer, and that its order to that effect was a proper one when the same was made. The issue sought to be raised by the defendant company concerning the ownership of the bonds was one which, in the orderly progress of the cause, would necessarily have been tried and determined as between the rival claimants of the bonds, when the trustee in the mortgage was called upon to distribute the proceeds of the foreclosure sale, and it was wholly unnecessary to consider it until that time had arrived. For this reason, therefore, the lower court properly rejected the proposed issue at the time it was tendered by the answer, as well as for the reason that the same issue was being tried in a proceeding between the proper parties in another jurisdiction.

This leaves for consideration the single question whether the lower court erred in expunging that part of the defendant's answer in which it sought to show that the bonds in controversy were void under section 5, art. 11, of the Nebraska constitution, quoted above in the statement; and there was no error in this regard, unless the answer was clearly sufficient to establish such invalidity. It is a notable fact that, on the first submission of the case to this court, little or no attention was paid to the constitutional question, either in the brief or on the oral argument of appellant's counsel; but, on the last hearing, it was given great prominence, and becomes the question of chief importance.

The material allegations contained in the defendant's answer which tend to establish the invalidity of the bonds are, in substance, these: That the railroad of the defendant company was formerly the property of the Nebraska & Western Railway Company, and cost to construct and equip, in the year 1890, a sum not to exceed \$2,000,000, as the defendants are advised and believe; that two persons, George W. Wickersham and A. S. Garretson, who bought the property of the Nebraska & Western Railway Company at a foreclosure sale, as trustees for the benefit of its bondholders, caused the defendant company, the Sioux City, O'Neill & Western Railway Company, to be formed, with a capital stock of \$3,600,000, and a bonded indebtedness of \$2,340,000, for the presumed purpose (because the defendant has been so advised) of evading the constitutional provision of the state of Nebraska above quoted; that the par value of the stock and bonds issued by the defendant company, to wit, \$5,940,000, as defendant is advised and believes, is three times the actual cost or intrinsic value of its property; that no substantial part of either said stock or bonds was ever paid in cash to the defendant company, or applied to the construction or equipment of said property; and that all of the stock, save a few shares, came to the hands of A. S. Garretson, and was deposited with the Union Loan & Trust Company of Sioux City, Iowa. On the other hand, the defendant's answer and the exhibits thereto show that the Nebraska & Western Railway Company was a corporation which had a capital stock of \$2,500,000, and an outstanding mortgage indebtedness somewhat in excess of that sum; that it was organized with a view of constructing a through line of railroad from Sioux City, Iowa, to a junction with the Central Pacific Railroad at Ogden, Utah, to be termed the Pacific Short Line; and that the road from Sioux City, Iowa, to O'Neill, Neb., formed one of the divisions of the proposed road. There is no allegation in the answer that either the outstanding stock or bonds of the old company, the Nebraska & Western Railway Company, had not been paid for in full, or that the same were, for any reason, either void or voidable. The answer further shows that the bonds and stock of the new company, the Sioux City, O'Neill & Western Railway Company, in the reorganization scheme, took the place of the stock and bonds of the old company, the bonds going to J. Kennedy Tod & Co. in exchange for the old bonds, and the stock to the Union Loan & Trust Company of Sioux City, Iowa. No allegation is found in the answer which shows who the officers and directors of the new company were at the date of the reorganization, and no allegations are found which will serve to impeach the good faith of such officers and directors in issuing its securities at the time of the reorganization, since their names and functions are not disclosed. There is an allegation, as heretofore stated, which tends to impeach the good faith of Wickersham and Garretson, who purchased the property and franchises of the old company at the foreclosure sale; but as they were the vendors of the property which was acquired by the new corporation, and were entitled to dispose of the property to the best advantage, and as it is not alleged that they were either officers or directors of the new company when it issued its stock and executed its bonds, it is not

apparent that their motives could have had any effect upon the validity of the transaction.

In view of the premises, we are of the opinion that the answer of the defendant company was insufficient to establish the invalidity of its mortgage indebtedness, and that no error was committed in expunging that part of its answer in which it undertook to plead such a defense. The case does not differ in any of its essential features from a case decided by the supreme court (*Railroad Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482), in which case it was said, in substance, that such a provision as is found in the Nebraska constitution is not necessarily indicative of a purpose to make the validity of every issue of stock or bonds by a corporation depend upon the inquiry whether the property received therefor was of equal value in the market with the stock or bonds, and in which it was further held that such provisions are not designed to prevent corporations from exchanging their stock or bonds for money, property, or labor, upon such terms as they think proper, provided the transaction is a real one, based upon a present consideration which is deemed adequate, and is entered into for a legitimate corporate purpose, and is not a mere device to evade the law, and accomplish what is forbidden. In that case, as in the one at bar, the owners of a certain railroad who had bought the same at a foreclosure sale, in trust for mortgage bond-holders, conveyed it to a new company that had been formed in pursuance of a plan of reorganization, and received in exchange all the stock of the new company as full paid, and also mortgage bonds of the new company to the amount of \$2,600,000, which were distributed among the holders of the bonds of the old company, and were taken by them in exchange for the old securities. The transaction in question took place in Arkansas, under a provision of the constitution of that state (section 8, art. 12), which provided that "no private corporation shall issue stock or bonds, except for money or property actually received or labor done; and all fictitious increase of stock or indebtedness shall be void." It also appeared in that case, from admissions contained in the pleadings, that the property which had been acquired by the new company did not exceed the par value of its stock. The transaction was sustained notwithstanding these facts, the court saying, in substance, that it did not fall within the prohibition of the constitution; that the owners of the property and franchises, when they conveyed the same to the reorganized company, had the right to fix the terms upon which they would so convey it; that all that was done was to form a new company in lieu of the old, with substantially the same amount of stock and bonds which the old company had lawfully issued; and that, in so far as the pleadings disclosed, there had been no fictitious increase or issue of either stock or bonds, within the true intent and meaning of the constitution. See, also, *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642-656. These observations in *Railroad Co. v. Dow* are strictly applicable to the case in hand, and should be decisive of the present controversy, in view of what has already been said concerning the averments contained in the defendant's answer, and the conditions which appear to have existed when the reorgani-

zation took place. It is contended, however, that a different construction than the one above indicated has been placed on section 5 of article 11 of the Nebraska constitution by the courts of that state, and that, according to the local view of the purpose and effect of the constitutional inhibition, the securities which are now in question are null and void. The case upon which this contention appears to be wholly founded (*State v. Atchison & N. R. Co.*, 24 Neb. 143, 38 N. W. 43) was one in which the state sought to forfeit the charter of the railroad company by a writ of quo warranto for acts of misuser and nonuser. The acts which were complained of by the state consisted in becoming consolidated with a competing railroad, in violation of the constitution of the state, and in executing a lease whereby the defendant road had abandoned the exercise of its public duties and franchises. No complaint appears to have been made in that case of an excessive issue of bonds or stock; and, in view of the issues that were raised by the pleadings, nothing was said in the case cited which can be regarded as authoritative upon the point involved in the present controversy. In the case at bar we are dealing with the question whether stock and bonds which were issued in exchange for other stock and bonds not shown to have been invalid, and in pursuance of a reorganization scheme which, for aught that appears, was entered into in perfect good faith by the issuing company, should be adjudged invalid because at the time of the exchange the cash value of the physical property and franchises which were acquired by the reorganized company was not fully equal to the par value of its securities. This question, we think, should be answered in the negative, for reasons already stated, since we find nothing in the local decisions to which our attention has been directed which serves to alter that conclusion.

It results from what has been said that the orders and the decree from which the appeals were taken should be affirmed, and it is so ordered; but inasmuch as counsel for the appellee has suggested in this court that it is considered desirable to make some changes in the provision of the final decree relative to the appointment of appraisers, to make the decree more nearly comply with the requirements of the local law regulating judicial sales in the state of Nebraska, the order of affirmance will be accompanied with leave to the circuit court to modify or amend its decree in the respect last stated in such manner as it may deem necessary or advisable.

MAYNARD, Atty. Gen., v. GRANITE STATE PROVIDENT ASS'N et al.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1890.)

No. 540.

1. CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES—DISTRIBUTION OF ASSETS OF INSOLVENT CORPORATIONS.

An amendment of the building association laws of Michigan (Pub. Acts 1895, No. 269, p. 580) imposes certain conditions on corporations organized in other states to entitle them to engage in business in the state. Section 27 provides that the authority of any such association may be revoked at any time, in which event the attorney general shall institute proceedings to wind up its business in the state, and that "stockholders and creditors in this state of such foreign corporation shall have a first lien on all assets in this state of such foreign corporation, and the business in this state of such foreign corporation shall be closed by such receiver, and its assets converted into money, to satisfy the claims of such stockholders and creditors." A mutual building association of another state, engaged in business in Michigan, became insolvent. Its authority in that state was revoked, and proceedings were brought by the attorney general under such statute. The only creditors in the state were shareholders, and it held certain mortgage assets covering property therein. *Held* that, as against shareholders who were residents and citizens of other states, the provision of the statute giving preference to citizens of Michigan in the distribution of assets therein was invalid, as in violation of section 2 of article 4 of the constitution of the United States, declaring that citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

2. FOREIGN BUILDING ASSOCIATIONS—PROTECTION OF LOCAL SHAREHOLDERS.

The requirements of such statute, so far as valid, are fulfilled where the association is being wound up by the courts in the state of its organization, by a decree in the Michigan suit requiring the receiver to turn over the proceeds of the Michigan assets when collected, less the cost of collection, to the general receiver, on his execution of a sufficient bond to secure to the Michigan shareholders their pro rata of the total assets.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This is an appeal from a decree of the circuit court of the Eastern district of Michigan, denying the relief prayed by the attorney general of Michigan in a bill in equity filed by him in a Michigan state court against the Granite State Provident Association, a corporation of New Hampshire. The bill was removed from the state court to the court below on the ground of diverse citizenship. The object of the bill was to wind up the affairs and business of the defendant association in Michigan, under the provisions of the statute of Michigan, hereinafter set forth, on the ground that its license to do business in the state of Michigan had been duly revoked. The bill prayed for the appointment of a receiver, the collection of the Michigan assets, the distribution of the proceeds pro rata among the creditors and stockholders of the association resident in Michigan, and, after the payment of their claims in full, the turning over of the remainder of the assets to one David A. Taggart, the assignee of the insolvent defendant association, who had been appointed by the supreme court of New Hampshire under a statute of that state. Taggart, the New Hampshire assignee, appeared in the cause by petition averring that he had been appointed under the laws of New Hampshire to wind up the affairs of the association, which had been declared insolvent by the supreme court of New Hampshire; that, as such assignee, he had received from the officers of the association notes payable in New Hampshire due the association for money loaned and secured by mortgages on real estate in Michigan; that, by the direction of the supreme court of New Hampshire, he had turned over the notes and mortgages to the receiver of

the court below for collection, treating the suit below as one ancillary to the one winding up the association in New Hampshire. In his petition he prayed that the proceeds of the notes, when collected, less the expense of collection, might be turned over to him for distribution pro rata to all the creditors and the stockholders of the association, wherever resident, in accordance with the laws of New Hampshire and the by-laws of the association. The circuit court denied the prayer of the bill that the proceeds of the note and mortgages should be distributed, first, among the Michigan creditors and stockholders, but directed the receiver to collect them, and, after deducting a sufficient sum for the expense of collection, to turn the proceeds over to the New Hampshire association for a ratable distribution to all the shareholders of the association, taking a bond from the assignee conditioned upon the payment of the proper part of the proceeds of all the assets of the association to the Michigan creditors and shareholders.

The defendant the Granite State Provident Association was a corporation organized under the laws of New Hampshire in 1881. It had other powers under its charter, but the only one we are here concerned with was its power to carry on business as a building association on the mutual plan. For seven years prior to 1895 the defendant association did business as a building association in Michigan, without restriction by Michigan laws. In 1895, the legislature of Michigan amended the general building association law by adding several sections making it unlawful for any corporation organized under the laws of any other state to engage in the business of a building and loan association until it should comply with certain requirements of the act which included filing a copy of its act of incorporation, and paying a franchise fee. Section 27 of the amendment provided that "the secretary of state may at any time, for reasonable causes, with the concurrence of the attorney general, revoke the authority of any foreign corporation to do business in this state; and in such event the attorney general shall take proceedings to wind up the business of such foreign corporation in this state, and a receiver may be appointed for the assets of such foreign corporation in this state. Stockholders and creditors in this state of such foreign corporation shall have a first lien on all assets in this state of such foreign corporation, and the business in this state of such foreign corporation shall be closed by such receiver, and its assets converted into money, to satisfy the claims of such stockholders and creditors."

It appears from the agreed statement of facts that on September 3, 1895, the date when the association took out its license under the foregoing act, it had then issued 7,506 shares of stock, and it had then placed loans secured by mortgage upon Michigan real estate in the amount of \$67,925; that, after the date of its license under the law of 1895, it issued 3,009 shares of stock to Michigan shareholders, and made further loans upon Michigan real estate amounting in the aggregate to \$10,300. It further appears that it has no creditors in the state of Michigan except the stockholders, and that, if the notes now held by the receiver were to be applied upon the Michigan shares alone, it would pay them in full, and would leave a small surplus to be turned over to the New Hampshire assignee. If, however, the New Hampshire assignee is permitted to use the proceeds of the notes secured by mortgages on Michigan real estate in the ratable distribution to the stockholders of the association, wherever resident, there will be paid but about 50 per cent of the amount due upon the shares. By the by-laws of the association, adopted May 16, 1895, it was provided, among other things, that the treasurer should have the custody of all the securities and funds of the association, and that all certificates of shares, notes, bonds, or contracts for the payment of money, and all payments of money, should be payable at the home office of the association in the city of Manchester, and should be governed by the laws of New Hampshire. The notes which have been turned over by the assignee to the receiver were all made payable in New Hampshire. Upon this state of facts, the circuit court held—First, that the act of June 4, 1895, could not and did not affect the contract between the association and the holders of the 7,500 shares of its stock taken before the passage of the act, because otherwise it would impair the obligation of an existing contract in New Hampshire; (2) that the owners of the other 3,000 shares,

taken after the passage of the act, in subscribing to the contract of membership, which provides for a ratable distribution of assets, must be held to have waived by such subscription all right to the preference secured to them by the statute; (3) that the statute, in giving preference to stockholders, did not extend the privilege to shareholders or members of mutual associations who could not properly be described as stockholders; (4) that, if the term includes shareholders in mutual companies, then the Michigan assets are to be devoted to the payment to the Michigan shareholders of only "that amount which they have engaged to accept, viz. whatever dividend is justly and equitably due them upon the final settlement of the affairs of the company and the distribution of its assets upon the basis of the equality of said shareholders with other members of their class, in whatever state resident"; (5) that the notes and mortgages upon Michigan land securing them were made payable in New Hampshire, were held by the association there, and were not assets in Michigan, and that, therefore, there were no assets subject to the operation of the act of 1895; and, finally, (6) that the act of 1895 is invalid, under the constitution of Michigan (section 20, art. 4), which provides that "no law shall embrace more than one object, which will be expressed in its title."

The petition for removal filed jointly by the Granite State Provident Association and David A. Taggart, assignee, states: "That Fred A. Maynard, attorney general as aforesaid, was at the time said suit was instituted, and still is, a citizen of the state of Michigan, and his official residence is at Lansing, Ingham county, in said state, and that said suit was instituted in the Ingham county circuit court, such circuit being in the Eastern district of Michigan; that the said complainant files the said bill in the interest of the members of the Granite State Provident Association, who are residents and citizens of the state of Michigan, and who were members of said association, and residents and citizens of Michigan at the time of the filing of said bill of complaint; that these defendants, the Granite State Provident Association and David A. Taggart, were at the time said suit was commenced, and ever since have been, and now are, citizens of the state of New Hampshire, and residents of the state of New Hampshire, the said company being incorporated under the laws of the state of New Hampshire. (3) That the bill of complaint was filed to secure to the members of said association, as aforesaid, who were residents and citizens of the state of Michigan, a first claim and lien upon the assets of said association located in the state of Michigan, and a preference over members of said association, who are not residents or citizens of the state of Michigan." In the first paragraph of the answer of the two defendants they admit the truth of the first paragraph of said complainant's bill of complaint, "that Fred A. Maynard is the attorney general of the state of Michigan, and that he filed said bill of complaint in behalf of the shareholders of the Granite State Provident Association, living in the state of Michigan, and who are citizens of the said state of Michigan." By the eleventh averment of the answer the defendants admit "that loans of money had been made by said Granite State Provident Association to shareholders, who were residents and citizens of the state of Michigan, upon mortgages given upon property in the said state of Michigan, as security for such loans, to the amount of eighty thousand dollars and upward. But they allege that substantially all of said stock was sold to shareholders, and loans made to shareholders in the state of Michigan, prior to September 3, 1895; and they allege that said Michigan shareholders in said association have only the same interest in the assets of said association, wherever the same may be situated, as the other shareholders who are residents of other states of the Union. (12) And these defendants, further answering, admit in substance the thirteenth paragraph of said bill of complaint; that the shareholders of said association residing in the state of Michigan purchased shares, and made payment in good faith. And also these defendants allege that the shareholders of said association, residents of other states than that of Michigan, also purchased shares of stock in said association in good faith, and are entitled to the same protection upon their shares, from the proceeds that may be realized from the assets of said association, as the shareholders residing in the state of Michigan." In the fourteenth paragraph the defendants allege "that the

title of said assignee, under the order of the supreme court of the state of New Hampshire, was ample to enable and authorize him to enforce claims wherever and in whatever states they might exist, or have been contracted, so as to do full justice to not only the shareholders in the state of Michigan, but the shareholders of said association in any and every state of the Union." In the fifteenth paragraph the defendants deny "that the shareholders of said association, residents and citizens of the State of Michigan, are entitled to any more of the proceeds of said association, or any different amount, than shareholders of said association, residents and citizens of other states of the Union or other countries. They further deny that the shareholders of said association, residing in the state of Michigan, are entitled, as claimed by said bill of complaint, to the full payment of the amount that shall be found due them, if there shall be sufficient assets in the state of Michigan, before any of the proceeds of the assets in Michigan shall be turned over to the defendant, assignee, or can be applied upon the claims and obligations of the shareholders of other states of the Union." In the petition which Taggart filed in the court below for the transfer of the funds, he says: "Your petitioner further alleges and shows that the position taken by said complainant is unjust, inequitable, and ought not to be sustained by this court, and all moneys collected from Michigan securities, whether from notes and mortgages turned over to said receiver by your petitioner, or other assets in the state of Michigan, should be paid over by the Michigan receiver, less the cost of collecting, for the following reasons: (3) Because, as your petitioner is advised and believes, if the construction of said act placed upon it by said complainant is correct, then such act is in violation of both the federal constitution and the constitution of the state of Michigan, in this: that it impairs the obligation of contracts; that it discriminates between citizens of the state of Michigan and citizens of other states, and does not give to citizens of other states than Michigan, shareholders in said association, the privileges and immunities of citizens of the state of Michigan."

Birney Hoyt, for appellant.

Moses Taggart, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). We think the decree of the circuit court must be affirmed on the authority of the decision of the supreme court of the United States in *Blake v. McClung*, 19 Sup. Ct. 165, announced December 12, 1898, Mr. Justice Harlan delivering the opinion. That was a writ of error to the supreme court of Tennessee from a decree entered in the latter court upon a creditors' bill exhibited against an insolvent foreign mining and manufacturing corporation authorized to do business under the laws of Tennessee in that state, and having assets therein. The writ of error was sued out by certain of the creditors, who were nonresidents of Tennessee and residents of other states, to reverse so much of the decree as accorded priority of payment out of the assets to creditors resident in Tennessee, in accordance with a statute of Tennessee, which, after providing that such foreign corporations should be subject to the same process for the collection of debts due from them as natural persons, enacted as follows:

"Nevertheless, creditors who may be residents of this state shall have a priority in the distribution of assets, or subjection of the same or any part thereof, to payment of debts over all simple contract creditors, being residents of any other country or countries."

Two of the plaintiffs in error, it appeared, were residents of Ohio, and did business in that state. In the intervening petitions of those

creditors, it was averred that the plaintiffs in the general creditors' bill, residents of Tennessee, claimed priority of right in the distribution of the assets of the insolvent corporation over other creditors of the corporation, "citizens of the United States, but not of the state of Tennessee." The plaintiffs in error attacked the validity of the Tennessee statute on the ground that it was in violation of the provision of the second section of article 4 of the constitution of the United States, declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. The court considered the preliminary objections—First, that, as the statute only referred to residents, there was no occasion to consider whether it was repugnant to the provision of the national constitution relating to citizens; and, secondly, that it did not sufficiently appear that the complaining plaintiffs in error were citizens of other states, so that they could raise the question. The court said that although the allegations might not be sufficient to show that the individual plaintiffs in error were citizens of Ohio, within the meaning of the statute regulating the jurisdiction of the circuit courts of the United States, they might be accepted as sufficient for that purpose in the present case, no question having been made in the state court that the individual plaintiffs in error were not citizens, but only residents of Ohio. Coming, then, to the other preliminary objection, the court said:

"Looking at the purpose and scope of the Tennessee statute, it is plain that the words 'residents of this state' refer to those whose residence in Tennessee was such as indicated that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention, when absent from that state, to return thereto; such residence as appertained to or inhered in citizenship. And the words, in the same statute, 'residents of any other country or countries,' refer to those whose respective habitations were not in Tennessee, but who were citizens, not simply residents, of some other state or country. It is impossible to believe that the statute was intended to apply to creditors of whom it could be said that they were only residents of other states, but not to creditors who were citizens of such states. The state did not intend to place creditors, citizens of other states, upon an equality with creditors, citizens of Tennessee, and to give priority only to Tennessee creditors over creditors who resided in, but were not citizens of, other states. The manifest purpose was to give to all Tennessee creditors priority over all creditors residing out of that state, whether the latter were citizens or only residents of some other state or country. Any other interpretation of the statute would defeat the object for which it was enacted."

After discussing the meaning of the words "privileges and immunities," and pointing out that citizens of other states might legally do business with a foreign corporation domesticated in the state of Tennessee, the court said:

"If a state should attempt by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that state over the claims of individual creditors, citizens of other states, such legislation would be repugnant to the constitution, upon the ground that it withheld from citizens of other states, as such, and because they were such, privileges granted to citizens of the state enacting it. Can a different principle apply, as between individual citizens of the several states, when the assets to be distributed are the assets of an insolvent, private corporation lawfully engaged in business and having the power to contract with citizens residing in states other

than the one in which it is located? It is an established rule of equity that, when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors (*Graham v. Railroad Co.*, 102 U. S. 148, 161), not simply of stockholders and creditors residing in a particular state, but all stockholders and creditors of whatever state they may be citizens. * * * These principles obtain, no doubt, in Tennessee, and will be applied by its courts in all appropriate cases between citizens of that state, without making any distinction between them. Yet the courts of that state are forbidden by the statute in question to recognize the right in equity of citizens residing in other states to participate upon terms of equality with citizens of Tennessee in the distribution of the assets of an insolvent, foreign corporation lawfully doing business in that state. We hold such discrimination against citizens of other states to be repugnant to the second section of the fourth article of the constitution of the United States, although, generally speaking, the state has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or imparting rights secured to citizens of the several states by the supreme law of the land. Indeed, all the powers possessed by a state must be exercised consistently with the privilege and immunities granted or protected by the constitution of the United States. * * * We adjudge that, when the general property and assets of a private corporation lawfully doing business in a state are in course of administration by the courts of such state, creditors who are citizens of other states are entitled, under the constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the Union. The individual plaintiffs in error were entitled to contract with this British corporation lawfully doing business in Tennessee, and deemed and taken to be a corporation of that state; and no rule in the distribution of its assets among creditors could be applied to them as resident citizens of Ohio, and because they were not residents of Tennessee, that was not applied by the courts of Tennessee to creditors of like character who were citizens of Tennessee."

We think the case at bar is governed by the principles adjudicated in the case from which we have quoted. It appears quite as clearly from the record in this case that the nonresident shareholders of Tennessee are citizens of other states in the Union as it did in the Blake Case that the individual plaintiffs in error were citizens of Ohio. The expression "stockholders and creditors in this state," contained in the Michigan statute, must be given the same construction as the words "creditors resident of the state of Tennessee," in the Tennessee statute, were given by the supreme court, and for the same reasons. Indeed, it is not denied, but it is expressly claimed by counsel for the complainant, that it was the intention of the statute to give a preference to citizens of the state of Michigan over citizens of other states. The Blake Case concerns a discrimination between resident and nonresident creditors. The statute whose validity is at issue in the case at bar concerns not only creditors, but shareholders. We do not see, however, that this creates any sound distinction. The parties in interest here are really creditors of the association to which they belong. It is a mutual association with respect to which shareholders occupy the relation both of stockholders and creditors. But, even if it were not so, the principles announced by the supreme court in the Blake Case necessarily cover the case of stockholders as well as creditors. Any one in any state had the right to become a stockholder or shareholder in the defendant cor-

poration. There was no restriction attempted by the law of Michigan or the law of any other state upon the residence of stockholders. The equity of stockholders to share in the assets of the corporation when it is being wound up is junior to that of creditors, but it is none the less to be protected as a privilege and immunity under the constitution of the United States. Mr. Justice Harlan, in referring to the equitable principle that requires the assets of a corporation civilly dead to be administered as a trust fund, says that it is a trust fund for the benefit, not simply of stockholders and creditors residing in a particular state, but of all stockholders and creditors of whatever state they may be citizens. Nor is the present case within the exceptions and qualifications of the rule which the supreme court deemed it wise to state in the Blake Case. Mr. Justice Harlan said:

"It may be appropriate to observe that the objections to the statute of Tennessee do not necessarily embrace enactments that are found in some of the states requiring foreign insurance corporations, as a condition of their coming into the state for purposes of business, to deposit with the state treasurer funds sufficient to secure policy holders in its midst. Legislation of that character does not present any question of discrimination against citizens forbidden by the constitution. Insurance funds set apart in advance for the benefit of home policy holders of a foreign insurance company doing business in the state are a trust fund of a specific kind to be administered for the exclusive benefit of certain persons. Policy holders in other states know that those particular funds are segregated from the mass of property owned by the company, and that they cannot look to them, to the prejudice of those for whose special benefit they were deposited. The present case is not one of that kind. The statute of Tennessee did not make it a condition of the right of the British corporation to come into Tennessee for purposes of business that it should at the outset deposit with the state a fixed amount, to stand exclusively or primarily for the protection of its Tennessee creditors. It allowed that corporation, after complying with the terms of the statute, to conduct its business in Tennessee as it saw fit, and did not attempt to impose any restriction upon its making contracts with or incurring liabilities to citizens of other states. It permitted that corporation to contract with citizens of other states, and then, in effect, provided that all such contracts should be subject to the condition (in case the corporation became insolvent) that creditors residing in other states should stand aside, in the distribution by the Tennessee courts of the assets of the corporation, until creditors residing in Tennessee were fully paid,—not out of any funds or property specifically set aside as a trust fund, and at the outset put into the custody of the state, for the exclusive benefit, or for the benefit primarily, of Tennessee creditors, but out of whatever assets of any kind the corporation might have in that state when insolvency occurred. In other words, so far as Tennessee legislation is concerned, while this corporation could lawfully have contracted with citizens of other states, those citizens cannot share in its general assets upon terms of equality with citizens of that state. If such legislation does not deny to citizens of other states, in respect of matters growing out of the ordinary transactions of business, privileges that are accorded to it by citizens of Tennessee, it is difficult to perceive what legislation would effect that result."

So, in this case, had the legislation of Michigan provided that, as a condition of the defendant association's doing business in the state of Michigan, it should deposit a fund with the state treasurer or other state officer to be used for the security of resident stockholders or creditors of the state of Michigan, such a provision would not have been in violation of the fourth article of the federal constitution. Such, indeed, was the character of the legislation adjudged to be valid in the case of *Lewis v. Association*, 98 Wis. 203, 73 N. W.

793, where a foreign building association was required by the law of Wisconsin to deposit \$100,000 of its security with the state treasurer in trust for the redemption of the obligation of the association to persons residing in Wisconsin; those obligations including the payment of shareholders in the building association.

We hold, therefore, that, in its operation against the other shareholders of the defendant association, residents and citizens of other states than Michigan, the section of the Michigan statute relied on is invalid, because it violates the second section of the fourth article of the constitution of the United States. We further hold that, in a case where the whole corporation is being wound up in the state of its incorporation, the collection of the Michigan assets by a Michigan receiver, and the direction to him to turn the same over to the New Hampshire assignee, less the cost of collection, on the latter's giving a sufficient bond to secure to Michigan shareholders their pro rata of the total assets, fulfills the requirements of the Michigan statute in so far as the same is valid. The decree of the circuit court is affirmed.

UNITED STATES, to Use of SABINE & E. T. RY. CO., v. HYATT et al.

(Circuit Court of Appeals, Fifth Circuit. February 7, 1899.)

No. 749.

UNITED STATES—BOND OF CONTRACTOR FOR PUBLIC WORK—FREIGHT CHARGES ON MATERIAL.

A bond required by the United States from a contractor for public work, under the act of August 13, 1894 (28 Stat. 278), conditioned that the contractor shall promptly pay all persons who supply labor and materials in the prosecution of the work, does not cover a charge by a railroad for freight on materials which are loaded and unloaded by the contractor, such charges being neither for labor nor materials, within the meaning and purpose of the act.

Writ of Error to the Circuit Court of the United States for the Eastern District of Texas.

This suit was brought by the Sabine & East Texas Railway Company, in the name of the United States, on a bond which F. A. Hyatt & Co. executed to the United States. The railway company claims that F. A. Hyatt & Co. are indebted to it for transportation charges, and that the principals and sureties on the bond just mentioned are liable for the indebtedness. A jury was waived in the trial court. The judge made findings of fact and law.

His findings of fact are, in substance, as follows:

F. A. Hyatt & Co., having, on January 4, 1895, entered into a contract with the United States to do certain work in the construction of East Jetty, at Sabine Pass, Tex., furnished a bond to the United States in the sum of \$30,000, for the faithful performance of their contract. This contractors' bond was executed on January 5, 1895, with J. T. Munson and J. B. McDougall as sureties. It contained a stipulation, under the act of congress approved August 13, 1894 (28 Stat. 278), that "F. A. Hyatt & Co. shall be responsible for all liabilities incurred in the prosecution of the work, for labor and materials, and shall promptly make payment to all persons supplying him or them labor or materials in the prosecution of the work." It was

necessary, in the prosecution of the work, for F. A. Hyatt & Co. to furnish a large amount of sand rock, which they did by procuring the same at Rockland, Tex., a point distant about 120 miles from Sabine Pass, and on the line of the Sabine & East Texas Railway Company, which is a common carrier. For the purpose of transporting the sand rock from Rockland to Sabine Pass, F. A. Hyatt & Co., on March 29, 1895, entered into a contract with said railway company. This contract provided that the railway company agreed to "carry over their lines shipments of sand rock to be used for the construction of jetties at Sabine Pass, as described and defined in contracts between the United States government, dated January 4, 1895," and F. A. Hyatt & Co. The contract provided for the rate of freight which F. A. Hyatt & Co. were to pay the railway company. F. A. Hyatt & Co. were to load the cars at Rockland, and unload them at Sabine Pass, and they waived "all claim for damages, or for the value of the sand rock lost by wreck, or for damage or delay caused by flood or by any other cause beyond the control of" the railway company. It was further agreed that F. A. Hyatt & Co. would pay the railway company, "between the 1st and 15th of each subsequent month, for all material transported under the provisions of the agreement during the preceding month." It was further agreed that "bond in sufficient amount will be furnished by the parties of the second part [F. A. Hyatt & Co.] to the parties of the first part [the railway company] which shall insure payment of said transportation charges." This contract between F. A. Hyatt & Co. and the railway company was, as stated, executed on March 29, 1895, and it was provided that it should terminate on October 1, 1895, unless renewed or extended by mutual consent. The bond provided for by the contract between F. A. Hyatt & Co. and the railway company was furnished by F. A. Hyatt & Co. for the prompt payment, according to the terms of the contract of March 29, 1895, of the transportation charges to the railway company. This bond was for \$10,000, and was signed by F. A. Hyatt & Co. as principals, and by Edward Perry, a member of the firm of F. A. Hyatt & Co., and one J. J. Solinsky, as sureties. It was under said contract and bond just referred to, of March 29, 1895, that the sand rock was transported from Rockland to Sabine Pass, and the railway company relied upon that bond as security for the payment to it of all freight charges for the transportation of said sand rock, and did not rely upon the bond executed by F. A. Hyatt & Co. to the United States on January 5, 1895. The railway company transported, at the instance of F. A. Hyatt & Co., a large amount of sand rock under the contract of March 29, 1895, and the freight charges therefor amounted, in the aggregate, to the sum of \$28,061.58. F. A. Hyatt & Co. paid the railway company various sums of money from time to time, and on April 28, 1896, there was due the railway company by F. A. Hyatt & Co., for the transportation of rock under said contract of March 29, 1895, \$12,019.15; and on that date the railway company brought suit in the district court of Jefferson county, Tex., against F. A. Hyatt and Edward Perry, composing the firm of F. A. Hyatt & Co., and against Edward Perry and J. J. Solinsky, as sureties upon the bond of March 29, 1895. In that suit in the state court, the railway company, on May 20, 1896, dismissed the suit as against J. J. Solinsky, one of the sureties, in consideration of the sum of \$6,000, paid to the railway company by F. A. Hyatt & Co. on May 16, 1896, and the railway company agreed that Solinsky be discharged from all liability on the bond of March 29, 1895. The cause was continued as to F. A. Hyatt & Co. and Edward Perry until the next term of court, in the following November. All of this—the payment of the \$6,000, the discharge of Solinsky, and the continuance of the cause as against F. A. Hyatt & Co. to the following November—was done by virtue of an agreement of counsel in the cause. On November 18, 1896, the railway company, in said suit in the state court, obtained a judgment against F. A. Hyatt & Co. and Edward Perry for the sum of \$6,445.70, being the balance due after deducting the \$6,000 paid the railway company on May 16, 1896.

The trial judge's conclusions of law are, in substance, as follows:

The judge found that the railway company, being a common carrier, would have had a lien upon all rock transported for F. A. Hyatt & Co. if it had not required of them a bond to secure the payment of freight charges for trans-

porting the rock, but that having required a bond, with security, to secure the payment of said freight charges, it thereby released its lien upon any rock it transported for F. A. Hyatt & Co.; that by the execution of the bond from F. A. Hyatt & Co. to the railway company, and the terms of the contract between those parties, the contractual relations existing between F. A. Hyatt & Co., and any person furnishing them labor and material by virtue of the bond executed to the United States, were changed from prompt payment for all labor and material to payment for transporting said rock between the 1st and 15th of the month for all freight charges accruing during the previous month; that the railway company released its lien for freight; that the bond executed by F. A. Hyatt & Co. to the railway company; and the contract between those parties, which was made a part of that bond, were executed and accepted for the purpose, by the railway company, of complete security for the freight charges that would accrue under the contract between F. A. Hyatt & Co. and the railway company, and the bond of March 29, 1895, was intended by both F. A. Hyatt & Co. and the railway company to take the place of any other security that said railway company might have for freight charges; and that by the continuance of the case in the state court from May to November, 1896, upon the payment of \$6,000 by F. A. Hyatt & Co., and the resulting extension of time for payment, and by the release of Solinsky as surety, a material alteration in the contractual relations between the railway company and F. A. Hyatt & Co. was effected.

The trial judge concluded his findings as follows:

"From all the above, I conclude that there is now no liability upon the part of the defendants in this cause to plaintiff, because there had been a complete change of contractual relations between plaintiff and defendants, since they executed the bond herein sued on, by the release of the lien in favor of plaintiff for freight charged; by the accepting of a bond from Hyatt & Co., with Edward Perry and J. J. Solinsky, securities, in lieu of, and in substitution of, the bond herein sued upon; by the release of Solinsky as surety; by the continuance by consent of parties plaintiff and Hyatt & Co., by judgment from November, 1896. I therefore find for the defendants."

The railway company excepted to the trial judge's conclusions of law, and, judgment having been rendered against it, it has sued out a writ of error to this court.

R. S. Lovett, J. D. Martin, and J. N. Votaw, for plaintiff in error.
A. C. Bullitt, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge (after stating the facts as above). Under the view which we take of this cause, it is unnecessary for us to pass upon certain matters discussed at considerable length in the briefs, such as the question whether the execution of the bond by F. A. Hyatt & Co. to the railway company, the proceedings on that bond in the state court, including the release of a surety on that bond and the granting of time to the principals, operated, quoad the railway company, the discharge of the obligation of the sureties on the bond executed by F. A. Hyatt & Co. to the United States. These and other matters discussed in the briefs are based upon the assumption that the railway company was a beneficiary of the bond executed to the United States. We are clearly of opinion that the railway company never had a right of action on this bond. The act of congress approved August 13, 1894 (28 Stat. 278), provides that persons who contract with the United States to perform public work shall

add to the usual penal bond an obligation to promptly pay all persons who supply "labor and materials" in the prosecution of the work. It is plain that the railway company did not supply "materials," for the stone which it carried was not supplied by it. The question is, did the railway company supply labor to the contractors, within the intendment of the act of congress just mentioned? This labor would consist in carrying the stone, the labor of loading and unloading being performed by the contractors. The labor which congress intended to protect, by the act under discussion, is evidently labor used directly upon the public work, claims for which would be made by the laborers primarily against the work; thus impeding, possibly, the prosecution of the work and hampering the government officers. Congress could not have intended to include in the term "labor," as used in this act, the freight charges of a railroad on materials carried by it. The railroad is abundantly protected by its lien on freight, and congress did not contemplate that a charge for transportation by a railroad would be made against the work, and certainly not when the carrier was fully secured otherwise. We notice, incidentally, that it is apparent that the railway company believed that it had no recourse against the bond executed to the United States, and that it protected itself, and proceeded throughout in accordance with that belief. The judgment of the lower court is affirmed.

MAY v. INTERNATIONAL LOAN & TRUST CO.

(Circuit Court of Appeals, Fifth Circuit. February 7, 1899.)

No. 773.

1. APPEAL—QUESTIONS REVIEWABLE—OPENING AND CLOSING ARGUMENT TO JURY.

In the federal courts the question of which party is permitted to close the argument to the jury is not the proper subject of a bill of exceptions or a writ of error, because it does not affect the merits of the controversy, and is a matter which should be left largely to the discretion of the trial judge.

2. PARTNERSHIP—REQUISITES—CONSTRUCTION OF CONTRACT.

A contract between the owner of an hotel and another that the latter should occupy and conduct the hotel, and share the profits, if any, with the owner, being alone responsible for the losses, did not create a partnership between the parties.

3. BUSINESS HOMESTEAD—STATUTE OF TEXAS—INTEREST IN BUSINESS.

The owner of an hotel permitted another to occupy and conduct it, under an agreement that the profits, if any, should be shared between them. There was actually a loss, which was borne by the tenant. Held, that the owner had no such interest in the business as rendered the property his business homestead, under the statute of Texas.

4. EVIDENCE—ADMISSIBILITY—BILL OF EXCEPTIONS IN DIFFERENT SUIT.

A bill of exceptions is not admissible in another suit between different parties as evidence of matters therein recited.

In Error to the Circuit Court of the United States for the Northern District of Texas.

The International Loan & Trust Company, a Missouri corporation, filed its petition in the United States circuit court at Dallas, Tex., against J. J. May,

Sr., a citizen of Texas, to recover from him on two notes executed on September 1, 1890. The petition alleged that the notes were secured by a deed of trust, and set forth so much of the deed of trust as provided for an option to declare the principal of the debt due in case of default on the interest. It also declared that the International Loan & Trust Company had exercised the option. The petition proceeded with the allegations usual in a petition at law in a suit upon debt, and prayed for judgment, and the foreclosure of an attachment lien resulting from an attachment sued out on the same day on which the petition was filed, and levied upon a lot, with a building thereon, situated in the town of Denton, Tex., and further levied upon a tract of land in Denton county, Tex. To this petition J. J. May, Sr., the defendant below, answered by demurrer, general denial, and special answer that the lot and building in the town of Denton were at the time of the levy of the attachment, and before and since that time, his residence and business homestead, and not subject, under the laws and constitution of Texas, to execution and forced sale for debt. The trial resulted in a verdict and judgment in favor of the plaintiff below, and J. J. May, Sr., the defendant below, has sued out this writ of error.

W. S. Simkins, for plaintiff in error.

John L. Henry, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge (after stating the facts as above). The first alleged error of which the plaintiff in error complains is that at the trial in the lower court he was not permitted to open and conclude the argument in the case. By statute the supreme court of the state of Texas is authorized to make rules of procedure, not inconsistent with the laws of the state, for its own government and the government of the other courts of the state, in order to expedite the dispatch of business. In pursuance of this authority the supreme court of the state of Texas has provided a rule by which a defendant may secure the right to open and conclude in adducing evidence and in the argument of the case, by entering of record an admission that the plaintiff has a good cause of action as set forth in his petition, "except so far as it may be defeated in whole or in part by the facts of the answer constituting a good defense which may be established on the trial." The plaintiff in error offered to file the admission required by this rule, and demanded the right to open and close, which was refused by the trial judge. It is contended by the counsel for the defendant in error that the defendant below did not comply strictly with the rule of the supreme court of Texas, and, furthermore, that that rule was not intended to have effect in the federal courts. Even if it were conceded that the defendant below brought himself strictly within the rule of the supreme court of Texas, and that the rule was binding upon the court below, it would seem, from the jurisprudence of Texas, that the error, if it was error, would not warrant a reversal of the case, in the absence of injury shown. It is difficult to see how the defendant below was injured, materially or otherwise, by the refusal of the trial judge to allow him to open and conclude the argument. The admission which the defendant below proposed to make left nothing in the cause but the simple issue of the right of homestead vel non, and we do not see how the refusal of a right to open and close the argument on a single plain issue of this character could

constitute reversible error. But, whatever be the view that might be taken of the matter in a case tried in a court of the state of Texas, it is well settled that in the federal courts the question as to which party shall make the closing argument to the jury is not the proper subject of a bill of exceptions or of a writ of error, because it does not affect the merits of the controversy. It is a matter which should be largely left to the discretion of the trial judge. *Lancaster v. Collins*, 115 U. S. 222, 6 Sup. Ct. 33; *Hall v. Weare*, 92 U. S. 728-732; *Day v. Woodworth*, 13 How. 363-369; *Railroad Co. v. Stimpson*, 14 Pet. 448-462.

The next matter alleged as error arises as follows: It appears that upon the lot situated in the town of Denton, which the defendant below claimed to be his residence and business homestead, he had erected an hotel building. One Massey occupied this building, and therein carried on the hotel business. It is evident that at the trial the defendant below was endeavoring to show that Massey was his business partner, and was carrying on the hotel business for himself and the defendant below. Massey testified as follows:

"I know Mr. May, the defendant in this suit. He owned an hotel building in Denton, Texas. I run that hotel for a while in 1892. I understood it was levied upon. I think I went out of the hotel when it was levied upon. I think I had gone out at the time it was levied upon. Mr. May furnished the hotel, and I was to run the hotel; and, if I made any profits, I was to divide profits with Mr. May. I think I was there the 14th day of June, 1892. I went out of there in June or July,—I am not sure which. I think I moved out about the 1st of July. Mr. May was not there then. He was there at his home in town, I guess. If I recollect correctly, when I moved out he moved in. Mr. May was there about the hotel office whenever he wanted to. He had a right there. He had a right to examine my books and see if I was making any profits. He was interested to the extent that, if I made any profits, I was to divide with him. The hotel was run in my name. I bought the goods and paid for them. I was responsible. Mr. May had nothing to do with the running of the hotel. I suppose the reason I didn't agree to pay him so much a month was because I didn't think I could make anything. There was no furniture there, that I know of, that didn't belong to the hotel, except what I put in there. I went in there after Mr. McNeil. I think a fellow by the name of Thompson and Mrs. Pancake was in there before McNeil. At the time I run this hotel, I run it at a loss of \$200. I paid the loss. The contract was that I was to pay the loss, if any. I lost about two hundred dollars."

The court charged the jury "that the contract between said Massey and the defendant was not a partnership, so far as Massey's evidence shows, but was a contract of rent for a contingent sum." To this charge the defendant below excepted. We find no error in the charge. The construction of the contract was clearly a matter for the court, and not for the jury; and the court's construction was, in our opinion, correct. We notice that the defendant below was endeavoring to show that the hotel was his residence and business homestead, not by proof that he personally occupied the building, but upon the theory that he might validly claim it as a business homestead, because a business, in the profits of which he was interested, was there conducted by another. It is unnecessary for us to say whether, under the most liberal application of the Texas homestead laws, such a contention could be sustained. It is sufficient for us to say that, whether or not, quoad

the public, May and Massey could be held to be partners, yet, under the testimony of Massey, it was perfectly plain that May had no such right in the business, or in the management or occupancy of the hotel, as might usefully serve him in the assertion of a claim to a business homestead upon the hotel. The charge of the trial judge, limited as it was to the construction of the contract as testified to by Massey, is, in our opinion, unexceptionable, under the issue involved.

The next matter of complaint on the part of the plaintiff in error is as follows: A witness named Smith, who was the attorney of J. J. May, Sr., in a suit in the county court of Denton county, Tex., which is in no manner connected with the present cause, testified in this cause that in the case in the county court of Denton county J. J. May, Sr., was the plaintiff, and one J. H. McNeil was the defendant, and that J. J. May, Sr., then testified that he had rented the property in controversy to the witness Massey on the same terms upon which it had been rented to McNeil, which was \$100 a month. The defendant below in this case then offered a certified copy of a bill of exceptions, which is a part of the record in the cause just mentioned in the county court of Denton county; this bill of exceptions stating that J. J. May, Sr., on objection, was not permitted to testify as to the terms upon which he had placed Massey in possession of the hotel, and the bill of exceptions being offered for the purpose of contradicting the testimony of Smith. The plaintiff below objected to the admission of this bill of exceptions. The objection was sustained by the trial judge, and the defendant below excepted to the rejection. We have been cited to no authority by the counsel for the plaintiff in error in support of his contention that the bill of exceptions just mentioned was admissible in the cause. It is plain to us that it was properly rejected. The cause in the county court of Denton county was *res inter alios acta*, and the sole purpose of the bill of exceptions in that cause was to certify to the appellate tribunal the matters which it contained. It importred verity in no other cause. It would seem that a bill of exceptions cannot be used in another suit, even as against parties to the record. See, in this connection, *Green v. Irving*, 54 Miss. 450-465; *Robinson v. Lane*, 14 Smedes & M. 161; *Elting v. Scott*, 2 Johns. 157-162; *Harrison's Devisees v. Baker*, 5 Litt. 250-252; *Neilson v. Insurance Co.*, 1 Johns. 301-304; *Boyd v. Bank*, 25 Iowa, 255.

As to the refusal of a new trial by the court below, it has been repeatedly held that a new trial is a matter discretionary with the trial court. We find no error in the record, and the judgment of the lower court is therefore affirmed.

LEVINSKI V. MIDDLESEX BANKING CO.

(Circuit Court of Appeals, Fifth Circuit. February 7, 1899.)

No. 735.

1. DAMAGES—REMOTENESS—BREACH OF CONTRACT TO LOAN MONEY.

Damages based on the estimated rental value of houses that were not built are not recoverable in an action for breach of a contract to loan the plaintiff money to pay for their erection, by reason of which breach he was unable to build them, though the purpose for which the loan was to be made was understood between the parties, and the defendant was to be secured on the houses when built.

2. REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY—EFFECT OF SUSTAINING DEFENDER'S PLEA TO PORTION OF CLAIMS.

Where a petition in a state court discloses claims for damages aggregating over \$2,000, and the cause is removed by the defendant into a federal court, the subsequent sustaining of exceptions to items of damages claimed, reducing the amount remaining to less than \$2,000, does not affect the amount in controversy in the suit so as to deprive the court of jurisdiction, where there is no question as to the good faith with which the claims were made, and the court should retain the case for trial of the remaining issues. Par lange, District Judge, dissenting, holds that where the petition shows on its face that, as a matter of law, less than the jurisdictional amount is recoverable thereunder, as evidenced by the sustaining of the exceptions, it appears therefrom affirmatively that the "suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of the court" so as to be legally removable, and the court should, on its own motion, set aside its ruling on the exceptions, and remand the case in its entirety to the state court.

In Error to the Circuit Court of the United States for the Northern District of Texas.

E. A. Jones, W. M. Sleeper, D. C. Bolinger, and Geo. Clark, for plaintiff in error.

Bennet Hill and L. M. Dabney, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

McCORMICK, Circuit Judge. It appears from the defendant's petition for removal, marked "Filed April 5, 1897," that this case was then pending in the state district court of McLennan county, Tex., and that the plaintiff was then seeking to recover of the defendant damages in the sum of \$7,600. On the same day, April 5, 1897, the state district court made its order of removal, reciting that the court having examined the petition and the bond for removal, and the petition showing on its face that the case is removable, and the bond being in the terms of the law, the same is approved by the court, and the case is ordered to be removed to the circuit court of the United States for the Northern district of Texas for further proceedings. On April 25, 1898, the plaintiff filed in the circuit court his second amended original petition, which, according to the practice in Texas, took the place of his previous pleading; so that the original petition and the first amended original petition do not appear in the transcript, and the date of their filing, respectively, and the averments in each, are not shown except by the answer of the defendant, from

which it appears that the plaintiff's action was originally brought in the state court on October 31, 1893, and that the action, as originally brought, was on a breach of contract to loan the plaintiff money, on the faith of which contract the plaintiff had purchased brick, which he was compelled to sell, on account of the defendant's breach, at a loss of \$100, and that he had suffered damages for the loss of rents for the months of September and October, 1893, to the extent of \$150 per month, and by reason thereof he was damaged by the defendant in the sum of \$2,000; and on January 23, 1897, the plaintiff filed in the state court what purported to be his first amended original petition, in lieu of his original petition, and in the amended petition alleged the loss of \$200 on the sale of the brick, and made a claim for \$6,000 damages for loss of rents, and for \$1,600 on account of increased cost of building houses on the premises referred to in the original petition. The second amended original petition, on which the case proceeded to trial, states the plaintiff's cause of action as follows:

"Plaintiff represents that heretofore, to wit, on or about the 9th day of June 1893, the plaintiff and the defendant entered into a contract with each other whereby, for a proper and legal consideration, the defendant undertook and agreed to loan to plaintiff the sum of \$8,000, for a term beginning on the 9th day of June, 1893, and ending on the 1st day of December, 1896, when said loan was to mature, and upon which sum so loaned, or agreed to be loaned, the plaintiff agreed and contracted to pay to defendant corporation ten per cent. per annum interest thereon, payable semiannually. Plaintiff further represents that he agreed to execute to the defendant, as proper and valuable security for the payment of the sum of money so contracted to be loaned to him by the defendant corporation, a deed of trust in the nature of a mortgage upon certain parcels of land, to wit: Lots 3, 4, 5, and 15 feet adjoining lot 5, out of block 4, in farm lot 24, according to the map of said city of Waco; also lots 10 and 11, in block 4, forming lot 21 of said city,—all situated in the city of Waco, county of McLennan, and state of Texas. Plaintiff alleges that, pursuant to the contract and agreement, the plaintiff and his wife, Sarah Levinski, executed and delivered to the defendant their two certain promissory notes, dated June 9, 1893, one for the sum of \$8,000, payable, as aforesaid, on the 1st day of December, 1896, and another note for \$1,112.89, for the semiannual interest installments of four per cent. on the principal note, the principal note of \$8,000 bearing six per cent. per annum interest; and thereafter the plaintiff and his wife did execute, acknowledge, and deliver to the defendant corporation a deed of trust in the nature of a mortgage upon the above-described property, dated the 28th of June, 1893, for the purpose of securing the aforesaid loan evidenced by the notes in accordance with the agreement, and in the form and manner required by the defendant. And plaintiff alleges that, although he performed his part of the contract as aforesaid fully and in every respect, yet, nevertheless, the defendant, after the performance aforesaid by the plaintiff of his part of the contract, wholly failed and refused, and still fails and refuses, to advance and pay over to the plaintiff the sum of money for which the notes and deed of trust were executed and delivered, although the same has frequently been demanded of the defendant by the plaintiff. Plaintiff further shows and alleges that the purpose and object in borrowing said sum of money from the defendant corporation was well understood and known by the defendant corporation at and before the time when the contract was made, and that the purpose and object was to construct and erect dwelling houses upon the real property conveyed by the plaintiff and wife to the defendant corporation as security for the loan, by means of the deed of trust, and described therein as aforesaid, which houses were to be erected by the plaintiff, with the assent of the defendant corporation, for the purpose of renting the same for profit. And the plaintiff alleges that the greater part of the sum of money so agreed to

be loaned to him by the defendant, to wit, about the sum of \$5,000, was required by the defendant to be applied to the construction of the houses on said real property so as to enhance the security, and that the last-mentioned sum was only to be received by the plaintiff from the defendant as such improvements were constructed. And plaintiff alleges that the defendant required, and it was so agreed, that the plans and specifications for the houses should be submitted to, and approved by, the defendant; and that such plans and specifications were in fact submitted to, and approved by, the defendant corporation before the execution and delivery of the notes and deed of trust as aforesaid. And plaintiff alleges that, according to the plans adopted by him and approved by the defendant, the houses were to be one-story frame cottages, with front porch, vestibule, parlor, two bedrooms, rear porch, dining room, kitchen, and back porch, bathroom, and closet, as shown by copy of floor plans marked 'Exhibit A,' and filed herewith and made a part of this petition. Plaintiff alleges that, had the defendant corporation complied with its contract in the premises, he could easily have rented the premises and the dwelling houses after they had been constructed and built upon the property, as it was understood between the plaintiff and the defendant corporation that they should be built, for the sum of \$30 per month each, that being the reasonable rental value of each of the houses and premises, it being the understanding and agreement between the plaintiff and the defendant corporation in the contract that the plaintiff was to erect eight dwelling houses on the lots of land; and that, had the defendant corporation complied with its contract and engagement as aforesaid, plaintiff would have received for the houses a rental of \$30 per month for each, amounting in the aggregate to the sum of \$240 per month; and that the interest which the sum of money should bear, according to the agreement of the parties, would amount to \$66.66 per month, or about that sum. And plaintiff alleges that his profits on the rentals, which profits were contemplated and understood by the parties plaintiff and defendant at the time the contract was entered into, would have amounted, after paying all expenses and interest, to the sum of \$175 per month from and after the 1st day of September, 1893, until the 1st day of November, 1896. For plaintiff shows to the court, and alleges, that at and before the time the defendant breached the contract as aforesaid it was informed by the plaintiff, and knew, that owing to the then stringency of the money market it would be impossible for the plaintiff to procure the money from any other source; that after the failure and refusal of the defendant corporation to comply with its contract in the premises the plaintiff made every effort in his power to procure the sum of money so agreed to be loaned by the defendant corporation to the plaintiff from other sources, but wholly failed, and was unable to borrow the sum of money, or any part thereof, until on or about the 14th day of August, 1896, when the plaintiff on said last-named date was enabled to procure a loan upon the property for a portion of the amount of money agreed to be loaned to plaintiff by the defendant corporation, with which money the plaintiff has erected some houses upon the property, which houses have been paying him rent, as aforesaid, at the rate of \$30 per month from and after November 1, 1896. And from said 9th day of June, 1893, to said November 1, 1896, the plaintiff was, by the wrongful act of the corporation defendant and its breach of contract, deprived of rents and profits accruing from the property as contemplated by the parties, and at the rate aforesaid. Wherefore, and by reason of the premises, and the failure of the defendant corporation to pay over to the plaintiff the sum of money and to carry out its contract as it had agreed to do, the plaintiff has been damaged in the sum of \$6,000, for which damages the plaintiff now sues. Plaintiff further alleges that, at the time said contract was entered into between the plaintiff and the defendant corporation, he (the plaintiff) had entered into a building contract with a contractor and builder to build and construct and complete the eight houses at and for the sum of \$750 each; that since the breach of contract, by reason of increased prices of building material and labor, the plaintiff has been unable to build, construct, and complete the houses for less than the sum of \$950 each, for the reason that the contractor who offered and agreed to build the houses for \$750 each thereafter refused to build the houses for that sum, and the plaintiff was unable to secure the houses built for less than the sum of \$950 each,

whereby the plaintiff has been further damaged in the additional sum of \$1,600 by reason of the breach of contract on the part of the defendant corporation. Plaintiff further alleges that, depending upon the contract and the good faith and integrity of the defendant corporation in carrying the same into proper effect, and believing that the defendant corporation would carry out the same according to the terms of its contract and agreement, the plaintiff purchased \$600 worth of brick to be used in the construction of the houses, for which brick the plaintiff was compelled to pay the then market price of \$600, and thereafter, by reason of the breach of contract of the defendant corporation and the inability of the plaintiff to secure money wherewith to proceed with the construction of the houses, he was forced to sell the brick for the sum of \$400, that being the reasonable market value of the brick at the time of sale, whereby, and by reason of the breach of contract, plaintiff has been further damaged in the additional sum of \$200 by reason of the defendant's failure to carry out its contract as aforesaid, for which sum he here now sues."

To this petition the defendant submitted a general demurrer and four special exceptions, the first of the latter being to that part of the petition in which the plaintiff claims damages by reason of the loss of rents from the 1st of September, 1893, until the 1st of November, 1896, because the damages thus claimed are remote, contingent, speculative, and uncertain, and do not appear from the allegations to have been within the contemplation of the parties when the contract was made, and are not shown to have arisen directly out of the alleged breach of the defendant's contract. The other special exceptions are directed to that part of the petition which claims \$1,600 increased cost of erecting the buildings that it was in contemplation to have erected at the time of contracting with the defendant. The defendant at the same time, but in due order of pleading, submitted the general issue and special pleas of the statute of limitation.

The cause came on for trial, and the result is shown in the following minute:

"On this the 26th day of April, 1898, the above-entitled cause coming on regularly to be heard, came the plaintiff and the defendant, by attorneys, and both announced ready for trial. And the defendant's general and special exceptions to the plaintiff's second amended original petition being presented to the court, and the court having heard the exceptions and having considered of the pleadings, and having heard argument of counsel thereon, the court is of the opinion that the defendant's special exception No. 1, as shown in its first amended original answer, is well taken, and should be sustained, in so far as the same excepts to so much of the plaintiff's cause of action as sets forth his demand for the sum of six thousand dollars damages for rents that the plaintiff would have obtained from houses which he would have built but for the breach of the defendant's alleged contract to lend the plaintiff money, and it is therefore considered by the court that the exception be, and it is hereby, sustained; to which ruling of the court the plaintiff excepted, and prayed that his bill of exceptions should be accordingly sealed by the court. And plaintiff having in open court refused to amend his pleadings, and it appearing to the court from the face of the plaintiff's petition that, after sustaining the exception to the plaintiff's claim for damages for the sum of six thousand dollars for rents, the plaintiff's remaining cause of action is for a sum less than two thousand dollars, exclusive of interest and costs, to wit, for the sum of \$1,800, and that this court has no jurisdiction thereof, and that the suit should be dismissed, it is therefore considered by the court that the suit be dismissed, and that this court take no further cognizance thereof, and that the defendant recover of the plaintiff all costs in this behalf expended, for which let execution issue; to which action of the court the plaintiff then and there excepted; and prayed that his bill of exceptions be sealed accordingly."

The first error assigned is: The circuit court erred in sustaining special exception No. 1 of defendant to the plaintiff's petition, because in the petition the plaintiff in error did not sue for the rents, as stated, but sued for damages, and the rents, being in the nature of profits contemplated by the parties in the contract, furnished a legal basis for the estimation of such damages. Counsel for the plaintiff in error contend that profits are recoverable as damages for a breach of contract when they are not remote or speculative, and it clearly appears that such profits were in contemplation of the parties, in entering into the contract, as the natural and probable result of the contract, and that rents constitute the safest basis in the estimation of such damages, because they are easily susceptible of proof.

The fundamental rule, as announced in *Hadley v. Baxendale*, 9 Exch. 341, is:

"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally,—that is, according to the usual course of things, from such breach of contract itself,—or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

At the trial it appeared that the plaintiffs carried on an extensive business as millers at Gloucester, and that on the 11th of May their mill was stopped by a breakage in the crankshaft by which the mill was worked. The steam engine was manufactured by Messrs. Joyce & Co., engineers, at Greenwich, and it became necessary to send the shaft, as a pattern for a new one, to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who were well-known carriers, trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and, in answer to the inquiry when the shaft would be taken, the answer was that if it was sent up by 12 o'clock any day it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants before noon for the purpose of being conveyed to Greenwich, and the sum of two pounds and four shillings was paid for its carriage for the whole distance. At the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect, and the consequence was that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received. After discussing the application of the fundamental principle above announced to the particular

case then at bar, the court of exchequer conclude: "The judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages."

Counsel for the plaintiff in error in their oral argument and in their printed brief cite with confident emphasis the case of Brownell v. Chapman, 84 Iowa, 504, 51 N. W. 249. The opening paragraphs of the opinion in that case are in these words:

"Lake Manawa is a small lake in the vicinity of Council Bluffs, in Pottawattamie county, and is a summer and pleasure resort. Boats are used on the lake for the accommodation of visitors, and among them was one known as the 'M. F. Rohrer,' belonging to the defendant. The boat was operated on the lake in the season of 1888, and the boilers and machinery contracted for, as known to the parties, were to refit the boat for use in the season of 1889. A breach of the contract on the part of the plaintiff, by a failure to deliver within the time, is not questioned, and the important question in this appeal is as to the proper measure of damages. The superior court admitted evidence to show and instructed the jury on the theory that the measure of damage was the rental value of the boat during the time that the defendant was deprived of its use in consequence of the breach."

The contract in this case was made April 12, 1889, and by it the contractors guarantied to deliver and set up the machinery in 30 days from April 13, 1889. There was a failure on their part to deliver for 18 days after the time specified in the contract. During these 18 days the defendant lost entirely the use of his boat. The court held that the value of such use, where it is proximate, and not speculative or uncertain, is the damage the defendant suffered. And it answered the contention that the boat in question had no established rental value, saying:

"By this it is meant that the boat had never been rented. But it will not do to say that because an article has never been rented it has no rental value, any more than it would to say that because an article has never been sold it has no market value. We should assume that an article suitable and adapted for use at a time and place has both a market and a rental value, at least until the contrary appears."

The court sustained the action of the superior court, and affirmed the judgment.

In Rogers v. Bemus, 69 Pa. St. 432, Bemus was bound by his contract with Rogers to build the foundation of a sawmill, and to furnish the money necessary to erect the mill (of which one-half should be at his own expense), all before the expiration of the year 1859, and afterwards to furnish the means to start and run the mill. Rogers, who was a carpenter, had the superstructure ready to put up in the year 1859, but Bemus did not have the foundation finished ready to receive it until the latter part of the year 1861. By the contract the parties were to be partners in running and operating the mill, and the expense of the erection, structure, and putting it up and stocking it, was to be paid first out of the earnings of the mill. On the trial Rogers offered to prove what would have been a fair rental value for the mill, and to prove the net profits the mill would have made. The trial judge sustained the objection to both these offers, and directed a verdict for nominal damages. The supreme court agreed with the trial judge that the probable net profits of an unfinished water

sawmill were too remote, contingent, and speculative to be the foundation of a verdict for damages. They add:

"But this cannot be said of the fair rental such a mill would bring. The rental of the property is entirely distinct from the business to be done upon it. The owner can always rent it for something near its yearly value, and has nothing to do with the results of the business which belongs to the tenant, who calculates his probabilities of profit or risks when he rents. The breach of the covenants of Bemus in this case exists in the delay of performance, not in an entire nonperformance. The delay, therefore, was a matter directly within his view when he declined or neglected to perform, and the direct injury in consequence of delay was the loss of the use of the mill. This might be fairly measured by the rental such a mill would bring. It is no more uncertain than the standard of damages for the use and occupation of property where the party has had the use of it. The mill here had itself to show for the thing to be used, so that an estimate of the value of its use was fairly within the range of competent evidence."

In *Manufacturing Co. v. Pinch*, 91 Mich. 156, 51 N. W. 930, the manufacturing company had contracted to put certain machinery in a flouring mill for Pinch, and to do the same within 10 days from the time it began the work. Pinch was compelled to keep his mill idle longer than 10 days, because of the fault of the company in not fulfilling its contract as to the time of performance. The court held that Pinch was entitled to recover as damages the value of the use of the mill while it was so kept idle by the plaintiff's fault.

In *Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E. 58, the defendant had obligated himself to furnish sufficient water power to run and operate shafting, gearing, millstones, machines, and machinery contained in a certain gristmill. He furnished water power equal to 12 horse, when the proof showed that 35 to 38 horse power was required to run the mill in a proper and efficient manner. The court held that the measure of damages was the difference between the rental value of the mill and machinery with the power contracted for and its rental value with the power actually furnished.

The cases above set out are sufficient to illustrate the rule and its application to the case we are considering. It would be tedious and unprofitable to review the numerous other cases which counsel have cited, and concerning which we only remark that we find in them nothing that will support the claim of the plaintiff to the \$6,000 damages, or any part of it, as averred in his petition. It will be observed that, in each of the above cases in which it was held that the loss of rent was the proper measure of the damage, the party against whom damages were sought had contracted to do what was directly necessary to enable the claimant to use the property, that was in existence and in the claimant's possession and control, for the use to which it was to be put, and of which both parties had full knowledge. Here the claim is made for damages to be measured by the estimated rent of houses which were not built at the time the contract to advance money was made. The defendant did not contract to build them. In another part of the petition, and as the basis of a claim for other damages, it is alleged that the plaintiff had entered into a building contract with another person to build and construct and complete the houses for the sum of \$750 each. But it is not averred that this fact was made known to the defendant; and, if it

had been so made known, it is within the bounds of reasonable possibility that the contractor to build might have breached his contract. And the financial conditions that prevented the plaintiff from obtaining the money from some other source might have operated to prevent the plaintiff from obtaining cash-paying tenants for each of his houses at a rate that would have yielded, net, more than 10 per cent. per annum on the cost of the houses. It seems to us that the conditions, general or local, or both, which for the space of three years prevented the plaintiff from procuring the money from any other source, at the highest rate of conventional interest permissible by law, on the same security, which had been unimpaired by any act of the defendant, shows how intensely uncertain and speculative were the anticipated profits which the plaintiff expected to derive from the rental of the houses that he contemplated building. No one of the cases to which we have been referred, nor any case with which we are acquainted, goes to the extent of authorizing, on the breach of a contract for the loan of money, the recovery of damages to be measured by the estimated value of the rental of houses not erected at the time the contract to loan was made and breached, and which houses the party contracting to make the loan did not obligate himself to build, and none of which were built until more than three years had elapsed after the alleged breach, and conditions had so greatly changed that the plaintiff could procure a loan of the money, or some part of it, from other sources. We therefore conclude that the circuit court did not err in sustaining exception No. 1 to the part of the petition which claimed these uncertain damages.

The other error assigned is the dismissal of the plaintiff's suit. The judgment in this case recites that, after the ruling on the demur-
rer which we have just discussed, the plaintiff having in open court refused to amend his pleadings, and it appearing to the court from the face of plaintiff's petition that, after sustaining the exception to the plaintiff's claim for damages for the sum of \$6,000 for rents, "plaintiff's remaining cause of action is for a sum less than \$2,000, exclusive of interest and costs, to wit, for the sum of \$1,800, and that the circuit court has no jurisdiction thereof, and that the suit should be dismissed, it is therefore considered by the court that the suit be dismissed, and that the court take no further cognizance thereof, and that the defendant recover of the plaintiff all costs in this behalf expended, for which let execution issue." Counsel for the plaintiff in error contend that the jurisdiction of the court is fixed by the amount for which the plaintiff sues, that this is the amount in controversy, and that, jurisdiction having attached, the court should have proceeded to trial. The language of the fifth section of the act of 1875 is:

"That if in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of the circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court; or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or as defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no

further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

We note this language in the brief of counsel for the defendant in error:

"Though we maintain that it is clear from the face of the petition that all plaintiff in error's claim, except \$206, is manifestly subject to general demurrer, yet we admit that the matter in dispute, which gave jurisdiction to the circuit court below, was the whole amount sued for by plaintiff; and we do not allege or claim that his claim for damages was colorable, or not made in good faith."

Although the plaintiff's original petition and his first amended original petition, both of which were filed in the state court, do not appear in the transcript, as already stated, and for the reasons stated, there is nothing to show or to indicate that there is any substantial difference, so far as the question of jurisdiction is involved, between the first amended original petition, which constituted the plaintiff's pleadings at the time of the removal, and the second amended original petition, which constituted the plaintiff's pleadings at the time of the trial. "The circuit courts have jurisdiction where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars." Act 1888 (25 Stat. 434). This language comes down from the act of the 24th of September, 1789, where it was used in reference to the jurisdiction of the supreme court on appeal or writ of error. It was first construed in the case of *Wilson v. Daniel*, 3 Dall. 400. There was a diversity of opinion, but the prevailing opinion was that, to ascertain the matter in dispute, the supreme court should recur to the foundation of the original controversy, or the matter in dispute, when the action was instituted; that the descriptive words of the law point emphatically to this criterion, and, in common understanding, the thing demanded (as, in that instance, the penalty of the bond), and not the thing found, constitutes the matter in dispute between the parties. The dissenting judges filed opinions, substantially to the effect that, in their view, what was in dispute on the writ of error was the matter the sum or value of which must exceed \$2,000 in order to support the jurisdiction of the supreme court. Thereafter the chief justice, on behalf of the majority, announced that it was not intended to say that on every such question of jurisdiction the demand of the plaintiff is alone to be regarded, but that the value of the thing put in demand furnished the rule. The nature of the case must certainly guide the judgment of the court, and whenever the law makes a rule that rule must be pursued; saying, for illustration, in an action in debt on a bond for £100, the principal and interest are put in demand, and the plaintiff can recover no more, though he may lay his damages at £10,000. The form of the action, therefore, gives in that case the legal rule. In the case of *Gordon v. Ogden*, 3 Pet. 32, Chief Justice Marshall says:

"The jurisdiction of the court has been supposed to depend on the sum or matter in dispute in this court, not on that which was in dispute in the circuit court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may still be recovered, should the judgment for a smaller sum be reversed, and consequently the whole sum

claimed is still in dispute. But, if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the circuit court, and consequently the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties. The counsel for the plaintiff in error relies on the case of *Wilson v. Daniel*, *supra*. That case, it is admitted, is in point. It turns on the principle that the jurisdiction of this court depends on the sum which was in dispute before the judgment was rendered in the circuit court. Although that case was decided by a divided court, and although we think that, upon the true construction of the twenty-second section of the judiciary act, the jurisdiction of the court depends upon the sum in dispute between the parties, as the case stands upon the writ of error we should be much inclined to adhere to the decision in *Wilson v. Daniel*, had not a contrary practice since prevailed. In *Cooke v. Woodrow*, 5 Cranch, 13, this court said, 'If the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute.' This, however, was said in a case in which the defendant below was plaintiff in error, and in which the judgment was a sufficient sum to give jurisdiction. The case of *Wise v. Turnpike Co.*, 7 Cranch, 276, was dismissed because the sum for which judgment was rendered in the circuit court was not sufficient to give jurisdiction, although the claim before the commissioners of the road, which was the cause of action and the matter in dispute in the circuit court, was sufficient. The reporter adds that all the judges were present. Since this decision, we do not recollect that the question has been ever made. The silent practice of the court has conformed to it. The reason of the limitation is that the expense of litigation in this court ought not to be incurred unless the matter in dispute exceeds two thousand dollars. This reason applies only to the matter in dispute between the parties in this court."

In the case of *Smith v. Greenhow*, 109 U. S. 669, 3 Sup. Ct. 421, the value of the property taken is stated in the declaration to be \$100, while the damages for the alleged trespass were laid at \$6,000. No circumstances of malice or of special damage were averred. The circuit court remanded the case on the ground that the matter in dispute did not exceed the sum or value of \$500. The judgment of the circuit court remanding the case was reversed by the supreme court. That court said:

"We cannot, of course, assume, as a matter of law, that the amount laid, or a less amount, greater than \$500, is not recoverable upon the case stated in the declaration. * * * But if the circuit court had found, as matter of fact, that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case removable under the act of congress, so that, in the words of the fifth section of the act of 1875, it appeared that the suit 'did not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court,' the order remanding it to the state court could have been sustained."

In *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, this subject is thoroughly discussed, and we note the following:

"The amount of damages laid in the declaration, however, in cases where the law gives no rule, is not conclusive upon the question of jurisdiction; but if, upon the case stated, there could legally be a recovery for the amount necessary to the jurisdiction, and that amount is claimed, it would be necessary, in order to defeat the jurisdiction, since the passage of the act of March 3, 1875, for the court to find, as matter of fact, upon evidence legally sufficient, 'that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case' within the jurisdiction of the court. Then it would appear to the satisfaction of the court that the suit 'did not really and substantially involve a dispute or controversy properly within the juris-

diction of said circuit court.' * * * Cases, as we have already seen, may exist, where a rule of law, as in certain cases ex contractu, in which the amount recoverable is liquidated by the terms of the agreement, fixes the limit of a possible recovery. Such was the case of *Lee v. Watson*, 1 Wall. 337, where it appeared 'that in the progress of the cause an amendment was made in the amount of damages claimed, for the purpose of bringing the case within the appellate jurisdiction of this court.' As was said in *Hilton v. Dickinson*, 108 U. S. 165, 2 Sup. Ct. 424, 'it is undoubtedly true that, until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction; but it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail.'"

Before the act of 1875 was passed, it had been held that the circuit courts could not of their own motion take notice of colorable assignments or transfers to create cases for the jurisdiction of the courts of the United States, and that in the absence of a plea in abatement or to the jurisdiction, under which the proof could be admitted, such proof could not be received or heard. Subject to the limitations named in the act, that statute (1875) authorized either party to a suit in a state court to remove the same to the circuit court, and was considered and construed by the supreme court to open wide the door for fraud upon the jurisdiction of the court by collusive transfers, so as to make colorable parties, and create cases cognizable by the courts of the United States, and was held in *Williams v. Nottawa*, 104 U. S. 209, to have changed the rule which had theretofore obtained, so far as to allow the court at any time, without plea and without motion, to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered.

In *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. 521, this language occurs:

"If, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties, or in any other way, it may at once, of its own motion, cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition."

In *Schunk v. Moline, Milburn & Stoddart Co.*, 147 U. S. 500, 13 Sup. Ct. 416, the plaintiff sued in the circuit court on several notes, amounting in the aggregate to over \$2,000, of which \$1,664.04 was not then due. The suit was by attachment, which it was claimed that the local statute authorized to be brought on a debt not yet due. The circuit court sustained its jurisdiction, and its judgment was affirmed by the supreme court. In the opinion announcing the decision of the supreme court we note this language:

"Suppose there were no statute in Nebraska like that referred to, and the plaintiff filed a petition exactly like the one before us, excepting that no attachment was asked for, and the right to recover anything was challenged by demurrer; would not the matter in dispute be the amount claimed in the petition? Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute. Suppose an action were brought on a nonnegotiable note for \$2,500, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute; can there

be a doubt that the circuit court would have jurisdiction? There would be presented a claim to recover the \$2,500, and, whether that claim was sustainable or not, that would be the real sum in dispute. In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the court? We do not mean that a claim evidently fictitious, and alleged simply to create a jurisdictional amount, is sufficient to give jurisdiction."

In *Vance v. W. A. Vandercook Co.*, 170 U. S. 469, 18 Sup. Ct. 650, the action was for the recovery of personal property, and for damages for its detention. The value of the personal property was alleged to be, and shown to be, \$1,000. The circuit court found damages for detention, also, in the sum of \$1,000. In that case the supreme court, speaking in an opinion by Mr. Justice White, say:

"The courts of South Carolina, as we have seen, have held that in an action of trover consequential damages are not recoverable, and have also held that in the action of claim and delivery damages for the detention must have respect to the property, and to a direct injury arising from the detention. Destruction of business not being of the latter character, it follows that the special damages averred in the complaint were not recoverable. It results that as the plaintiff's action was solely one for claim and delivery of property alleged to have been unlawfully detained, and for damages for the detention thereof, the amount of recovery depended first upon the alleged value of the property, which in the present case was one thousand dollars, and such damages as it was by operation of law allowed to recover in the action in question. As, however, by way of damages in an action of this character, recovery was only allowable for the actual damage caused by the detention, and could not embrace a cause of damage which was not in legal contemplation the proximate result of the wrongful detention, and such recovery was confined, as we have seen, to interest on the value of the property, it results that there was nothing in the damages alleged in the petition, and properly recoverable, adequate, when added to the value of the property, to have conferred upon the court jurisdiction to have entertained a consideration of the suit."

In Texas, where this case arose, distinctions in forms of action do not obtain. The method of pleading is by petition and answer, and each suit is an action on the case. The state court, in which this suit was brought, has jurisdiction of controversies in which the matter in dispute amounts in value to \$500. The plaintiff claimed \$7,800, all grounded on an alleged breach of contract on the part of the defendant. The defendant is a citizen of the state of Connecticut; and, if the matter in dispute exceeds the value of \$2,000, the defendant had a right, upon making application in proper time, and in the proper manner, as it did, to have the case removed to the circuit court. However confident the defendant may have been that the plaintiff's petition was subject to general demurrer or to special demurrer, it could not, and its counsel could not, tell in advance what would be the ruling of the court on defenses of this character. It had the right to have all issues of law, equally with issues of fact, submitted to the circuit court for trial. It had the right to have its demurrers ruled on by the circuit court, to the same extent that it had the right to have that court pass upon its objections to the introduction of proof offered. The defenses that appear on the face of the plaintiff's pleadings are properly interposed by demurrer. The cir-

cuit court recognized the right of the defendant to remove this case for the purpose of submitting and having tried demurrers to the plaintiff's pleading. It took jurisdiction, and heard the parties in their dispute on the questions of law presented by the demurrers. The record affirmatively shows that it sustained the special demurrer No. 1. The record shows, by implication, that the general demurrer and the other special demurrers were not sustained. The order sustaining the special demurrer No. 1 was not such a final judgment in the case that the party aggrieved thereby could sue out a writ of error and have the ruling of the trial court reviewed. If the circuit court had jurisdiction to make the ruling on the demurrer, it could only be by reason of its having jurisdiction of the case; and, as the demurrer sustained did not go to the whole case, the ruling thereon was, from its very nature, an interlocutory order. The plaintiff had the same right to stand on his pleadings that he would have had if all the demurrers or the general demurrer had been sustained. His pleading may have been as good as his case permitted. But, whether it was or was not, he had the right to act on his own opinion of its sufficiency, and the right to have the adverse ruling thereon reviewed and tested by the appellate court. If the demurrer sustained had gone to the whole case, and the plaintiff had declined to amend, his case would have been dismissed, not because the court was without jurisdiction to try it, but because the court had jurisdiction, and had tried it fully, and rendered judgment against him, to review which he could sue out a writ of error. The reason for not granting the right to appeal or to take a writ of error from an interlocutory order is the tax that the exercise of such a right would impose on the tribunals and the parties litigant. The interest of such parties and of the public requires that the whole case should be tried to final judgment. To hold that the circuit court had jurisdiction to act on the demurrer, and that, having exercised that jurisdiction to the extent of sustaining the demurrer to a part of the plaintiff's case, it thereby lost jurisdiction to proceed further and try the whole case, it seems to us, is equivalent to holding that the court may by its ruling on one issue in a case deprive itself of jurisdiction to pass upon the other issues. Of course, the ruling on the one issue may be such that the other issues become immaterial or ineffective. This, however, is to be judged of by the court in the exercise of its jurisdiction. It seems clear to us that where there is no cause to suspect that the action is colorable, or brought or prosecuted with the purpose and effect of perpetrating a fraud upon the jurisdiction of the court, and the amount in good faith claimed is within the jurisdiction, the trial court should not remand or dismiss the case, unless, from the nature of the action, it is apparent that the plaintiff cannot recover an amount within the jurisdiction of the court. It having appeared to the circuit court that the plaintiff's pleadings not subject to demurrer showed matter in dispute of the value of \$1,800, the plaintiff having brought his suit in the state court, which had jurisdiction of amounts exceeding \$500, and the case having been removed to the circuit court by the defendant, without any collusion with the plaintiff, and without any consent upon his part, further than his ready submission to and recognition of its

right to remove, it seems too clear for argument that the circuit court should not have dismissed his case, but should either have tried it, or have remanded it to the state court for trial. As the law now is, a judgment of the circuit court remanding a case cannot be reviewed on a writ of error to that court. If, after ruling on the demurrer, the circuit court had remanded this case, in what condition would it have returned to the state court? The ruling on the demurrer did not change the plaintiff's pleadings. It only construed the legal effect of the pleading to be that the plaintiff did not show a cause of action for an amount in value exceeding \$2,000, and that, therefore, the circuit court could not acquire or exercise jurisdiction of the case, further than to make the order to remand. The case would therefore return to the state court in the same condition that it was when the order of removal was made. The state court would not—no court could—recognize rulings made by another court which had no jurisdiction of the case in which the rulings were made. The defendant in error would be denied its right to have the questions presented by the demurrers tried by the circuit court, and its position would be no better, if, after our taking jurisdiction of this writ of error, and sustaining the action of the circuit court in its rulings on the demurrs, and reversing the judgment of that court dismissing the case, we should now remand the cause to the circuit court with the direction to that court to remand the cause to the state court. It is therefore ordered that the judgment of the circuit court is reversed, and the cause is remanded to that court, with direction to reinstate the action, and to otherwise proceed therein in conformity with the views herein expressed, and according to law.

PARLANGE, District Judge (dissenting). The plaintiff below alleged that the Middlesex Banking Company bound itself to advance him \$8,000, and knew that he intended, with the larger part of the money, to build certain houses. He alleged that the Middlesex Banking Company failed and refused to comply with its obligation to furnish the money, the result being that the plaintiff below was unable to build the houses. He claimed damages to the amount of \$7,800, consisting of the following items: Loss of rent which plaintiff below claimed he would have received if he had not been prevented from building the houses, \$6,000; increase of the cost of building the houses caused by delay in obtaining money, \$1,600; loss on the sale of bricks, which, on account of the failure of the Middlesex Banking Company to furnish the money, the plaintiff below was compelled to sell at a sacrifice, \$200. The defendant below having filed a general demurrer and also four special exceptions, the first of which was to the claim for speculative rents, amounting as stated to \$6,000, the trial court sustained said first special exception. The remaining claim in the suit (increase in cost of building and loss on bricks) amounted only to \$1,800. Upon the refusal of the plaintiff below to amend his pleadings, the trial court dismissed the suit on the ground that, the amount then involved being less than \$2,000, the court had no jurisdiction.

I agree fully with this court that the claim for speculative rentals could not, as matter of law, be sustained. I also agree with this court that it was error to dismiss the suit as to the remaining claims, aggregating \$1,800. But it is clear to me that the cause in its entirety should have been remanded to the state court, and I am constrained to dissent from the proposition that the circuit court should have proceeded with the suit and tried the remaining claims. In my opinion, it is apparent upon the face of the pleadings, as matter of law, that the circuit court had no jurisdiction, because of the insufficiency of the amount involved. It is elementary, of course, that in the federal courts the jurisdiction must appear plainly and affirmatively on the face of the pleadings. I need not cite authorities to show the particularity which is required of pleaders in this respect. But the case at bar is not one in which the jurisdiction is merely nonapparent. This court being unanimous in the opinion that the claim for speculative rentals was not recoverable as matter of law, it follows that the petition shows upon its face that the trial court had no jurisdiction.

In the case of *Vance v. W. A. Vandercook Co.*, 170 U. S. 468, 18 Sup. Ct. 645, the supreme court has said:

"In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if, from the nature of the case as stated in the pleadings, there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach, even though the damages be laid in the declaration at a larger sum."

In that case the demand was for \$1,000, alleged to be the value of certain property taken from the complainant, and in addition for \$10,000 damages. The supreme court, after a full examination of the law and authorities bearing on the point, having reached the conclusion that the claim for damages could not be sustained as a matter of law, held that, upon the face of the pleadings, the circuit court had no jurisdiction, because, after striking out the claim for damages, the remaining claim did not exceed \$2,000. The supreme court further said:

"The courts of South Carolina, as we have seen, have held that in the action of trover consequential damages are not recoverable, and have also held that in the action of claim and delivery damages for the detention must have respect to the property, and to a direct injury arising from the detention. Destruction of business not being of the latter character, it follows that the special damages averred in the complaint were not recoverable. It results that as the plaintiff's action was solely one for claim and delivery of property alleged to have been unlawfully detained, and for damages for the detention thereof, the amount of recovery depended first upon the alleged value of the property, which in the present case was one thousand dollars, and such damages as it was by operation of law allowed to recover in the action in question. As, however, by way of damages in an action of this character, recovery was only allowable for the actual damages caused by the detention, and could not embrace a cause of damage which was not, in legal contemplation, the proximate result of the wrongful detention, and such recovery was confined, as we have seen, to interest on the value of the property, it results that there was nothing in the damages alleged in the petition, and properly recoverable, adequate, when added to the value of the property, to have conferred upon the court jurisdiction to have entertained a consideration of the suit. Upon the face of the complaint, therefore, the circuit

court was without jurisdiction over the action, and it erred in deciding to the contrary."

I am unable to differentiate the case at bar from the case of *Vance v. W. A. Vandercook Co.*, just referred to. Both cases involve claims for damages the recovery of which is impossible as matter of law.

In the early case of *Wilson v. Daniel*, 3 Dall. 407, Chief Justice Ellsworth, dealing with the question of the amount in dispute necessary to confer jurisdiction, summarized the matter thus:

"The proposition, then, is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one; but, where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded."

Chief Justice Ellsworth also said in that case that if, in an action of debt on a bond for £100, the principal and interest are put in demand, the plaintiff can recover no more, though he may lay his damages at £10,000. He further said that the form of action gives in that case the legal rule, but that in an action of trespass or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion to which, from the nature of the action, resort can be had in settling the question of jurisdiction.

With all due respect for the opinion of my learned brothers, I cannot comprehend how the jurisdiction can be sustained in the case at bar, either under the language quoted from *Vance v. W. A. Vandercook Co.*, or from the proposition stated by Chief Justice Ellsworth. It is plain that, as a matter of law,—on which point this court is unanimous,—the complaint itself manifestly shows that there could not legally be a judgment for an amount necessary to the jurisdiction. It is also plain to me that in the case at bar the law, as declared by this court, furnishes the rule which strikes out the speculative rentals from the aggregate amount of damages claimed. The case of *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, does not, in my opinion, sustain the jurisdiction in the case at bar. On the contrary, it draws a clear distinction, as does *Wilson v. Daniel*, *supra*, between those cases in which, *ex necessitate*, the plaintiff's statement of the amount of his claim must be accepted for the purpose of jurisdiction, and the other class of cases, in which the amount stated is not determinative of jurisdiction. *Barry v. Edmunds* was an action of trespass on the case, in which certain damages were claimed. Substantially, the trial judge dismissed the cause for the reason that, in his individual judgment, the plaintiffs could not recover damages in a sum as large as the jurisdictional amount. The supreme court, with evident correctness, said that the amount of recovery in such a case was for the jury, and not for the judge. But in that case the supreme court was careful to say that:

"In some cases it might appear, as matter of law, from the nature of the case as stated in the pleadings, that there could not legally be a judgment recovered for an amount necessary to the jurisdiction, notwithstanding the damages were laid in the declaration at a larger sum."

The case of *Wilson v. Daniel*, *supra*, was cited and affirmed.

In my opinion, there is nothing deducible from Schunk v. Moline, Milburn & Stoddart Co., 147 U. S. 500, 13 Sup. Ct. 416, which would support the jurisdiction in the case at bar. The substance of the opinion in that case is that even if, from the plaintiff's own pleadings, it appears that his action is barred by limitation, or even if, from those pleadings, a perfect defense to the suit should appear, the court would still have jurisdiction, if the amount claimed is sufficient. This is evidently clear and sound doctrine, but it does not, in my opinion, apply in any manner to the case at bar. It is perfectly true that a trial judge, in determining the real amount involved, cannot supply a plea of limitation, or speculate whether defenses, even though clearly apparent, will be made. But the case at bar is not one in which a defense appears from the plaintiff's pleadings, within the doctrine of Schunk v. Moline, Milburn & Stoddart Co., supra. A valid and substantial right may not entitle its owner to a recovery, if at the trial it should develop that, by reason of something which took place after the right originated, the right had become extinguished or otherwise nonenforceable. A debt which is valid and binding when contracted may become extinguished by payment or other cause. Still, the right or the debt had a valid existence at some time; and an adjudication concerning it may be claimed from a court, even though upon the trial it may be ascertained that the cause of action is extinguished, or its scope has been diminished. But in the case at bar, in the unanimous opinion of this court, there never was a time when any cause of action for the speculative rentals existed, and a judgment for their recovery is, and has always been, a legal impossibility.

Smith v. Greenhow, 109 U. S. 669, 3 Sup. Ct. 421, was an action in trespass vi et armis, in which personal property worth \$100, and damages in the sum of \$6,000, were claimed. The main question decided was that a federal question was involved, which supported a removal of the case to the federal court. At the close of the opinion the court said:

"There is a ground of remanding the cause suggested by the record, but not sufficiently apparent to justify us in resorting to it to support the action of the circuit court. The value of the property taken is stated in the declaration to be but \$100, although the damages are laid at \$6,000. The petition for removal does not allege the sum or value of the matter in dispute, otherwise than by the statement of the amount of the claim for damages. *We cannot, of course, assume, as a matter of law* [italics mine], that the amount laid, or a less amount, greater than \$500, is not recoverable upon the case stated in the declaration."

In my opinion, Smith v. Greenhow, far from supporting the jurisdiction in the case at bar, is an authority against sustaining the jurisdiction, and is in accord with Vance v. W. A. Vandercook Co., supra. See, also, Gorman v. Havird, 141 U. S. 206, 11 Sup. Ct. 943.

I am well aware that there are several cases in which courts, having come to the conclusion that litigants had fraudulently or intentionally inflated the amount of their claims in attempts to have the courts take jurisdiction, denied the jurisdiction and dismissed the suits. The dominant idea in this line of cases is that parties will not be allowed to commit a fraud upon the jurisdiction. But there is another and

distinct class of cases in which the jurisdiction is denied, not because of any fraud attempted to be committed upon the jurisdiction, but because the case, as stated by the plaintiff himself, as strongly as he can and as favorably to himself as possible, discloses, without the necessity of any evidence being heard, and without any regard to the opinion of the judge as to what would be a reasonable recovery in the cause, but simply as a pure matter of law, a case which under none of its aspects could support a judgment for the jurisdictional amount. Such was *Vance v. W. A. Vandercook Co.*, *supra*, in which there was not even an intimation that the plaintiff in the suit was in bad faith. In fact, the conclusion may readily be reached that he was in perfect good faith. He obtained a judgment from the learned trial judge. But the litigant was conclusively presumed to know the law, and his error of law, however honest it might be, could not confer jurisdiction. The case at bar, in my opinion, comes under the doctrine of *Vance v. W. A. Vandercook Co.*, *supra*.

As to the action of the trial judge in passing upon the question of jurisdiction, and acting thereon, on his own motion, I am clear that it was not only his right, but his duty, to do so. *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. 521, and *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, make it plain, in my opinion, that under section 5 of the act of March 3, 1875, the trial judge could and should have acted on his own motion, and remanded the whole cause to the state court. Upon ascertaining that the suit "did not really and substantially involve a dispute or controversy properly within the jurisdiction" of the court, he should have set aside his action on the special exception, and remanded the case, in its entirety, to the state court. In this connection, see *Wetmore v. Rymer*, 169 U. S. 115, 18 Sup. Ct. 293, which was a case originating in the federal court, and in which, after verdict and judgment, the trial judge set aside the verdict and judgment, and passed, without a jury, on the question of the jurisdictional amount involved, which in that case was a question of fact, and dismissed the case for want of jurisdiction. While it is true that on writ of error the supreme court reversed the action of the trial judge, that court did so for the reason that it came to a different conclusion on the facts from that which the trial judge had reached. I am unable to see how the fact that this was a cause which originated in a state court, and was removed to the federal court, can affect the question under discussion. If this cause had originated in the federal court, it should, if my views are correct, have been dismissed for want of jurisdiction, either on the application of the defendant, or *mero motu* by the judge. I do not see how the jurisdiction can be assisted by the fact that the cause was removed from the state court. The fifth section of the act of 1875 applies, in terms, to "any suit commenced in a circuit court or removed from a state court to a circuit court." I note what is said in *Black's Dillon on Removal of Causes* (Ed. 1898, § 47) as to the strictness with which the statute providing for removals from the state courts must be construed on the question of the jurisdictional amount. I also note that it has been held that when a cause is removed to a federal court, if at any time after the removal a substantial doubt arises as to the jurisdiction of the federal

court, the cause should be remanded. *Fitzgerald v. Railway Co.*, 45 Fed. 812-820; *Hutcheson v. Bigbee*, 56 Fed. 329; *Coal Co. v. Haley*, 76 Fed. 882; *In re Foley*, 76 Fed. 390-392; *Kessinger v. Vannatta*, 27 Fed. 890; also, *Mining Co. v. Largey*, 49 Fed. 291. In Black, *Dill. Rem. Causes*, § 216, it is said that:

"Notwithstanding an order made by the state court allowing the removal, the federal court must determine for itself the question of jurisdiction, and send back the cases, unless it clearly appears that the defendant is entitled to the removal."

To my mind, the matter is summarized in this question: Can a litigant create jurisdiction in a federal court, as regards the jurisdictional amount, by setting out in his complaint a demand for damages, the nonexistence of which, in law, he is conclusively presumed to know, and for which a legal recovery is an impossibility? It is clear to me that there can be but one answer to the question, and that in the negative.

HILL V. CITY OF INDIANAPOLIS.

(Circuit Court, D. Indiana. March 18, 1899.)

No. 9,672.

1. MUNICIPAL CORPORATIONS—RATIFICATION OF UNAUTHORIZED CONTRACT.

A city council having authority to enter into a contract, or to authorize its board of public works to enter into it, on behalf of the city, may legally ratify such a contract made by the board without previous authority,—the performance of the contract by the second party being a sufficient consideration,—and a ratification is equivalent to authority originally given, and renders the contract valid from its date.

2. SAME—ACTION TO ENFORCE CLAIM AGAINST—EFFECT OF INJUNCTION AGAINST OFFICERS.

An injunction against officers of a city restraining them from paying a claim, issued in a suit to which neither the city nor the owner of the claim is a party, constitutes no defense by the city to an action against it on the claim.

On Demurrer to Answer.

Morris, Newberger & Curtis, for plaintiff.

John W. Kern and J. E. Bell, for defendant.

BAKER, District Judge. The plaintiff, who is a citizen of the state of Ohio, brings this suit against the defendant, a municipal corporation created under the laws of this state, to recover for certain services rendered to the city by him as an expert engineer, in the examination of the waterworks located in the city, belonging to a private corporation, under a contract entered into by the board of public works of said city and the plaintiff. The common council of the city possesses the unquestioned power, under the charter of its organization, to contract for the services which the plaintiff rendered; but it is insisted by the answer that the defendant was employed by the board of public works of the city, without any previous authority conferred upon it to represent the city in making the contract of employ-

ment. By Rev. St. Ind. 1894, § 3830, the board of public works of this city possesses, among other things, the following powers:

"The board of public works shall have power * * * to purchase or erect, by contract or otherwise, and operate water works, gas works, electric light works, street car and other lines for the conveyance of passengers and freight, natural gas lines, telephone and telegraph lines, steam and power houses and lines for the purpose of supplying such city and the suburbs thereof, or to purchase or hold a majority of the stock in corporations organized for either of the above purposes, provided that none of the powers conferred by this paragraph shall be exercised except in pursuance of an ordinance specifically directing the same."

This grant of power unquestionably conferred upon the board of public works, provided an ordinance therefor had been previously enacted, power to do all acts and things properly and necessarily incidental to the purchase by the city of the waterworks in question. And it is equally clear that an examination into the physical condition and value of such a plant as the waterworks of Indianapolis was so indispensable to an intelligent negotiation for its purchase that to dispense with it would have subjected the officers to well-merited criticism. The common council of the city had, previously to the employment of the plaintiff by the board of public works through its city engineer, adopted an ordinance by which it directed that the mayor and the board of public works should enter into communication with a representative of the waterworks company and its stockholders for the purpose of procuring from them a definite and specific proposition looking to the purchase of the waterworks plant from the Indianapolis Water Company. The passage and existence of this ordinance prior to the employment of the plaintiff is alleged in the complaint, and expressly admitted in the answer. The board of public works, improperly assuming that this ordinance conferred upon them authority to employ the plaintiff, who is an experienced consulting engineer for waterworks and sewerage, by written correspondence set out in the complaint, and admitted in the answer, entered into a contract with him to make an examination, and report upon the physical condition, the cost of reproduction, and the present valuation of the property of the Indianapolis Water Company, agreeing to pay the plaintiff for his services at the rate of \$50 per day. The plaintiff, in pursuance of this contract, and with the knowledge of the city, entered upon its performance, and performed work and labor for the city of the aggregate value of \$2,440. The answer admits the rendition of the services, and that their value is as stated. It is alleged in the answer that, at the time the board of public works entered into said contract, the charter of the city, in section 51, provided as follows:

"No executive department, officer or employé thereof, shall have power to bind such city by any contract, agreement or in any other way to any extent beyond the amount of money at the time already appropriated by the ordinance for the purposes of such department, and all contracts or agreements, express or implied, and all obligations of any and every sort beyond such existing appropriations are declared to be absolutely void."

Facts are alleged in the answer which it is claimed show that there was no appropriation existing at the time for the payment of the plain-

tiff's services. It is by no means certain that the facts stated in the answer show that there was no existing appropriation for such services. But, assuming that there was no existing appropriation, still the demurrer to the answer must be sustained. The board of public works had jurisdiction of the subject-matter of purchasing the waterworks, and necessarily had jurisdiction of all incidental inquiries necessary to make a contract understandingly for such purchase. This would necessarily impose upon the board the duty of ascertaining the character, extent, and physical condition of the waterworks plant, the cost of its reproduction, and the present value of the plant. All that was required by the statute to authorize the board of public works to enter upon the performance of these duties was the adoption of an ordinance by the common council of the city directing it to proceed. The board, without such specific authorization previously granted to it by ordinance, assumed, by virtue of the ordinance above referred to, that it had been so authorized, and in behalf of the city it entered into the contract with the plaintiff for the services which he thereafter rendered. After the services had been rendered, the common council of the city, on the 19th day of December, 1898, adopted an ordinance making a specific appropriation for the payment of the claim of the plaintiff, and set apart specific funds for that purpose. This ordinance amounts to a ratification, if the act of the board in behalf of the city is capable of ratification by the common council. The question presented, then, is simply this: Is the ratification by the common council of the city, of an act done by one of its executive boards for and on behalf of the city, but without previous authority, a binding ratification of the previous invalid contract made by the board of public works? On this question there can be no doubt.

"Ratification, as it relates to the law of agency, is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority, and such ratification as effectually establishes the duties, rights, and liabilities of the parties as if the acts ratified had been fully authorized in the beginning." 1 Am. & Eng. Enc. Law, p. 1181, and the numerous authorities there cited.

Here the common council had the undoubted authority to have employed the plaintiff to render the services which he did render, if it had chosen to do so. It had the power to authorize the board of public works, in behalf of the city, to enter into a contract for such services. The board of public works professed to make the contract in suit on behalf and by virtue of the authority of the city. It is the case of one professing to contract for and in the name of another. Of course, the contract, being unauthorized, is not binding unless the principal ratifies it. Ratification is, in general, the adoption of a previously formed contract, notwithstanding the vice that rendered it relatively void. By the very nature of the act of ratification, the party ratifying becomes a party to the original contract. He that was not bound becomes bound by it, and entitled to all the proper benefits of it. He accepts the consideration of the contract as a sufficient consideration for adopting it, and this is quite enough to support a ratification. It follows that the contract, having been ratified by the common council of the city, becomes binding upon it

from the date that it was improvidently entered into by the board of public works, and is just as conclusive and binding upon it as though it had been made by the previous authorization of the board of public works to make it. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* Of course, the principle of ratification does not apply where the act sought to be ratified is ultra vires the powers of the corporation. But this is not such a case.

It is further alleged, as a ground of defense in the answer, that one John H. Crall, by proceedings duly had in the Marion superior court, has obtained an injunction against the board of public works and the members thereof, and against the comptroller and treasurer of the city, enjoining and restraining them from drawing any warrant for the indebtedness due the plaintiff, as well as from making any payment of the claim or of the warrant issued therefor. The plaintiff in this case is a stranger to that litigation, and his right to maintain this suit is in no manner affected thereby. Neither the plaintiff nor the city in its corporate capacity is a party to such litigation, and it would be strange indeed if an injunction issued in a suit to which both the plaintiff and defendant in this case are strangers should in any wise affect the rights or liabilities of either. There is nothing in this ground of defense. The answer admits all the material averments of the complaint, and sets up nothing in avoidance or bar of the plaintiff's claim. It therefore follows that the demurrer to the answer must be sustained, and, unless within 10 days herefrom an amended answer is filed, judgment will be entered for the plaintiff for want of an answer. So ordered.

FELTON v. NEWPORT.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 606.

1. APPEAL—NECESSITY OF EXCEPTION—TESTIMONY ADMITTED SUBJECT TO OBJECTION.

An assignment of error will not lie upon the admission of testimony, unless the ruling is excepted to; and where evidence is admitted subject to objection made, and no exception is taken at the time, the matter must be again called up, and a final ruling obtained, and an exception taken thereto.

2. RAILROADS—INJURY TO PERSON ON TRACK—TRESPASSERS.

Under the provision of Shannon's Code Tenn. § 1574, which makes a railroad company liable for an injury to a person on its track, where it fails to keep a lookout on the engine as therein required, it is not absolved from such duty, nor from liability, because the person injured was a trespasser.

3. APPEAL—SUFFICIENCY OF EXCEPTION—REFUSAL OF REQUESTS FOR INSTRUCTIONS.

A general exception to the refusal of the court to give a series of instructions requested is not good, unless all were proper.

4. SAME—EXCEPTION TO PORTION OF CHARGE.

An exception to that part of the charge of the court which relates to a particular subject is sufficiently specific to authorize a review of that

part, where it is entire, and contains but a single proposition, especially where the matter involved is discussed by counsel for defendant in error without objection to the sufficiency of the exception.

5. RAILROADS — INJURY TO PERSON ON TRACK — FAILURE TO GIVE SIGNALS — TENNESSEE STATUTE.

The word "town," as used in Shannon's Code Tenn. § 1574, subd. 3, requiring the bell or whistle to be sounded on the approach of a railroad train to a "city or town," and at short intervals while passing through such city or town, having been construed by the supreme court of the state to mean "incorporated town," in an action for the killing of a person on the track, based on the alleged failure to give such signals, proof of the incorporation of the town in which the injury occurred is essential to the plaintiff's case; and where the record of incorporation, which is the best evidence of the fact, is not introduced, but evidence tending to show user of corporate franchises by the town is admitted without objection, conceding such evidence to be competent in such case to raise a presumption of incorporation, the question of its sufficiency is one for the jury, and not for the court; and an instruction is erroneous which makes the defendant liable, under the further provisions of the statute, if it failed to give the required signals, without requiring the jury to first find the fact of incorporation.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This action was brought, under a statute of Tennessee giving a remedy in such cases, by Rhoda Newport, the widow of J. H. Newport, deceased, in behalf of herself and her children, who were also the children of the deceased, against Samuel M. Felton, as receiver of the Cincinnati, New Orleans & Texas Pacific Railway Company, to recover damages arising from the death of her husband, resulting from alleged negligence in the operation of the railroad of said company while it was in the hands of the defendant as receiver. The declaration contained two counts; the first being founded upon the common law, and the second upon the special provisions of section 1574 of Shannon's Code of Tennessee, relating to the running of trains upon railroads. The substance of the first count was that one of the defendant's trains negligently ran down and killed the deceased while he was upon the defendant's railroad track, in the town of Helenwood, Tenn. In the second count it was alleged that the injury occurred in an incorporated town (Helenwood), and resulted from the failure of the defendant to observe the precautions of keeping a lookout upon the engine, sounding the bell or whistle, and taking certain measures for stopping the train when the deceased appeared upon the track, as required by the statute above mentioned. The plea was the general issue. The facts developed on the trial were these: J. H. Newport, the deceased, a man about 37 years of age, resided at Huntsville, some five miles distant from Helenwood, where the accident occurred. He left home on the afternoon of February 14, 1896. The next that was seen of him was at Helenwood, about 8 o'clock in the evening of the same day, in company with a drunken desperado by the name of Terry. The last time that he was seen alive was at the window of the station house of the defendant's railroad at Helenwood, when he was observed by the telegraph operator, and was then intoxicated. This was at 8:30 or 9 o'clock that evening. He was found dead on the railroad track about 500 feet north of the depot the next morning about 6 o'clock. His body was badly mangled. Its condition, and the fragments thereof, and spots of blood along the track, indicated that the body had been passed over by several trains, and pushed or carried over a space of 200 feet, to where the body was found. About midway of this space, one of the feet was found in a frog. Six trains passed over the road after Newport was last seen, and before his body was found, none of which stopped at Helenwood, but went through at full speed. The first three went north, and the last three south. After the first two trains had gone north, and at half past 11 o'clock, two men were noticed by the station agent coming south from the locality where Newport's body was found. They were

walking fast, and, when they saw that they were observed, shied off, and passed by, further away. It was too dark to identify them. A brother-in-law of Newport lived a half mile north of the station, and the usual way of going to his place was by the railway, or a path alongside of it. The men upon the engines of the several trains which passed that night testified that the proper lookout was maintained, and that no one saw Newport, or knew of the accident; and no witness testified to the contrary. The foregoing are all the circumstances known which indicate in what manner Newport was killed, or by what, if any, train he was killed. Upon the trial, the plaintiff, against the objection of the defendant, was allowed to prove that Helenwood was an incorporated town, as alleged in the declaration, by parol. Evidence of the assumption and exercise of some of the franchises of incorporated towns was also given. During the trial the presiding judge asked several questions of the witnesses in relation to the circumstances, and errors are assigned upon some of these. At the close of the plaintiff's testimony, counsel for defendant moved the court to direct a verdict for the defendant. The motion was denied, but the court suggested that it might be renewed upon the close of the testimony. The defendant then adduced evidence by way of defense. At the close of all the evidence, counsel for defendant renewed his motion for a direction to the jury to find a verdict in his favor. The court replied that the motion might be argued in addressing the jury. Thereupon the arguments upon the facts to the jury proceeded. The court, in its charge to the jury, instructed them that the plaintiff was not entitled to recover upon the first count, it being shown that the plaintiff was guilty of gross negligence, but, overruling the motion for direct instructions, said that it would be left to them to determine whether the plaintiff was entitled to recover upon the second count, being the one founded upon the statute. The court thereupon proceeded to state the provisions of the statute above referred to, and deemed applicable to the case, and then explained their bearing upon the facts of the case, as the jury might find them. The particular provisions of the statute in question, and the instructions of the court to the jury thereon, are stated in the opinion which follows, as are also certain requests preferred by the defendant's counsel, and refused by the court. An exception was taken to the charge of the court in regard to the precautions required of the defendant by the statute in the running of trains, and an exception was also taken to the refusal of the defendant's requests. The jury returned a verdict for the plaintiff in the sum of \$3,000. A motion for a new trial was made and refused, except upon the failure of the plaintiff to remit the sum of \$500. A remittitur was filed, and judgment entered for \$2,500. The defendant brings the case here on writ of error.

Charles R. Head, for plaintiff in error.

Jerome Templeton, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

The first question presented by the record relates to the ruling of the court in reference to the proof offered to show that Helenwood, within the limits of which the injury is alleged to have occurred, was an incorporated town. This was a material fact in determining the liability of the defendant upon the count on which the verdict and judgment were founded; for, as will be seen upon reading the statute which is quoted below, an obligation to observe certain special precautions is imposed upon railroad companies while they are running their trains through cities and incorporated towns. The question arose in this way: Counsel for plaintiff asked the witness J. J. Newport whether on February 14, 1896, Helenwood was an incor-

porated town, or not. The question was objected to, no ground for the objection being stated. The court asked counsel for plaintiff, "Can you not show that in a better way than that?" to which counsel replied, "Yes; we could have got a copy of the record from the county court." The court then allowed the witness to answer "just for the minute, under the objection." The witness answered, "It was." The county court record was not produced, nor was this ruling of the court again referred to. There was no exception taken to the ruling at any time. The assignment of error cannot, therefore, be sustained. The rule is perfectly well settled, as the multitude of authorities collected in 8 Enc. Pl. & Prac., p. 212 et seq., will show. No exception being taken at the time, counsel should have called the matter up later, and obtained a final ruling. Thereupon, if it was adverse, and the evidence allowed to stand, an exception could have been taken, if it was desired. It is true, no ground was stated for the objection; but it is apparent that the court and opposing counsel fully understood the reason for making it, and that is the object of the rule requiring the grounds to be stated.

It is also assigned as error that the court admitted evidence of certain facts tending to show that there was an assumption and exercise of some of the franchises of an incorporated town by the residents of Helenwood, such as the having a mayor, marshal, and "town squire." But to this no objection whatever was interposed. There is nothing to support an assignment of error upon it. The same disposition must be made of other assignments of error, and for the same reason. Among them are such as refer to the questions asked of witnesses by the court in regard to the matters they were testifying about. It is needless to particularize. No complaint was made at the trial, nor was any exception taken.

The defendant's counsel asked for five special instructions. Some were refused, and some granted in part only. The bill of exceptions states that, "to such portions of the above requests which were refused by the court, the defendant, by counsel, duly excepted to the action of the court at the time." Some parts of these requests were proper to be given; others were not. Of the latter was the first request, which was as follows:

"If J. H. Newport was drunk, and was voluntarily upon the track without license of the defendant, then he was a trespasser, and the defendant owed him no duty or care, except that they must not willfully or wantonly hurt or kill him; and the plaintiff, under such circumstances, cannot recover, unless it appears that the defendant, through his agents, did willfully or wantonly kill him."

The contrary of this, where the action is founded upon the statute, was distinctly held by the supreme court of Tennessee in *Patton v. Railway Co.*, 89 Tenn. 370, 15 S. W. 919. If the request had been limited to the first count, it might have been proper; but it was not so limited, and it would have been error to have granted it as presented. The rule is that a general exception to the refusal to give a series of requests is not good, unless all were proper. The assignments of error founded upon this general exception are therefore untenable.

But there was one exception—and this was one which touched the substance of the case upon which the plaintiff recovered—which we think was sufficiently specific. This was an exception to that part of the charge of the court which stated to the jury what were the precautions prescribed by the statute which the defendant was bound to observe. The charge upon this subject was entire, and bound up in a single proposition. If it was erroneous in any substantial particular, it would seem that the exception would reach the error, especially where it pervades the whole instruction given upon the subject to which the exception relates. *Edgington v. U. S.*, 164 U. S. 361, 365, 17 Sup. Ct. 72; *Coal Co. v. Johnson*, 12 U. S. App. 490, 6 C. C. A. 148, 56 Fed. 810. The alleged error is sufficiently assigned within the ruling of this court in *Tefft v. Stern*, 43 U. S. App. 442, 21 C. C. A. 73, and 74 Fed. 755, where it was held that a somewhat general assignment of error would be regarded as sufficient to cover a specific error which was included in the larger assignment, where the matter involved had been fully discussed by the defendant in error, and no complaint had been made about the sufficiency of the assignment.

Section 1574, Shannon's Code Tenn., to which reference has been made in the preceding statement of facts, and the two following sections, are as follows (omitting subsections 1 and 2, which are not material here):

"Sec. 1574. Accidents on Railroads; Precautions to Prevent. In order to prevent accidents upon railroads, the following precautions shall be observed:
* * * (3) On approaching a city or town, the bell or whistle shall be sounded when the train is at a distance of one mile, and at short intervals until it reaches its depot or station; and on leaving a town or city, the bell or whistle shall be sounded when the train starts, and at intervals till it has left the corporate limits. (4) Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident." Laws 1857-58, c. 44, § 3.

"Sec. 1575. Failure to Observe Precautions. Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur." Laws 1855-56, c. 94, § 9.

"Sec. 1576. Observance of. No railroad company that observes, or causes to be observed, these precautions shall be responsible for any damage done to person or property on its road. The proof that it has observed said precautions shall be upon the company." *Id.* § 10.

It was held in *Webb v. Railroad Co.*, 88 Tenn. 122, 12 S. W. 428, that "town," in subsection 3, above quoted, means an incorporated town.

Upon the subject to which the exception which we are considering relates, the court, after stating to the jury the third and fourth subsections of section 1574, put the question of the plaintiff's right to recover in this way:

"Now, the case comes to you on the fact, if you find that the train killed the man, of whether or not the railroad was at the time of the accident observing the things which this statute requires of it, namely, that it was sounding the bell at short intervals from the time it got within a mile of the city—until it left it, and whether or not it had some one on the lookout ahead—

'always on the lookout' means at the time of the accident, and not elsewhere, nor at different times—some one on the lookout ahead, and in a position to see the track, and see an animal or person on the track, or within striking distance on either side, that would be hit by the train. That is what is meant. If you find that the train killed the deceased, and in addition find that it was complying with this statute, it is nevertheless not liable. Whereas, if you find that the train killed the deceased, and that the company was not at the time observing these requirements, then the company is liable; and this without regard to the negligence of the deceased, so far as his right to recover is concerned. If the company did not ring the bell or sound the whistle, or did not have some one on the locomotive on the lookout ahead,—which means in a position to see and observe, with a design to see anything if it occurred; on the alert; being watchful—If they either did not sound the whistle, or did not ring the bell, or did not have some one on the lookout, then the law makes it liable, regardless of whether the plaintiff could have prevented the accident or not."

The substance of this instruction was subsequently repeated, and the court then said:

"If you are satisfied by a preponderance of the testimony that the defendant did not observe the provisions of the statute, and are further satisfied that the train killed him, why, then, your verdict should be for the plaintiff. If you are not so satisfied, then you should find for the defendant."

Thus, it is seen that the court made no discrimination between the precautions required by subsections 3 and 4, respectively, but put the defendant under the responsibility of having complied with all the requirements of both subsections. But the requirements of subsection 3 did not rest upon the defendant, unless the accident occurred in an incorporated town or city. If it had been conclusively established that Helenwood was an incorporated town, the obligations of subsection 3 would have rested upon the defendant. But the question whether it was incorporated was an open one, and should have been submitted to the jury under proper instructions; and the instructions of the court above quoted should have been qualified by making it a condition to the application of subsection 3 that the jury should find from the evidence that the place was in a town which had been incorporated, and they should have been told that, if they did not so find, the defendant was not required to observe the precautions imposed by subsection 3. It is true that the court, in stating this subsection, to the jury explained, said that "under that section it is the law that if, instead of stopping at the station, the train runs through an incorporated town, why, then, it must ring all the way through." But this was evidently said to point out to the jury, more particularly than the language of the statute did, the duty of the railroad company in ringing the bell when no stop is made at the station; and, if it suggested that the town must be incorporated, it did so only obscurely, and not in a way to attract the attention of the jury to the issue upon that point.

It was necessary for the plaintiff to prove that Helenwood was an incorporated town, before there could be a recovery upon the ground that the defendant neglected to ring the bell or sound the whistle all the way through the town. How must such fact be proven? As the question arose collaterally, we should have no hesitation in holding, if there were no statute affecting the general rule, that, though the charter (in this case the record of incorporation) might be the most

satisfactory proof, yet that it might be shown by evidence of long-continued user of the franchises peculiar to an incorporated town. See *Ashley v. Board*, 16 U. S. App. 656-658, 8 C. C. A. 455, 60 Fed. 55. But the statute of Tennessee contains some peculiar language, creating absolute conditions to the validity of attempted organizations thereunder, which, as construed by the supreme court of Tennessee, present some difficulty in applying the general rule to the case before us. Shannon's Code, pt. 1, tit. 9, c. 1, art. 1, prescribes the method by which towns may be incorporated. A list of voters must be prepared, 14 at least of whom must make application for a charter. The list must be verified, and deposited with the county clerk or justice of the peace. Notice of the application must be published and posted. Thirty days thereafter the sheriff of the county, upon giving 10 days' notice, holds an election to ascertain the will of the voters in regard to incorporating, whereupon he makes a return to the county clerk, indicating the result. If two-thirds of the votes are in favor of incorporating, the county clerk makes a certificate to that effect, and transmits it to the secretary of state, who thereupon issues a certificate or "charter of incorporation," and this is to be registered in the county clerk's office. Section 1897 is as follows:

"Sec. 1897. Sheriff's Certificate to be Indorsed on Charter and Registered. But no application or charter of incorporation for such town shall be registered, or, if registered, such application or charter shall be of no force or effect whatever, unless the certificate of the sheriff or deputy holding said election shall be indorsed on the application and registered with it, and shall show the number of voters on said list, and that at least two-thirds thereof have voted in favor of the incorporation of said town."

Section 1899 reads thus:

"Sec. 1899. Registration of, Conclusive. After such registration the legal incorporation of such municipality shall not be collaterally questioned."

In the case of *Ruohs v. Athens*, 91 Tenn. 20, 18 S. W. 400, the plaintiff brought suit on bonds issued by the defendant as an incorporated town. The defendant pleaded that it was not an incorporated town. It was shown that there had been proceedings for that purpose, and the record from the county clerk was produced. Evidence was also given to show that for some years prior to the issue of the bonds the defendant was acting as a corporation. But in the charter record no certificate of the sheriff, showing an election, appeared to have been indorsed upon the application. The supreme court of the state held that "the charter was therefore void, by express provision of the statute," and that "it consequently followed that the town of Athens was not a legally incorporated town when it issued the bonds in question." Proceeding, the court said:

"This brings us to the most serious question in the case,—whether the defendant can now rely on the defense of no corporate existence; having acted as a corporation, and issued the bonds while in apparent exercise of legal corporate power. This is a question of much difficulty. There is a line of most respectable cases on the negative of the proposition stated, but in none of them is the question determined that a corporation attempting to organize under a general law, which declares that the charter shall be void for non-compliance with special provisions thereof, shall be held, by estoppel or otherwise, to be a corporation. But, whatever may be the rule held elsewhere, it is settled here, in cases most maturely considered, that a body or corpo-

ration having no legal existence has no legal power to issue bonds or obligations of a binding character, and that such body or corporation does not obtain a de facto status, so as to require a direct proceeding by the state to avoid its existence or its acts."

—And, in conclusion, held the bonds were void. The distinct holding of the court was that under that statute a town had no legal existence, except upon compliance with the provisions of the statute, and would not become such by the assumption and exercise of the franchises of a town. A case involving a similar question came before the court of appeal in England, under the companies act of 1862. *In re Padstow Total Loss & Collision Ins. Ass'n*, 20 Ch. Div. 137. The act contained provisions for the formation of companies and for registration, and by the fourth section declared that no company consisting of more than 20 persons should be thereafter formed for the purpose of carrying on a business of the kind in which the Padstow Association was engaged, unless it was registered under the act. The association consisted of more than 20 members, and had not been registered, but had been doing business for several years. The question was whether it had such a legal status as that it could be wound up. It was held that the company had no legal existence, and was therefore not a proper subject for such proceedings. Brett, L. J., in delivering judgment, after stating the contention for the petitioners, said:

"On the other side, I understand the argument to be that the circumstances under which this association was attempted to be formed were such as to bring it within the fourth section, which says that such an association or company or partnership as this shall not be formed, and that, therefore, there never, in this case, existed any association or partnership or company which the law can recognize as such, or with which the law can in any way deal. Now, if the case is within the fourth section, the words of that section being imperative and prohibitory and negative, it seems to me that the law can take no cognizance of the existence of such an association, and that the absence of notice to the petitioners of these facts cannot enable the law to act in their favor with regard to such an association, as if it existed, when the law has said it shall not exist."

But the question remains whether a lawful organization may not be presumed from proof of the user of the franchises of an incorporated town for a long period of time. This question was not directly decided in *Ruohs v. Athens*. In that case the record of incorporation was produced, and the lack of compliance with the statute appeared upon its face. Having regard to the purpose of the statute prescribing the precautions to be taken in running railroad trains, and seeing that the dangers to be avoided are the same, whether the assumed corporate character of the town rests upon a lawful basis or not, we should be inclined to hold, in the absence of countervailing reasons, that presumptive evidence of due incorporation would be competent in cases of this character. But the ultimate fact to be proven is the fact of incorporation, and the statute has provided for a record thereof. Obviously, this record is the best evidence of the fact to be proven. It is made easily accessible. If it is lost or destroyed, secondary evidence would doubtless be admissible. The court would take judicial notice of the statute under which incorporation might take place, but the question whether in a given instance it has taken

place is one of fact for the jury. *City of Hopkins v. Kansas City, St. J., etc., R. Co.*, 79 Mo. 98; *Bassett v. Porter*, 4 *Cush.* 487; *Bow v. Allenstown*, 34 N. H. 351; 1 *Dill. Mun. Corp.* (3d Ed.) § 84. Judge Dillon states the rule thus:

"And where there is no direct or record evidence that a place has been incorporated, and it is sought to show the fact of incorporation from circumstantial evidence, the question is ordinarily for the jury, and not for the court; that is, the jury, under the circumstances, determine whether there is or is not sufficient ground to presume a charter or act of incorporation, or the due establishment and existence of a corporate district under some general act."

In this case there was no record evidence of incorporation, but, as we have seen, the court permitted oral evidence to be given of certain facts from which incorporation might be inferred, and no exception was taken thereto. There was no documentary or written evidence of any kind to support the allegation. The facts proven tending to make out that the town was incorporated were fragmentary and inconclusive, and the proof of its boundaries was not, as we should think, very satisfactory. Perhaps they might satisfy the jury, but the court could not say, as a matter of law, that the ultimate fact was established in favor of the plaintiff.

Counsel for the defendant in error calls our attention to an act of assembly, passed March 19, 1897, to repeal the charter of Helenwood, and relies upon this as a legislative recognition of its previous incorporation. Assuming that this act is one of which the court should take judicial notice, there are two answers to be given to the contention of counsel: In the first place, the repealing act furnishes no evidence of the date of the supposed incorporation. The accident happened in February, 1896. But, secondly, the question of fault or no fault must be determined by the conditions existing at the time of the accident. If, with reference to those conditions, the defendant was not guilty of negligence, he could not be converted into a wrongdoer by a subsequent act of assembly.

It is strenuously insisted in behalf of the plaintiff in error that the proof given on the trial that the death of the plaintiff's husband occurred in such a way as to render the receiver responsible therefor was too vague and conjectural to justify the verdict. But as the judgment must be reversed for the error we have indicated, and the evidence may be different on a new trial, we forbear to discuss that subject. For the same reason, we do not consider the merits of the complaint that the court ignored, in its charge to the jury, the theory of the defendant below, that Newport was probably murdered while in an intoxicated condition, and his body put upon the track to obscure the evidence of it. The judgment is reversed, with costs, and a new trial will be awarded in the court below.

BOLLES et al. v. PERRY COUNTY.

(Circuit Court of Appeals, Seventh Circuit. February 24, 1899.)

No. 549.

MUNICIPAL BONDS—DEFENSES—BONA FIDE HOLDERS.

Where county bonds contain no recital that they were issued in accordance with the requirements of a statute, compliance with which was essential to their validity, the fact that the bonds were registered under the provisions of such statute, and a certificate to that effect indorsed thereon, does not preclude the county from showing that the statute was not complied with in their issuance, even as against innocent holders.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Geo. A. Sanders, for plaintiffs in error.

Samuel P. Wheeler, for defendant in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

PER CURIAM. This action was brought to recover the amount of bonds issued in the name of Perry county, Ill., to the Belleville & Southern Illinois Railroad Company or bearer, in discharge of a subscription made in the name of the county to the capital stock of the railroad company. The case is governed in all respects by the decision of the supreme court in *Citizens' Savings & Loan Ass'n v. Perry Co.*, 156 U. S. 692, 15 Sup. Ct. 547, where coupons from the same series of bonds were declared invalid. It is urged, but we cannot see, that that decision is inconsistent with the later opinions of the supreme court in *City of Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, and *Graves v. Saline Co.*, 161 U. S. 359, 16 Sup. Ct. 526, and of this court in *Wesson v. Saline Co.*, 34 U. S. App. 680, 20 C. C. A. 229, and 73 Fed. 917. In those cases the recitals in the bonds showed compliance with all statutes relating to the subject, while the recital in the bonds in suit contains no reference to the act of April 16, 1869; and that compliance with that act was necessary, and is not shown by, or to be inferred from, the registration or certificate of registration of the bonds, was decided in *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 539, 9 Sup. Ct. 159, and reaffirmed in *Citizens' Savings & Loan Ass'n v. Perry Co.*, supra. The judgment below is affirmed.

CRAVENS v. CARTER-CRUME CO.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 555.

1. TRIAL—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

Error cannot be assigned upon the action of the court in receiving documents in evidence, where no ground for their exclusion is stated in the objection made.

2. MONOPOLIES—COMBINATION TO RESTRICT PRODUCTION—VALIDITY OF CONTRACTS.

At a convention of manufacturers of wooden ware, in which 80 per cent. of the production of the country was represented, a combination

was formed for the purpose of restricting the production of wooden dishes throughout the country, and keeping up the price thereof. To this end it was expected and intended that all the factories would be brought under the control of a central organization, which was to regulate the prices. The articles to which the combination related were such as are in common use. *Held*, that a contract made in pursuance of such combination, by which a manufacturer was guaranteed a certain sum as dividends on his stock in the central company, in consideration of the closing of his factory for a year, was contrary to public policy, and therefore unlawful, and would not be enforced by the courts.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Charles Cravens, plaintiff in error, a citizen of Indiana, doing business at Paducah, Ky., under the name of Charles Cravens & Co., brought this action against the Carter-Crume Company, a West Virginia corporation, the National Mercantile Company, an Ohio corporation, and the Crume & Sefton Manufacturing Company, another West Virginia corporation, to recover the sum of \$9,000, which he claimed had inured to him under the guaranty of the Carter-Crume Company that the dividends upon certain stock, sold to him by contract between the National Mercantile Company and himself, should amount to the sum of \$9,000 for the year then next ensuing. The National Mercantile Company demurred to the petition, and, the demurrer being sustained, the case was dismissed as to that company. The Crume & Sefton Manufacturing Company dropped out of the case by consent of parties. The Carter-Crume Company answered the petition, and the plaintiff replied. As no question arose upon the pleadings, and none of the errors assigned has relation thereto, it is unnecessary to give any detailed statement thereof. The only questions involved are such as arose upon the trial of the case, and they are based entirely upon the testimony. The facts as they appeared upon the trial were substantially these:

The plaintiff, Cravens, was, and for some time had been, engaged in manufacturing wooden dishes and dish machines at Paducah, Ky., at the time of the making of the contract of guaranty, which was on the 28th day of August, 1896. At that time there were also a number of parties engaged in the same kind of business at various other places scattered throughout the United States, principally in the northern portion thereof. One of these was the Carter-Crume Company, which, by its charter, was required to establish its principal office at Niagara Falls, N. Y. The president and secretary kept their offices at that place, but the vice president and manager had offices at Dayton, Ohio. Another of such manufacturers was the Crume & Sefton Manufacturing Company, the locality of whose principal office is not stated, but it appears to have been doing business at Dayton, Ohio. The National Mercantile Company was an Ohio corporation, having its principal office at Dayton, the majority of the stock in which was owned by parties largely interested in the other two companies just mentioned. William E. Crume, of the Carter-Crume Company, and John C. Crume, of the Crume & Sefton Company, were charter members thereof. William E. Crume was the secretary, and appears to have been largely influential in the direction of the management of the National Mercantile Company. He was also vice president of the Carter-Crume Company, and managed its affairs at Dayton, Ohio. The business for which the National Mercantile Company was incorporated is thus set forth in the third article of incorporation: "Said corporation is formed for the purpose of buying and selling and dealing in wooden ware and grocers' novelties." It was not a manufacturer. This corporation appears to have been formed for the purpose of creating a common controlling head, into connection with which the various manufacturers of wooden dishes throughout the country should, as far as possible, be brought, whereby the output and sale of their manufactures should be controlled in respect to quantity and price. The plaintiff, Cravens, after some preliminary negotiations with the parties representing the corporations doing business at Dayton, as above stated, went there on the date above mentioned, August 28, 1896, for the purpose of meeting and conferring with those parties and others

interested in the manufacture of wooden dishes and dish machines. A considerable number of such persons from different places in the country, representing about 80 per cent. of the entire output of wooden dishes in the country, convened there that day, and a meeting was held, which the plaintiff attended, for the purpose of effecting a combination whereby the output of their goods should be restricted and prices maintained. This plan involved the making of contracts by the manufacturers with the National Mercantile Company of a kind similar to that hereinafter stated between the plaintiff and the National Mercantile Company. Having taken some of the stock, the plaintiff was made a director of that company on that day.

The following is an extract from his testimony, as found in the bill of exceptions: "Q. Mr. Cravens, you were contemplating that deal before that? A. I was contemplating a deal with the National Mercantile Company. Q. You went down to Dayton for the purpose of getting into that deal? A. I didn't know. I was asked to go and attend a meeting. Q. In what way? A. A meeting of the different manufacturers. Q. How much of the output of the country was represented at that time? A. I could not say. Q. Have you no idea? A. (No response.) Q. What was the object of the meeting, as stated to you? A. Mr. Crume had been to see me; wanted me to go into the National Mercantile Company. He wanted me to put my factory in. My factory would represent so much stock. My dividend, he said, would amount to six thousand dollars or more. I refused to do it. I told him that I would if Carter-Crume Company would guaranty me nine thousand dollars. I would close my factory, and not run it at all. Q. You were made director of the National Mercantile Company? A. Yes, sir. Q. What was the object of that company, as you understood as a director? A. Well, I saw that they were then working to get all these factories in line. Q. For what purpose? A. They wanted to close my factory. Q. For what purpose? A. To get the factories all in line. Q. As you understand that, as a director of the company? A. They were to maintain prices. Q. And anything else, sir? A. What they wanted to do was to control the business at that time. Q. And that was the object of that meeting, was it not? A. That was the object of that meeting; yes, sir. Q. And you were director of the company? A. I was director of the company. I will state, though, before I went into that company I had the guaranty—I had Mr. Crume's word that Carter-Crume Company would guaranty me nine thousand dollars a year, if I did this. Q. You knew what you were going into? You made the proposition that, if they would guaranty this nine thousand dollars, you would close your factory? A. I was leasing them my machinery. Q. Didn't you know what the Mercantile Company was buying your factory for,—what you were going into it for? A. To get rid of my machinery; to get this nine thousand dollars. Q. Didn't Mr. Crume tell you what he wanted to do? A. That he wanted to get me in line. Q. What for? A. To maintain prices."

On the occasion of that meeting, the following contracts were entered into between the plaintiff and the other parties named therein:

"Contract.

"This agreement, entered into by and between the National Mercantile Company, a corporation by virtue of and under the laws of Ohio, with office at Dayton, Ohio, their successors or assigns, party of the first part, and Charles Cravens & Co., a co-partnership, of Paducah, Ky., parties of the second part, witnesseth:

"(1) That party of the first part being desirous of leasing all the wood-dish machines now owned or controlled by the party of the second part, and the party of the second part being desirous of renting said machines to the party of the first part, it is hereby agreed that, for the sum of one dollar (\$1.00) and other valuable considerations, the party of the second part agrees to lease, and does hereby lease, to the party of the first part, all the wood-dish machines now owned or controlled by it, and all the wood-dish machines that may, during the continuance of this contract, come into the possession or control of the party of the second part.

"(2) It is also agreed and understood that the said machines shall remain

in the possession and control of the party of the second part, and it agrees to operate and keep in repair the said machines, and proceed to make wood dishes for the party of the first part, on the following terms and conditions:

"(3) The wood dishes shall be made of gum and maple wood, all light in color, all first quality, and satisfactory to the general trade, and they shall be securely packed in good, substantial crates, containing 250 or 500 dishes, as may be, from time to time, specified by first party. If packed in crates, the crate heads shall be planed, branded, and stenciled as instructed by the party of the first part.

"(4) The party of the first part agrees to take wood dishes per year during the continuance of this contract, which shall be distributed as near as may be to dishes daily.

"(5) It is hereby agreed that the price to be paid for said wood dishes shall be: No. 1-2's, 65c.; No. 1's, 65c.; No. 2's, 75c.; No. 3's, 85c.; No. 5's, \$1.05,—per thousand, f. o. b. cars at factory point, and shipped as per instructions from party of the first part; shipping bill, together with invoice, to be promptly mailed to party of the first part. Terms: Cash ten days after date of bill of lading.

"(6) In consideration of the large quantity of wood dishes purchased by the party of the first part, the party of the second part agrees that it will not make for or sell wood dishes, directly or indirectly, to any other person, firm, or corporation.

"(7) The dishes purchased by, and to be made for, the party of the first part shall not become the property of the party of the first part until they are loaded on board cars or vessel, and receipted for by the transportation company.

"(8) It is further agreed that the party of the second part shall make a weekly factory report to the party of the first part; said report to be made out on the Monday following the close of each week, and mailed to the office of the first party. This report to contain a record of the quantity of each size dish made and shipped for the week, and quantity on hand at the end of each week. These reports to be made out on report blanks furnished by the party of the first part.

"(9) The party of the second part agrees to furnish wood dishes additionally in proportion to above-named quantity, at the same prices, and upon the conditions, herein named, if called to do so by the party of the first part.

"(10) Where the words 'wood dishes' are used herein, it is understood that wire-end wood dishes are meant.

"August 28, 1895.

The National Mercantile Company,
"By W. E. Crume, Sec'y.
"By Charles Cravens & Co."

"Supplementary Agreement.

"Between the National Mercantile Company of Dayton, Ohio, party of the first part, and Charles Cravens & Co., party of the second part, to be attached to and become a part of an original agreement between the above parties, dated August 28, 1895:

"(1) Party of the second part, being desirous of obtaining forty-nine shares of the capital stock of the National Mercantile Company, hereby agrees to pay for the same five hundred dollars (\$500), to be paid for in wood dishes shipped to the order of the party of the first part, all to be of first quality, and at the prices named in the original agreement of August 28, 1895.

"(2) The value of said dishes to be placed to the credit of the second party on the books of the company, representing its shares in the capital stock of the company.

"(3) Said quantity of dishes in value to be furnished by the party of the second part before the party of the first part shall be required to pay cash for dishes, as specified in section 5 of the original agreement.

"(4) It is agreed, upon the expiration of this agreement or any renewal thereof, that the share of assets of the company, as represented by the shares of stock held by the party of the second part, shall be paid over to the party of the second part.

"(5) This agreement to remain in force and effect during the continuance of the contract between the parties hereto of even date herewith.

"The National Mercantile Company,

"By W. E. Crume, Secretary.

"By Charles Cravens & Co."

"It is hereby agreed, by the parties hereto, that the Carter-Crume Company, a corporation under the laws of West Virginia, agrees to assume, and does hereby assume, to make the above quantity of wood dishes at the prices and upon the conditions above named.

"Dated August 28, 1895.

The Carter-Crume Company,

"By W. E. Crume, Vice President.

"By Charles Cravens & Co."

"Memorandum of agreement made this 28th day of August, 1895, by and between the Carter-Crume Company, a corporation organized under the laws of the state of West Virginia, party of the first part, and Charles Cravens & Co., of Paducah, Kentucky, parties of the second part, referring to a contract and supplementary agreement made this day between the National Mercantile Company, Dayton, Ohio, and Charles Cravens & Co., of Paducah, Kentucky, parties of the second part: Inasmuch as, under the agreement above referred to, Charles Cravens & Co. have become owners of fifty shares of stock in the National Mercantile Company, parties of the first part guarantee to parties of the second part that the dividends paid by the National Mercantile Company to Charles Cravens & Co., on said fifty shares of stock, shall amount to seven hundred and fifty dollars (\$750) per month, or a total of nine thousand (\$9,000) dollars for the year, ending one year from to-day, or, in the event of such dividends not amounting to such amount, then parties of the first part agree to pay to parties of the second part, on or before one year from to-day, the difference in money between the total amount of dividends paid on said fifty shares of stock and the sum of nine thousand (\$9,000); it also being a condition of this agreement that party of the second part is not to manufacture the dishes for the National Mercantile Company, as specified in their contract of this date, referred to above, but such dishes are to be made in fulfillment of said contract by the party of the first part. Party of the first part to receive all money paid by the National Mercantile Company for such dishes.

"Signed August 28, 1895.

The Carter-Crume Company,

"By W. E. Crume, Vice President.

"By Charles Cravens & Co."

Typewritten minutes of the proceedings at a meeting of the directors of the National Mercantile Company attended by the plaintiff on that day, which a witness testified were taken at the time, were offered in evidence by defendant, and, against objection on behalf of the plaintiff, received, which, among other things, stated that it was resolved: "That it is the policy of this company to hold the price on machine-made wire-end wood butter dishes firm at \$1.60 basis, and that the secretary be, and is hereby, instructed to use his best endeavor to stop all attempts to manufacture dishes, or the making of machines for the manufacture of wood dishes, and to use coercive measures, if necessary, to accomplish this result." These minutes had never been entered in any record book of the company.

The plaintiff executed his part of the above agreements, and in due time demanded the \$9,000, no part of which had been, or was at any time, paid to him. Numerous other contracts between manufacturers of wooden dishes and the National Mercantile Company or the Carter-Crume Company of a similar character, made about the same time, were offered in evidence, and received, against the objection of counsel for plaintiff, who, however, assigned no reasons or grounds for his objection. Some other incidental facts were shown, but the foregoing is the substance of the case as it appeared upon the trial. The trial judge held, at the conclusion of the evidence, that the contracts between the plaintiff, the National Mercantile Company, and the Carter-Crume Company, were not, standing by themselves, unlawful, but that when taken in connection with the other facts, which had been shown, it appeared that they formed part of an unlawful combination in restraint of trade;

that they were therefore contrary to public policy, and could not be enforced. He therefore directed a verdict for the defendant. Counsel for plaintiff duly excepted thereto, and, the verdict and judgment having passed in accordance with the instructions of the court, the case is brought here on writ of error.

Charles W. Baker, for plaintiff in error.

Joseph Wilby, for defendant in error.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

The first of the assignments of error relates to the admission in evidence of the contracts between other parties and the National Mercantile Company of a kind similar to that of the plaintiff with the latter company. But no grounds were stated for the objection to their admission, and for that reason, according to the settled rule, error cannot be assigned upon the action of the court receiving them. 8 Enc. Pl. & Prac. 163, and cases cited. It may not be improper, however, to say that no valid reason occurs to us on which the objection could have been based, seeing that those contracts were immediately connected with the contracts in suit, and, all taken together, constitute the entire transaction in which the parties were engaged. The same observation is applicable to contracts between Cravens and the defendant, the Carter-Crume Company, and the National Mercantile Company, which are copied in the preceding statement of facts. They are to be construed as one.

The second assignment relates to the following ruling of the court at the conclusion of the evidence to the jury:

"Now on the face of the papers themselves, I do not think, and I so charge you, that the contracts—the three of them—are against public policy. But there is evidence tending to show that these contracts were a part of a combination or plan entered into between the manufacturers to the extent of eighty per cent. of the output of the country of wooden dishes, by which they each made a contract with a central company, who was to be the selling company, agreeing to sell all their output to that company at cost, taking shares in that company, and allowing that company to fix the market price for the disposition of the goods after they had been transferred to them for sale, and that these contracts were made for the purpose of maintaining prices, and that for the purpose of maintaining prices further they made contracts to limit the production of machines for the making of wooden dishes."

The record proceeds to state: "Whereupon the counsel for plaintiff excepted to that part of the charge of the court touching the contracts as being against public policy." In explanation, it is proper to say that the above ruling was given in charge to the jury in its preliminary instructions. The jury reported a disagreement. Whereupon the court gave them direct instructions to find for the defendant. The latter instruction superseded the former, and opens the whole case.

The third assignment is based upon the exception to the direction of the verdict in favor of the defendant. We cannot, of course, assume, and the court below could not, that any fact was established about which there was room for controversy. All questions of fact

material to the issue, about which different opinions could fairly have been formed, were for the jury; and the question for us is whether upon the facts, which were substantially uncontested, including those to which the plaintiff himself testified, the verdict which the court directed was the only one which the court would have allowed finally to stand. *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463, and 43 U. S. App. 408. From the preceding statement of the case as exhibited upon the trial, the material and uncontested facts may be gathered into the following synopsis. But first, we lay out of consideration the typewritten minutes of the proceedings at the meeting of the directors of the National Mercantile Company, on August 28, 1896. We think it might well be that the jury would have been justified in sharing the suspicion of counsel for the plaintiff in regard to their genuineness and veracity. It must be admitted that it is most remarkable that any board of directors of a business establishment should pass such a resolution as is quoted in the foregoing preliminary statement, however much in line it might be with their real purposes.

The parties who were engaged in these transactions, of whom the plaintiff was one, representing 80 per cent. of the total product, undertook to, and did in fact, form a combination for the purpose of restricting the production of wooden dishes throughout the country and keeping up the prices thereof. The articles to which this combination had reference were articles in common use. The plaintiff's contracts were part of the means employed for effecting the common object, and he secured the means of sharing in the profits expected to be gained through the combination. To this end all the factories were expected to be brought under the control of the National Mercantile Company, which was to regulate the prices. The plaintiff testified that it was the purpose to close his factory, and not run it at all. He further testified that it was the purpose "to get all the factories in line," in order "to maintain prices." He was guaranteed \$9,000 for closing his factory for a year, and the contract included all the dish machines that might come into his possession or control, thus disabling himself from manufacturing, and he obligated himself not to sell any wood dishes to any other person, directly or indirectly, during the continuance of the contract. It is manifest that it was the expectation, and that the parties intended, to get a sufficiently large number of manufacturers into the combination to practically accomplish their purpose. We cannot doubt that such a combination, for such purposes, was opposed to public policy, and therefore unlawful. It is the settled doctrine that one cannot maintain a suit in a court of justice upon a contract entered into for the purpose of promoting such objects. The doctrine was elaborately discussed, upon the principles of the common law, by Judge Taft in a case recently decided by this court. *U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271. In that case the question was also discussed whether the anti-trust law of 1890 was applicable to the contract then under consideration. But the relation of that act to the common law was involved in the discussion, and much research was bestowed upon the established principles of the latter. The proposition there maintained

was that "no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." It was not doubted, nor, indeed, can it be, that where the direct purpose of the contract in suit is to establish, for increasing their profits, a combination among manufacturers and tradesmen whose function is to prevent competition, and thereby prevent the public from obtaining those articles which are in general use, at the prices at which they could be obtained as the result of fair and untrammeled competition, such contract is unlawful, and cannot be enforced. We have, in the foregoing statement of what we suppose to be the conceded rule, restricted it to the case of "articles in general use," in order to indicate a test which is not affected by a feature put forward in some decisions as creating a distinction. We do not commit ourselves upon the question whether such distinction exists or not. The result of the application of the test above formulated to the facts of this case is, manifestly, that the contract here in question cannot be enforced. It is argued by counsel for plaintiff that the contract should be sustained, within the principles stated and approved in U. S. v. Addyston Pipe & Steel Co., upon the theory that the contract upon which the action is based was collateral merely, and did not require the aid of the agreement for combination. But it seems clear to us that this proposition cannot be maintained. This contract was one of the steps in the forbidden organization, and was intended to be one of many by which the objects of the combination were to be accomplished. Seeing what has been the result to the plaintiff, one cannot help feeling that he may have been duped by more artful men. But he was a business man. It is not claimed for him that he was mentally incompetent in any such sense as to absolve him from responsibility for the legal consequences of his acts, and, in such a case as this, the court does not administer equities according to the relative merit of the parties.

We think the court below was right in directing a verdict for the defendant. The judgment is affirmed, with costs.

KINGMAN & CO. v. WESTERN MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. February 13, 1899.)

No. 703.

DAMAGES—BREACH OF CONTRACT OF SALE—GOODS TO BE MANUFACTURED.

The measure of damages for breach of a contract to purchase goods to be manufactured by the seller, where the goods are not manufactured and ready for delivery at the time the seller is notified that they will not be accepted, if no materials have been purchased, and no labor expended towards their manufacture, is the difference between the cost to the seller of their manufacture and delivery and the contract price, if such price is greater than their cost. If materials have been purchased, the difference between their market value and their cost, if the cost is

greater, is to be added. If materials have been purchased, and labor has been expended towards their manufacture, the difference between the market value of the partly finished articles and the cost of the materials and the labor expended thereon, if the cost is the greater, is to be added.

In Error to the Circuit Court of the United States for the District Nebraska.

James H. McIntosh, for plaintiff in error.

Walter J. Lamb and George A. Adams, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an action for a breach of a contract to order and purchase from the Western Manufacturing Company, the defendant in error, agricultural implements of the peculiar character which it made. The manufacturing company was a corporation engaged in the manufacture and sale of agricultural implements at Lincoln, in the state of Nebraska, and Kingman & Co., the plaintiff in error, was a corporation engaged in the purchase and sale of such implements in the states of Illinois, Missouri, Kansas, Nebraska, Iowa, and South Dakota. On May 8, 1893, Kingman & Co. agreed to order of the defendant in error, at the respective dates, and to pay for at the respective prices stated below, the following implements manufactured or to be manufactured by the defendant in error, to wit: On or before October 1, 1893, 160 Kingman and Weir Standard mowers at \$25 or \$26 each, according to the length of the cutter bar; on or before May 8, 1893, 1,800 Defiance hand cornshellers at \$4.35 each, with a fan and feed table, and at \$4 without a fan and feed table; and between August 1 and December 1, 1893, 1,200 Climax end gates at \$1.25 each. The defendant in error brought this action for a breach of this contract, and alleged that it made and tendered all these articles to the plaintiff in error, but that Kingman & Co. refused to order, accept, or pay for any of them except 54 mowers and 400 cornshellers, and it sought to recover as damages the difference between the market value and the contract price of 106 mowers, 1,400 cornshellers, and 1,200 end gates. The evidence, however, failed to show that at the time of the breach of the contract, which the witnesses for the defendant in error fixed on November 22, 1893, the defendant in error had made or tendered, or had on hand to tender, any of these implements except the 106 mowers, while the fact was established that it had no end gates and no finished cornshellers, and only about 800 cornshellers in process of manufacture at that time. In other words, on November 22, 1893, when Kingman & Co. refused to order or receive any more implements under this contract, the manufacturing company did not have in its possession or control, and could not and did not tender, the 1,200 end gates nor 600 of the cornshellers required by the contract. The court below, over the objection of the plaintiff in error, gave to the jury the rule for the measure of the damages of the defendant in error which would have been applicable if it had proved the manufacture and tender of all the goods. It charged them that, if they found for the defendant

in error, it was entitled to recover the difference between the contract price and the market value of all the articles covered by the contract, whether they had been manufactured or not at the time of the breach. The principal question in the case is whether this was the true rule for the measure of the manufacturer's damages which resulted from the failure of the purchaser to order and take the 600 cornshellers and the 1,200 end gates which it had not made, or commenced to make, when the purchaser refused to order or take any more implements under the contract.

Compensation is the true measure of damages. The injured party may recover what he loses by the breach of his contract, but he cannot recover more, and his recovery must always be limited to the losses which he necessarily suffered from the breach. After he has received notice that the defaulting party will not perform the contract, he may not unnecessarily incur further liabilities or expenses in its performance, and then charge the increased loss he thus incurs to the defaulter. When, on November 22, 1893, the defendant in error received notice from Kingman & Co. that the latter would accept no more implements under the contract, the manufacturing company was bound to refrain from adding to its own loss and to that of the plaintiff in error by making the implements it had not commenced to make; and, if it did so, it cannot be permitted to recover the increased loss it thus voluntarily incurred. *Danforth v. Walker*, 37 Vt. 239, 244. When the manufacturing company received this notice there were 600 cornshellers and 1,200 end gates which it had not commenced to make, and which it never did in fact manufacture. Was it entitled to recover the difference between the market value and the contract price of these implements? The general and the just rule for measuring the damages for a breach of a contract for the sale of personal property is the difference between its market value and its contract price, because the vendor is presumed to have the property on hand; and his profits if the contract is performed, and his loss if it is broken, is the exact difference between the price he can sell the property for in the market and the price he is entitled to receive for it under the contract. This was the true measure of the loss of the defendant in error on the 106 mowers which it had made and was ready to deliver when the contract was broken, because it had them on hand, and it was entitled to their contract price; while after the breach it could obtain only their market value, so that it necessarily lost the difference. But the difference between the market value and the contract price in no way measured the loss the manufacturing company sustained on the 600 shellers and the 1,200 end gates which it never made or had. It could not sell these at the market price, for it did not have them. What it did have under the contract, at the time of this breach, was the right to manufacture and deliver these articles, and to receive the contract price for them. When the breach was made, it was deprived of this right, and its loss was necessarily the difference between the expense it would have incurred in manufacturing and delivering them and the contract price it would have received; or, in other words, the profit it would have made upon them if it had

performed the contract. A simple illustration will make the soundness of this view clear. The contract price of one of the shellers was four dollars, the cost of making it was three dollars, and its market value at the time of the breach was two dollars. If the defendant in error had already made, at an expense of three dollars, and had in its possession, one of these shellers, at the time of the breach, its loss upon it was two dollars, because it lost its profit, the difference between its cost and the contract price, one dollar, and also one dollar of its cost, since it could not have sold it for more than the market value, two dollars. But on a sheller which it had not made it lost none of the cost, because it had not incurred or paid any, and its only loss was the difference between the three dollars it would cost it to make the sheller and the contract price it would have received if it had made and delivered it. In this way it appears that the application by the court of the general rule for the measure of damages upon sales to the loss upon these unmanufactured implements entailed upon the plaintiff in error a loss, much heavier than that which the manufacturing company actually suffered.

The distinction we have pointed out exists in the authorities as well as in reason. In U. S. v. Speed, 8 Wall. 77, the government agreed to pay Speed for slaughtering and packing 50,000 hogs, which it was to furnish. It provided only 16,107, and Speed sued for damages. The court held "that the true measure of damages was the difference between the cost of doing the work and what the claimant was to receive for it, making reasonable deductions for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract." In Hinckley v. Steel Co., 121 U. S. 264, 7 Sup. Ct. 875, the steel company sued Hinckley for a breach of a contract to furnish it drilling directions for, and to buy of it, 6,000 tons of steel rails, which it was to manufacture. None of the rails were actually rolled, but the court assessed the damages on the basis of the difference between the amount it would have cost the plaintiff to manufacture the rails and their contract price. In Danforth v. Walker, 37 Vt. 239, 244, and *Id.*, 40 Vt. 260, the defendant agreed to buy of the plaintiff 1,500 bushels of potatoes, but after the delivery of about 400 bushels, and before the plaintiff had obtained all of the remainder, the defendant gave him notice to buy no more. The court held the measure of damages on those which the plaintiff had not bought when he received the notice was the difference between what it would have cost him to buy and deliver them and the contract price. In Kingsland & Ferguson Mfg. Co. v. St. Louis Malleable Iron Co., 29 Mo. App. 527, 540, the defendant agreed to purchase about 10,000 pounds of castings, which the plaintiff was to manufacture, but broke the contract when only about 5,000 pounds had been made. The court held that the measure of damages was the difference between the market value and the contract price of those manufactured at the time of the breach and the difference between the contract price and the amount it would have cost the plaintiff to manufacture and deliver those that were not made at that time.

The following rules for the measure of damages for the breach of a contract to manufacture and deliver articles will be found to be sustained by the authorities, based upon the rule of compensation, just and applicable to the facts of this case:

1. The measure of damages for a breach of a contract to purchase personal property is the difference between the market value and the contract price of the property at the time of the breach, if the latter be greater than the former.

2. The same rule is applicable to the measure of damages resulting from the failure to accept articles which have been made and are ready for delivery at the time of the breach by the purchaser of the contract to purchase goods of a manufacturer, but it is not the true rule for the measure of damages resulting from the breach on account of those not then made and ready for delivery.

3. Where materials have been purchased and labor has been bestowed upon such articles under such a contract before the manufacturer has notice of the breach, his damages on these articles are the difference between the amount it would cost him to make and deliver them and their contract price, if greater, plus the difference between the value of the partly manufactured articles and the cost of the labor and materials that had been bestowed upon them at the time of the breach, if the cost be greater than the value.

4. If materials have been purchased with which to fulfill the contract, but no work has been bestowed upon them at the time of the breach, the measure of the manufacturer's damages upon the articles which might have been made with such materials under the contract is the difference between the amount it would cost him to make and deliver them, including the cost of the materials, and their contract price, if greater, plus the difference between the cost and the market value of the materials that have been purchased at the time of the breach, if the market value be less than the cost.

5. The measure of the damages upon articles covered by such a contract for which no materials had been bought, and upon which no work had been expended at the time of the breach, is the difference between the amount it would cost the manufacturer to make and deliver them and their contract price, if that price is greater than the cost.

The application by the court below of the general rule for the measure of damages upon a breach of a sale of personal property to the measure of the damages for a refusal to take from the manufacturer in this case articles that had never been made under the contract, was erroneous, and compels a reversal of the judgment. There are other errors assigned, but none which present questions that demand discussion, or that would be liable to raise a doubt in the mind of the court below upon a second trial of the case. The judgment is accordingly reversed, and the case is remanded to the court below, with directions to grant a new trial.

GRADY V. SOUTHERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1893.)

No. 634.

1. MASTER AND SERVANT—RULES FOR THE PROTECTION OF EMPLOYEES FROM INJURY.

Where a railroad company, through its superintendents in charge, had made and enforced a rule in its car-repair shop that employés working on or along any of the tracks in the shop should be given personal notice when cars were to be moved on such track, it cannot be charged, by an employé who is injured by moving cars, and who had knowledge of such rule, with negligence in failing to establish proper regulations for the protection of the men, merely because the rule was not printed.

2. SAME—FELLOW SERVANTS—VICE PRINCIPALS.

The foreman of a freight-car repair shop of a railroad, who is a subordinate of the master car builder, who alone employs and discharges men in his department, which itself is a branch of the mechanical department of the road, under the control of the master mechanic, is not a vice principal, as to another employé in such shop, but a fellow servant, for whose negligence, resulting in an injury to such employé, the railroad company is not liable.¹

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

The action below was brought by George W. Grady against the Southern Railway Company to recover damages for injuries sustained by Grady while in the service of the railway company as a car repairer, caused, as he avers, by the negligence of the railway company. There were three counts in the declaration. The first count charged that the defendant carelessly, negligently, and wrongfully inflicted said injuries upon the plaintiff, causing him great suffering and total and permanent disability. There was in this count no specification of the negligence by which the injury was caused. This count was eliminated by demurrer. The second count averred that while the plaintiff, in the discharge of his duties, was passing between two standing cars, and across one of the defendant's tracks, the defendant suddenly, negligently, and without warning, pushed said standing cars together, thereby catching the body of the complainant between the cars and inflicting the injury. The third count charged that the defendant was negligent in its failure to employ a competent and careful superintendent of the shops and yards, and in its failure to make and enforce reasonable regulations for the protection of plaintiff while engaged in his said work, and that the injuries were caused by the failure of the defendant, through its superintendent of said shops and grounds, to give proper notice to the plaintiff before moving said cars.

The facts of the case were as follows: The plaintiff was a carpenter and car repairer in the service of the Southern Railway Company at its freight-car repair shops, in Knox county, Tenn. The shed in which the work was done had six parallel tracks, all connecting with a so-called "house track" outside the shed. Cars in need of repairs were pushed in by way of this house track onto the various tracks, and cars when repaired were pulled out therefrom in the same way. The tracks were numbered 1, 2, 3, 4, 5, and 6. Only freight cars were repaired in this shed. The whole branch of repairs was in the mechanical department, at the head of which was the master mechanic of the road, J. B. Michael. The work of car repairs in that department was under the control of Master Car Builder A. B. Corinth, who was the immediate subordinate of the master mechanic, Michael. These particular sheds

¹ As to who are fellow servants, see note to Railroad Co. v. Smith, 8 C. A. 668, and supplementary notes to Railway Co. v. Johnston, 9 C. C. A. 596, and Flippin v. Kimball, 31 C. C. A. 286.

were under the control of Patterson, an immediate subordinate of Corinth, and the foreman of freight-car repairs. Subordinate to Patterson in the superintendence of these car sheds was Ed Miller, known as the "gang foreman." Corinth alone employed and discharged men. It appears by the undisputed evidence of the witnesses on both sides that under a rule adopted by the predecessor of Patterson, and verbally promulgated, whenever a line of freight cars was to be moved in or out on any track the foreman or assistant foreman, or some man sent by one of them, went the whole length of the track, and notified in person every man working thereon that cars were to be moved on that track. It further appeared that, when Patterson succeeded as foreman, he enforced this rule still more strictly. The plaintiff himself said that such notification was invariably given, and that he never knew it not to be given, except upon the occasion of his injury; that the men working upon the cars paid no attention whatever to the sounding of the bell on the engine, or any other signal, because they could always depend upon receiving notice, in the way already mentioned, that cars were to be moved upon a particular track. Upon the day of the accident the plaintiff was working on track No. 1. In order to get a necessary tool, he was obliged to go across track No. 2 to track No. 3, where his tool chest had been placed by direction of the foreman. A train of cars was standing on track No. 2, with an opening between the last two cars. A fellow workman was with him. The fellow workman passed through between the two cars, in advance of him, and crossed without injury. The plaintiff, however, put himself between the cars just at a time when the front car was pushed against the back car. He was injured severely. The plaintiff says that he heard no warning from any one that the train on track No. 2 was to be pulled out. There was evidence that the usual warning was given by one whom the assistant foreman had sent for the purpose. There was no evidence of the unfitness of a superintendent or other employé. At the close of the plaintiff's evidence, upon a motion by the defendant, the court directed a verdict for the defendant on the ground that, if the injury was due to the negligence of any one other than the plaintiff, it was due to the negligence of a fellow servant of the plaintiff, for which the defendant company was not liable.

Jerome Templeton, for appellant.

W. L. Welcker, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. The judgment of the circuit court must be affirmed. The evidence leaves no ground whatever for the contention that a reasonable rule had not been adopted by the defendant company for the notification of every one engaged in and about the cars standing upon the repair tracks that they were about to be moved. The system of notice was that of personal notice to every employé engaged in and about the cars. It is true that the rule was not printed, but that it was a well-recognized rule is conclusively shown by the evidence, without a single contradiction. The necessity for written or printed rules is that the course of conduct may be definitely prescribed, and may be more certainly brought to the attention of every person having to enforce or execute the rules, or to rely upon their execution. In this case the person charged with the execution of the rule testified that he did give the notice, and also testified to his knowledge of the rule. The plaintiff, whose right it was to rely upon the rule, testified in the most explicit terms that there was such a rule, and that it had been constantly observed until his injury. The failure to print the rule therefore could in no way have contributed to the injury here complained of. The charge of

negligence based upon the absence of a sufficient rule therefore fails for utter lack of evidence.

The second ground urged for reversal is the negligence of the foreman or assistant foreman, or some man selected by them, in failing to comply with the rule in this particular instance. It is said that this question ought to have been left to the jury. The foreman who had charge of moving the cars was a foreman in the freight-car repair sheds, and, even if we assume that it was his negligence in this particular instance which caused the accident, we should still be obliged to find, under the decision of the supreme court of the United States, that he only was a fellow servant of the plaintiff, and that his negligence in this instance was not the negligence of the company. He was not at the head of a distinct department. He was at the head of one of the many branches (to wit, the freight-repair branch) of a distinct department (to wit, the mechanical department). In the case of *Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, the question was whether the defendant mining company was liable to one of its employés for injury suffered through the negligence of another of its employés, named Finley. The defendant introduced evidence, which was uncontradicted, that its business was under the control of a general manager, and was divided into three departments, the mine, the mill, and the chlorination works, each of which departments had a foreman or superintendent under the general manager; that the mine department had three shifts or gangs of workmen, two by day, and one at night; and that Finley was boss of the one at night. The jury had returned a verdict for the plaintiff in the circuit, and a judgment entered thereon was affirmed in the court of appeals for the Ninth circuit. The judgment of the circuit court of appeals was reversed by the supreme court. Mr. Justice Gray, delivering the opinion, said:

"Finley was not a vice principal or representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery, or in giving orders to the men. The case is governed by a series of recent decisions of this court, indistinguishable in their facts from this one. *Railroad v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269; *Railroad v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848; *Same v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843; *Martin v. Railroad*, 166 U. S. 399, 17 Sup. Ct. 603. See, also, *Wilson v. Merry*, L. R. 1 H. L. Sc 326."

In addition to the cases cited by the learned justice, reference may also be made to *Martin v. Railroad*, 166 U. S. 398, 17 Sup. Ct. 603, *Railroad Co. v. Baugh*, 149 U. S. 369, 13 Sup. Ct. 914, and to *Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397. It seems to us very clear that the duties of the foreman in this case were not those of a superintendent in a department of the railroad company, such that the foreman of it could be regarded as a vice principal. It is

useless to elaborate the discussion upon this point, because the question is to be determined by the decisions of the supreme court, and not by the general discussion of public policy. The Baugh Case has set such limits to the vice-principal doctrine that it is exceedingly difficult to suggest a position, outside of the superintendent or acting superintendent of the various great departments of the road, which will not be filled by fellow servants of all the other employés. The Ross Case, 112 U. S. 377, 5 Sup. Ct. 184, it is said, has never been expressly overruled. This is true, but it has been so limited to its peculiar facts as to make it of no force as authority in any case where those facts are not exactly presented.

The assumption that the accident was due to the foreman of the car shed has, moreover, little, if any, evidence to support it. If there was negligence in this regard, it was in all probability the negligence either of the assistant foreman, or of some workman selected and directed to give the usual alarm. Clearly, the neglect of either would be that of a fellow servant. These views lead to an affirmation of the judgment.

ANN ARBOR R. CO. v. FOX et al.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 636!

RAILROADS—LIABILITY FOR FIRES—BURDEN OF PROOF AS TO NEGLIGENCE.

Under the Michigan statute (How. Ann. St. § 3481) which provides that any railroad company shall be liable for all loss or damage by fire originating from such railroad, "provided that such company shall not be held so liable if it prove * * * that such fire originated from fire by engines whose machinery, smoke-stack, or fire-boxes were in good order and properly managed," proof of a fire having started from an engine of a railroad company raises a presumption of negligence, and the burden rests upon the company to bring itself within the exception by showing that its engine was in good order and properly managed; and this is true although the property destroyed was on its right of way, and within less than 50 feet of its track, when it was there with the knowledge and acquiescence of the company, and for the mutual convenience of the owner and the company.

In Error to the Circuit Court of the United States for the Western District of Michigan.

The plaintiffs, on the 23d day of October, 1895, owned, in the village of Thompsonville, in the state of Michigan, a large quantity of lumber, which lay near the track of the Toledo, Ann Arbor & North Michigan Railway Company. About 1 o'clock in the afternoon of that day, the lumber was destroyed by fire. The fire broke out shortly after the passage of a train known as the "work train." On behalf of the plaintiffs the claim was that the fire originated from sparks emitted from the engine on this train; that the engine was defective in construction, in not being provided with proper spark-arresting devices, and in other respects; that it was improperly managed on the occasion in question; that combustible matter had been carelessly allowed to accumulate on and over the right of way of the railway company; that sparks from the engine fell upon this combustible matter upon the right of way, which took fire; and that the fire ran through this inflammable material under one of the piles of lumber, and, without fault on the part of the plaintiff, spread over and consumed all of the lumber in the yard. The railway

at the time was being operated by Wellington R. Burt, as receiver, appointed by the circuit court of the United States for the Northern district of Ohio. The receiver was subsequently discharged, the railway property having been sold to the defendant, the Ann Arbor Railway Company, which assumed and agreed to pay all of the receiver's debts and liabilities. This action was brought by leave of the court appointing the receiver, for the purpose of having an adjudication as to the liability of the receiver (and the defendant railroad company) for the loss in question. On behalf of the defendant it was claimed that the receiver was not negligent in respect either of the construction or operation of the engine, or the condition of the right of way; that the plaintiffs were guilty of negligence in respect (1) of the location of their lumber; (2) the condition of the ground about the lumber piles; and (3) the failure to use reasonable efforts to stay the progress of the fire.

The case was tried before a jury, resulting in a verdict for the plaintiffs for \$15,500, upon which judgment was entered. The right of way of the defendant at the place where the fire occurred was 100 feet in width. The track was in the center of the right of way. The line of the railroad ran north-easterly, and the lumber yard was on the northerly side of the track. The railroad at this point was a part of what had formerly been the road of the Frankfort & Southeastern Railway Company, which latter company conveyed its railroad to the Toledo, Ann Arbor & North Michigan Railway Company in 1892. The lumber yard in question was owned, and for some years had been operated, by the Thompson Lumber Company. The owners of the Thompson Lumber Company were also largely interested in the Frankfort & Southeastern Railway Company. At the time of the fire, Charles Fox & Co. were the lessees of the Thompson Lumber Company, and were operating the yard. The Thompson Lumber Company had been accustomed to pile lumber on the right of way of the railroad company without its objection. A tramway had been constructed by the Thompson Lumber Company to the north of and lengthwise of the railway track, partly on and partly off the right of way, and piles of lumber were placed on the right of way. This was done originally for convenience in shipping lumber over the railroad, for it was then the custom to load from the piles onto cars standing on the main track of the road. Subsequently a side track was built, extending up into the yard, and thereafter all the shipping was done from the side track. The lumber company, however, continued to pile its lumber in the same place on the railroad right of way; and the successors in title of the lumber company, the defendants in error here, continued the practice, without objection or remonstrance by the railway company. In 1894 the receiver built a fence along the right of way. When the lumber piles were reached, the fence was "jogged" in towards the track, and was constructed along the top of the bank of the excavation in which lay the railway track. The lumber pile in which the fire first broke out was four feet from the fence. The distance from the fence to the edge of the bank was from six to seven feet. The distance from the top of the bank to the railway track in the cut below was from 15 to 20 feet. Plaintiffs' evidence tended to show that the spark from the engine had fallen into some dry grass on the bank on the railway side of the fence, and set fire to it; that the fire ran along the fence, and thence to the lumber pile, but four feet distant. When the fire was first discovered, there was no blaze visible, except what was readily extinguished, but smoke was issuing from under the pile. Ineffectual efforts were made by several men to put it out by throwing water and dirt under the pile. Other efforts were made to throw the lumber from the top of the pile, but this would have required so much time that the efforts were abandoned. Evidence was also introduced to show that it was suggested to Fox, one of the defendants in error, by an employé of the receiver, that the pile be blown up with dynamite, of which a supply was on hand, but that Fox at first refused, and, when he subsequently gave permission, it was then attempted, but without success. At the time of the fire, a strong wind was blowing from the railway track towards the yard. The day was fair, and the season had been dry.

A. L. Smith, for plaintiffs.

Mark Morris and George P. Wanty, for defendant.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge. The statute of Michigan provides that:

"Any railroad company building, owning or operating any railroad in this state, shall be liable for all loss or damage to property by fire originating from such railroad, either from the engines passing over such road, fires set by the company's employés, by order of the officers of said road, or otherwise originating in the constructing or operating of such railroad; provided, that such railroad company shall not be held so liable if it prove to the satisfaction of the court or jury that such fire originated from fire by engines whose machinery, smoke-stack, or fire-boxes were in good order and properly managed, or fires originating in building, repairing or operating such railroad, and that all reasonable precautions had been taken to prevent their origin, and that proper efforts had been made to extinguish the same in case of their extending beyond the limits of said road, when the existence of such fire is communicated to any of the officers of such company."

The court charged the jury that:

"Where it appears that fire has originated in the manner mentioned by the statute, and injury has happened therefrom, the duty devolves upon the defendant of showing that, notwithstanding it has happened, the railroad company—or receiver, in this case—has not been guilty of any negligence which has caused the fire, and has taken proper precautions in the construction and management of his machinery, and in other particulars pointed out by the statute." "Under the statute, upon proof of a fire having started from one of the engines of a railroad company, there is a presumption that it has been caused by some fault, some negligence, on the part of the company, either in the structure or management of the engines, or in the manner in which it has taken care of its right of way; and upon proof of the fact that the fire has been caused by an engine of a railroad company, which has passed over onto the land of private owners, and there caused damage, a *prima facie* case is made out, and the railroad company cannot escape liability, except by assuming and maintaining the burden of showing that it has exercised due care in the premises."

We think that this was the plain and manifest effect of the statute. The statute first imposes a liability upon the railway company for all loss occasioned by fire originating from the operation of its road, and follows this with an exception or proviso in which the railroad company is given the opportunity to escape such liability by showing that it has exercised due care. This necessarily imposes upon the railroad company, if it wishes to take advantage of the proviso of the statute, the burden of showing the fact upon which the proviso becomes operative, to wit, that it exercised due care with respect to the prevention of the fire, which had originated in its operation of the road. But it is argued that, even if this be conceded to be the correct view of the statute, the statute is not thus to be construed where the property destroyed is upon the right of way of the company. The learned counsel says that:

"Section 3323 of Howell's Annotated Statutes of Michigan permits and contemplates that railway companies shall have 100 feet as a right of way, which they are obliged to keep reasonably clear and free from combustible matter. This width is allowed, not merely for building additional tracks, but for better security from fire from sparks thrown by the engine. It is presumed that if the track is in the middle of the right of way, and the latter is kept reasonably clear of combustible matter, such sparks as are necessarily emitted by the engines will fall inside the right of way, and do no harm;

and so railroad companies are properly charged with the duty of keeping the right of way clear, and are made liable for fires set outside the right of way; and, when fires are set outside the right of way, this fact raises a presumption of negligence on the part of the railway company. But this has no application where the plaintiff himself voluntarily places his property on railroad property, inside of this danger limit. In so doing, he takes his chances. We do not think a plaintiff in such case should have the benefit of such a presumption in his favor."

There is nothing in the particular statute of Michigan we are discussing which requires that a railroad shall have a right of way 100 feet in width, nor is there anything to show that the application of the statute was limited to any particular width of the right of way. Where a railroad company and the abutting property owner by agreement temporarily or permanently narrow the distance from the track to the edge of the right of way, as they did here, by a fence erected considerably within the right of way, it may be conceded that the risk of fire is increased. But the relation of the parties to the risk and danger is the same. It is an additional risk for each, but the loss must fall just where it would have fallen had a greater distance between the lumber and the track been maintained; for they voluntarily assumed the burden from the increased danger.

In Railroad Co. v. Richardson, 91 U. S. 454, the statute of Vermont provided that:

"When any injury is done to a building or other property by fire communicated by a locomotive engine of any railroad corporation the said corporation shall be responsible in damages for such injury unless they shall show that they have used all due caution and diligence, and employed suitable expedites to prevent such injury."

The property destroyed in that case was property of the abutting owner, built on the right of way by the owner for the convenience of the owner and railroad company. The railroad company contended that the statute did not apply to property located within the limits of the railroad. The supreme court said, speaking through Mr. Justice Strong:

"This view of the statute, as we have already remarked, is not, in our judgment, correct as a general proposition, and certainly not in its application to a case where property is placed within the lines of a railway, by the consent of a railway company, for the convenience, in part, of its traffic."

The lumber in this case was placed within the lines of the railway company's right of way originally for the convenience of the railway company; that is, for loading and unloading. Subsequently a side track was built from which the lumber was loaded and unloaded, but the piles were permitted to remain. The side track was often used by the railway company for switching cars and trains in its general business. The storing of the lumber and the use of the side track were the result of an arrangement profitable to both parties. The case before us cannot be distinguished from the Richardson Case.

The second assignment of error was based on the refusal by the court to give the following charge:

"Even if you find that the burning of the plaintiffs' lumber was caused by the negligence of the railroad, either in the condition or management of its engines, or in maintaining an unsafe condition of the right of way, the defendant will not be liable therefor, unless you also find that the burning of the lumber was the natural and immediate result of the fire communicated

from the railroad, without the intervention of any other cause or agency, such as might reasonably and naturally have been foreseen as the result of the fire on the inclosed right of way."

The third assignment of error was based on the refusal to give the following:

"Even if you find that the receiver was negligent in causing the setting fire to plaintiffs' lumber, in case you further find that plaintiff Charles Fox unreasonably refused to consent to the use of dynamite or to the tearing down of the lumber pile first discovered to be on fire, and that by such use of dynamite, or by tearing down the pile, or by both such means, the spread of the fire would have been prevented, plaintiffs can, in such case, recover no more, in any event, than the value of the lumber that would have been burned had such pile been torn down or destroyed by dynamite."

The charge upon the general subject which the court did give was as follows:

"Even if the receiver was negligent in permitting the setting fire to plaintiffs' lumber, plaintiffs cannot recover, provided due care on their part would have prevented the burning of their lumber, nor can the defendant be made responsible for the loss of any lumber, the burning of which would have been prevented by due care on the plaintiffs' part. This suggests the doctrine of contributory negligence,—that is, negligence on the part of the plaintiffs which has contributed or might have contributed to the injury,—about which I shall give you some further instructions later on. The question is not, 'Is the plaintiffs' contributory negligence or lack of care as great as the negligence of the receiver?' If negligence on the part of the plaintiffs, no matter how slight as compared with that alleged against the receiver, if negligence of this kind on the part of the plaintiffs directly contributed to the burning of the plaintiffs' lumber, the plaintiffs cannot recover. And to this I add, also, this contributory negligence must have been such, however, as that, if it had not occurred, the loss would not have happened."

It seems to us that this covers in a sufficient way all that the defendant was entitled to have charged to the jury upon the question whether the fire from the engine was the proximate cause of the burning of the lumber, or any part of it. There is not the slightest suggestion in the case of any intervening cause between the fire from the engine and the burning of the lumber pile, which could break the causal relation of one to the other, unless it was negligence on the part of the plaintiffs in not preventing or suppressing the fire, and that intervening cause this charge fully discusses.

The fourth assignment of error is based on the refusal of the court to give the following charge:

"It being undisputed that the plaintiffs were, at the time of the fire in question, maintaining on their side of the fence, and within the railroad right of way, material as combustible as that on the other side next to the railroad track, and the lumber first discovered on fire being within the limits of the right of way, plaintiffs cannot recover on account of any of the alleged negligence of the receiver in not keeping the right of way free from combustible material."

In lieu of this the court gave the following:

"If a fire started on that part of the right of way occupied by the plaintiffs, and caught there, and spread in combustible material carelessly allowed by the plaintiffs to accumulate there, and the fire would not otherwise have caught and spread, they cannot recover upon the negligence imputed to the receiver on account of the condition of the roadway not thus occupied by the plaintiffs; that is to say, in other words, if the jury should find that this fire caught in combustible material carelessly left and allowed to accumulate

by the plaintiffs on the property occupied by themselves for their lumber yard, although that was a part of the original right of way, then the plaintiffs in this case would not be entitled to recover, notwithstanding the fact that, intervening the place between where this fire originated and the railroad track, it might have been out of order in respect of the existence of combustible material, because, in the case supposed, the condition of affairs between the place where the fire caught and the railroad track would be entirely immaterial, and, in the case supposed, would not in any way have been involved in the communication of the fire from the engine to the lumber yard."

In a previous part of the charge the court had told the jury that it was—

"The duty of the plaintiffs to exercise reasonable care and prudence to keep that part of the right of way occupied by them free from inflammable and combustible material. That I have in substance already charged you. The duty of keeping that part of the right of way free from any combustible material by which fire might be communicated to the lumber was devolved upon the plaintiffs. If you find that plaintiffs neglected this duty, and that this neglect on their part directly contributed to the loss of their lumber, they cannot recover in this case, notwithstanding you find that defendant was also negligent."

It is claimed for the defendant that the evidence as to the condition of the four-foot space between the fence and the lumber pile where the fire first smoldered and caught in the lumber was such that contributory negligence contributing to the injury conclusively appeared, and that the court ought to have given the charge requested, which was in effect a peremptory instruction. Undoubtedly, the great weight of evidence does show that the part of the right of way on the northerly side of the fence, where the lumber piles were, had grass and other combustible material spread about in such a way as easily to communicate fire. There was evidence, however, by some witnesses, that the space between the fence and lumber pile was fairly clean. Moreover, in a short distance of four feet between the fence and the lumber pile, with a northerly wind blowing, it is easy to conceive that fire might have been communicated directly from the fence to the lumber pile without any aid from intervening grass or combustible material. If it did so, the presence of combustible material between the fence and the lumber pile did not contribute to the fire, and negligence of plaintiffs in this regard, however great, would not bar recovery. There was sufficient doubt as to how the fire did spread from the fence to the lumber pile to require the submission of the question to the jury.

We have covered all the assignments of error the plaintiffs have deemed it wise to press, and find no substantial error therein. We affirm the judgment of the court below.

LONDON & L. FIRE INS. CO. v. FISCHER.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 615.

1. INSURANCE—CONDITION AGAINST INCUMBRANCE—WAIVER.

The delivery of an insurance policy, by an agent having authority to deliver or withhold it, with knowledge of an existing incumbrance on the property insured, is a waiver of a condition of the policy against incumbrances, which is binding on the company as to such existing incumbrances.

2. SAME—CONSTRUCTION OF POLICY.

In a clause in an insurance policy providing that it shall be void if "there be kept, used, or allowed * * * gasoline" on the premises, the word "allowed" is to be construed as meaning "allowed to be kept or used," and the condition is not violated by merely permitting gasoline to be carried through the building on the premises.

In Error to the Circuit Court of the United States for the District of Kentucky.

Action on insurance policy. For former report, see 83 Fed. 807.

This was an action by John Fischer, upon an insurance policy, to recover the value of a stock of goods in the city of Louisville, upon which the defendant insurance company had issued a policy of \$3,000. The defense of the company rested upon alleged violations of three conditions of the policy. The conditions were as follows:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void (1) if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; * * * or (2) if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage; or (3) if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine or other explosives, phosphorus, or petroleum, or any of its products, of greater inflammability than kerosene oil of the United States standard."

The cause was tried before a jury. Upon the issue whether the first and second of the foregoing conditions had been broken, the trial court instructed the jury as follows:

"Then the next inquiry is whether at the time of the delivery of the policy there was a chattel mortgage. The provision of the policy is that if the subject of insurance is personal property,—and it is personal property here,—and be or become incumbered by a chattel mortgage, the policy shall be void. The plaintiff says in regard to that, by his evidence, by his pleading, by statement of counsel, that there was a chattel mortgage on it; that the plaintiff had previously bought that stock of goods, or a stock, part of which, perhaps, remained, and that he owed some \$2,900 on it, or \$3,000, and to secure that he had taken out policies in his own name,—two policies,—one of \$2,500 and the other of \$500, and had assigned them to the person from whom he purchased, and that that was known and communicated to Mr. Rehkopf, who was the agent of the insurance company, and that he had full knowledge of it before he delivered the policy sued on. If that be true, from the evidence, if you find that to be true, this provision of the policy is not effectual as a defense, because he is estopped,—the company has waived, through him (to rely on such breach of), that provision of the policy; and, if the fact be that there was one or more chattel mortgages on it, it makes no difference, the

policy is good, the evidence being that he had the right and had the authority, as the agent, to deliver or not to deliver this policy. Now, if he delivered this policy with the knowledge of the existence of those several mortgages, then the knowledge under such circumstances precluded the insurance company from making such a defense. It is a waiver. It is estopped now from making any such defense. If, however, he delivered the policy, made the contract complete as the agent of this defendant, and the knowledge was communicated to him afterwards, the fact that he knew it afterwards would not release the plaintiff from this obligation, because by the very terms of the contract between the parties any agent was precluded from waiving the provision of the contract, except where it was indorsed in writing upon the paper,—the contract itself.”

Upon the remaining condition (3) cited above, the charge of the court was as follows:

“Did the plaintiff in this case, between the 7th of October, 1895, and the 31st of May (the time of the fire), 1896,—did he, in the language of the policy, ‘keep, use, or allow in the premises, to wit, the main building, gasoline?’ If you conclude that he did ‘keep, use, or allow’ to be used, or kept, gasoline in the premises, thus described, why, then, you should find for the defendant, because by the very terms of the policy the plaintiff agreed that the policy should be void, if he did this thing, which was prohibited. You must keep in mind, now, this proposition refers only to the main building, which excludes the shed behind. Now, this language here is not used in any technical sense, either. It is for you to say whether, from the evidence, this plaintiff kept, used, or allowed to be kept or used, gasoline between the 7th of October, 1895, and the 31st of May, following. You must consider the whole evidence on that subject.”

Augustus E. Wilson, for plaintiff in error.

John Barret, for defendant in error.

Before TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge (after stating the facts). We think the judgment must be affirmed. It is well settled in the law of fire insurance that the insurer is estopped to plead as a defense the breach of conditions against other insurance or incumbrances without the consent of the company in writing on the face of the policy, if it appears that, when the agent of the company, with authority to deliver or withhold policies, delivered the policy in question, he then knew of the existence of the other insurance or the incumbrance. In *Insurance Co. v. Norwood*, 32 U. S. App. 490, 16 C. C. A. 136, and 69 Fed. 7, which was decided by the circuit court of appeals for the Eighth circuit, it was held that, where the agent was advised by the insured at the time of the issuing of the policy that he intended to take out other insurance, the estoppel would apply. Judges Caldwell and Thayer upheld this view. Judge Sanborn dissented on the ground that the rule did not apply to the knowledge of the agent of the intention on the part of the insured to take out other insurance in future, but only to knowledge of existing insurance at the time the policy was issued. But the proposition formulated above, and which goes as far as is needed to sustain the charge of the court below, was expressly approved, not only by the majority of the court, but also by the dissenting judge. Other cases sustaining this doctrine are *Putnam v. Insurance Co.*, 4 Fed. 753 (a decision by Mr. Justice Blatchford, then circuit judge); *Whited v. Insurance Co.*, 76 N. Y. 415; *Insurance Co. v. Hick*, 125 Ill. 361, 17 N. E. 792; In-

surance Co. v. Copeland, 86 Ala. 551, 6 South. 143; Patten v. Insurance Co., 40 N. H. 375-381; 1 May, Ins. (3d Ed.) § 294e; 2 May, Ins. § 372c, and cases there cited. There was, therefore, no error in the charge of the trial court upon this point.

The second assignment is based upon the construction which the court gave of the word "allowed" in the clause providing that the policy should be void "if there be kept, used, or allowed" on the premises gasoline. The court construed the word "allowed" to mean "allowed to be kept or used." The evidence tended to show that gasoline was carried through the store from a shed in the back yard, not connected with the main building, where the stock of goods was insured. It was conceded that such carrying of gasoline through the store without leaving it there permanently did not come within the adjudicated meaning of the terms "kept and used"; but it was contended that the word "allowed" embraced more than "kept or used," and was sufficiently broad to include the carrying of gasoline through the store for immediate delivery to customers, even though gasoline was not allowed to be stored on the premises, or to remain there longer than the time required to carry it from the back door to the customer, and to deliver it to him. The court construed the word "allowed" as if inserted for the purpose of making it clear that the condition would be broken, whether the keeping and using was done by the insured himself, or was allowed or permitted by him to be done by some one else. The argument made on this construction is that under it the word "allowed" is merely redundant, and adds nothing to the meaning of the other two words, because it has often been adjudicated that they are broad enough to cover, not only the act of the insured, but also the act of any person whom the insured may permit or allow to keep or use gasoline upon the premises, and in some cases even the act of a tenant in keeping gasoline against the express command of the insured. The mere fact that the words "kept or used" might, by construction, be made wide enough to include "allowed," does not require of us, when the word "allowed" is expressly made a part of the policy, to give it any different meaning from what it would have when it was implied from the use of other words. The habit of using apparently redundant expressions in statutes and contracts and deeds, for the purpose of excluding any possibility of a misconstruction, is very frequent. It justifies us in giving the word "allowed" its ordinary meaning, instead of attributing to it a strained and vague significance, which will defeat the policy. The duty of the court, where the meaning is ambiguous, is to construe the words used against the insurer, who framed them, so as to validate the policy, rather than destroy it. London Assurance v. Companhia De Moagens Do Barreiro, 167 U. S. 157, 17 Sup. Ct. 785; Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 462, 14 Sup. Ct. 379; National Bank v. Insurance Co., 95 U. S. 673. This disposes of all the assignments of error made by the plaintiff in error, and leads to an affirmance of the judgment.

UNITED STATES LIFE INS. CO. V. SMITH.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 605.

1. LIFE INSURANCE—MISREPRESENTATIONS IN APPLICATION—WAIVER—AUTHORITY OF AGENT.

An application for life insurance, which was made part of the contract, and the representations in which were part consideration for the issuance of the policy, consisted of two parts, one of which (to be filled and signed in the presence of the medical examiner) contained a provision that "no information or statement, unless contained in this application, made, given, received, or required by any person at any time, shall be binding on the company." Such application contained the following question: "Has any application ever been made for insurance on this life, on which a policy was not issued for the full amount and of the same kind as applied for, and at ordinary rates?" This question was answered, "No." In an action on the policy it was shown without dispute that the insured had previously made three applications for insurance to different companies, all of which had been absolutely rejected. *Held*, that the fact that the local agent of the company, who had no duty in connection with such application, had been told of such rejections, and advised the answer made, did not bind the company, or change the effect of the answer as a fraudulent misrepresentation on a material matter, which rendered the policy void, the question not being ambiguous.

2. SAME—DEFENSE TO ACTION ON POLICY—TENDER OF PREMIUMS PAID.

A life insurance company is not required to tender back the premiums paid on a policy, to enable it to defend against an action thereon on the ground of fraudulent misrepresentations made in the application, where by the terms of the policy such defense is permitted, and the premiums paid are forfeited, in case the fraud is discovered, and notice thereof given the insured, within two years from the date of its issuance, and such provision has been complied with, and no premiums thereafter received. In such case, where the fraud is established, the forfeiture may be enforced.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This is an action upon a policy of life insurance issued by the United States Life Insurance Company of New York upon the life of Joseph Smith; the beneficiary being Minnie J. Smith, wife of the assured. The policy was for \$5,000, issued April 1, 1895. The assured died September 25, 1895. All liability was denied by the company, and suit was brought in the circuit court for the county of Hamilton, state of Tennessee, and removed therefrom by the company upon the ground of diversity of citizenship. The plea was, in effect, the general issue, with notice, according to Tennessee practice, that the defendant on the trial would rely, among other defenses, upon the fact that the person insured, in his application, had made untrue statements in respect to former applications for insurance which had been rejected, and had also made untrue statements in respect to certain diseases to which he had been subject,—among others, Jaundice, palpitation of the heart, disease of the genital or urinary organs, diabetes, etc.,—and that the falsity of his statements had been discovered, and communicated to the insured and assured, within two years from the date of the policy. The policy, among other things, provided (1) that it was issued "in consideration of the statements and agreements in the application" for the same, "which are made a part of this contract," and the further consideration of the payment of an annual premium, "and upon the conditions and agreements upon the back thereof." Among these conditions and agreements referred to were the following: "(3) In case of understatement of age, the amount payable shall be the insurance that the actual premium paid would have purchased at the

true age of the insured. Any other breach of warranty or untrue or incomplete statement made in the application for this policy will render this contract void, provided that discovery of the same must be made and communicated to the insured or assured within two years from the date hereof." "(7) After two years from the date hereof, if the premiums on this policy are duly paid as herein stipulated, the liability of the company under this policy shall not be disputed." Among the questions and answers embodied in the application made part of the contract were the following: (1) "Has any application ever been made for insurance on this life, on which a policy was not issued for the full amount and of the same kind as applied for, and at ordinary rates?" "If so, by what company, and when?" This was answered, "No," without other comment or explanation. There was uncontradicted evidence that, at the time this application was made and signed, three separate applications had been made in as many different companies for insurance upon the life of this applicant, all of which had been rejected. (2) Among the questions and answers touching diseases to which the applicant might have been subject, were these: "Has the person ever been subject to or had jaundice? Difficulty in urinating? Neuralgia, or any disease of the genital or urinary organs?" Each of these questions were answered, "No." There was also a more general question in these words: "Has the person ever had any illness, local disease, or personal injury, or been subject to any surgical operation? If so, state nature, date, duration, and severity thereof?" The answer to this was: "No. Not in bed by illness for years, except a cold last fall, disabling him two weeks." There was evidence of most conclusive character tending to show that the insured had for years been the subject of a most serious disease, called "diabetes," and there was also evidence tending to show that he had had each of the other diseases inquired of. There was a disagreement between medical experts as to whether diabetes was a disease of the genital or urinary organs, and consequently an issue for the jury to say whether this was or was not one of the diseases specifically inquired about. The medical examination made at the time of the application was by a physician unacquainted with the previous medical history of the insured, and failed to disclose any present evidences of diabetes. The insured was asked to give the names and residences of physicians "who have attended the person or have been consulted by him," and to state "when and for what they were consulted." To this he answered by giving the name of Dr. Satterlee, and by saying that he had consulted him for the cold he had referred to in a former answer. There was evidence tending to show that the insured had been treated by or consulted with several other physicians. This application, after being filled out by the insured, was signed by him, and witnessed by the medical examiner. At the conclusion of all the evidence the plaintiff in error asked that the jury be instructed to find for the defendant. This was denied, and the cause submitted to the jury, who found for the defendant in error.

Henry A. Chambers and O. P. Buel, for plaintiff in error.

Wm. T. Murray, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The controlling question in the case is as to the effect upon the contract of insurance of the untrue answer of the insured to the question in respect to former applications for insurance. That question was in these words:

"Has an application ever been made for an insurance on this life, on which a policy was not issued for the full amount and of the same kind as applied for, and at ordinary rates?"

This the insured answered, "No."

The fact was not disputed that the insured had had three separate applications for life insurance rejected, and yet he answered this question in such way as to withhold this most material information from the company to whom he was then making a new proposal for insurance. That the answer was both material and a warranty has not been, and cannot be, disputed. For the defendant in error it is said that the insured stated the facts touching his former applications to one D. J. Duffey, then the local agent of the insurance company, and that Duffey advised him that the correct answer upon the facts stated would be, "No." The facts thus stated to Duffey were simply that three former applications to three different companies had been absolutely rejected. The learned trial judge refused to instruct the jury to find for the defendant, but left it to them to say whether the insured in good faith had acted upon the advice of the company's agent after stating the facts touching his former rejected applications, and that, if they should find this to be the case, the company would be estopped to rely upon the untruthfulness of the answer. This view of the trial court seems to have been due to some doubt entertained as to the entire clearness of the question. This question occurs in the printed form used by the company's medical examiner. One part of the application is to be filled out and signed in the presence of the soliciting agent, and witnessed by him. This is called "Form A." But the remainder of the application is to be filled out and signed in the presence of the company's medical examiner, and is called "Form B." The agent has nothing to do with this medical examination, and no control over it; and Duffey, though present in this instance, states that many companies require that the agents shall not be present. This form B, when filled out and signed, including the medical officer's personal examination and report, is forwarded by the latter to the company's chief medical officer, and does not pass through the hands of the local agent. Duffey was therefore in the discharge of no duty when present during the medical officer's examination, nor when advising the applicant as to how he should answer questions then propounded. Just preceding the signature of the applicant upon form B there is found the following declaration and agreement:

"(1) That all the statements and answers in this application are hereby warranted to be true, full, and complete, and that this application and declaration shall, with the policy herein applied for, alone constitute the contract between me and the United States Life Insurance Company of New York; *and no information or statement, unless contained in this application, made, given, received, or required by any person at any time, shall be binding on the company.* * * * (5) *That this application, its statements, representations, and agreements, together with all the conditions and stipulations contained in the policy hereby applied for, shall be binding on me and on any future holder of this policy."*

This is signed by the insured, Joseph P. Smith, and witnessed by E. A. Cobleigh, the medical examiner of the company. We have italicized the material parts of this declaration and agreement. The stipulation most material to the question in hand is that "*no information or statement, unless contained in this application, made, given, received, or required by any person at any time, shall be binding on the company.*" The contention now is that the "information"

given by the insured to D. J. Duffey, local agent of the company, as to the former rejected applications, and the "statement" made by Duffey that such out and out rejections were not comprehended by the question to which a false answer was given, should be binding on the company, and operate to estop it from relying upon this most material breach of warranty. This contention is based upon the singular theory that this declaration and agreement are not intended as a limitation upon the power of the company's agents to bind it by information given them by the assured, or statements made by such agents to an applicant, and not contained in the written contract and agreement. This construction needs no serious refutation. Information not communicated to a company's agent, or statements made to the insured by one not a company's agent, could in no event be binding on the company, or affect the contract. It would be a vain thing to stipulate against the binding consequences of that which without the stipulation could not affect the contract. This declaration is a plain and distinct limitation upon the powers of the agents of the company to affect the written contract by any statements or opinions not contained therein, or through any information received, and not embodied in the written application. This stipulation, signed by the insured, operated to inform him that he was to be absolutely responsible for the truth of his answers, and that answers not truthful and complete could not be excused because made at the suggestion of an unfaithful or ignorant agent. But it is said that to enforce such a provision will enable the company to take advantage of the misconduct or mistakes of its own agent. The same objection was urged in the late case of *Maier v. Association*, 47 U. S. App. 329, 24 C. C. A. 243, and 78 Fed. 570, when this court, speaking by Justice Harlan, said:

"It was said in argument that the company should not be permitted to take advantage of the misconduct or wrong of its own agent. But the law did not prohibit the company from taking such precautions as were reasonable and necessary to protect itself against the frauds or negligence of its agents. If the printed application used by it had not informed the applicant that he was to be responsible for the truth of his answers to questions, and if the want of truth in such answers were wholly due to the negligence, ignorance, or fraud of the soliciting agent, a different question would be presented. But here the assured was distinctly notified by the application that he was to be held as warranting the truth of his statements, 'by whomsoever written.' Such was the contract between the parties, and there is no reason in law or in public policy why its terms should not be respected and enforced in an action on the written contract. It is the impression with some that the courts may, in their discretion, relieve parties from the obligations of their contracts whenever it can be seen that they have acted heedlessly or carelessly in making them; but it is too often forgotten that, in giving relief under such circumstances to one party, the courts make and enforce a contract which the other party did not make or intend to make. As the assured stipulated that his statements, which were the foundation of the application, were true, by whomsoever such statements were written, and as the contract of insurance was consummated on that basis, the court cannot, in an action upon the contract, disregard the express agreement between the parties, and hold the company liable, if the statements of the assured—at least, those touching matters material to the risk—are found to be untrue."

The argument that the company should not be permitted to take advantage of the misconduct, wrong, or ignorance of its own agent

has little force upon the facts of this case. It is not possible to believe that the insured was honestly misled by the self-serving suggestion of an unfaithful agent. The menace and peril of the business of life insurance lies in the interest given to agents to deceive both the insured and their companies, by making their compensation depend upon the success of applications secured by them. This was the trouble with Duffey. Unless he could succeed in suppressing the fact that this applicant had been three times rejected as a bad risk, he had no hope of seeing this application go through, or of earning his commission. Smith must have realized that his own record in this respect was a bad one, and was doubtless ready to lend an easy ear to any interpretation of this ominous question which threatened to defeat his purposes. This question was undoubtedly a comprehensive one. Possibly it would have been better to divide it into two or more. Still, it was not ungrammatical or ambiguous, when read with attention. When thus read, it is not possible to misunderstand it. We repeat it:

"Has any application ever been made for an insurance on this life on which a policy was not issued for the full amount and of the same kind as applied for, and at ordinary rates?"

Now, if Smith's former applications for insurance had been allowed, but for a less amount, or for a different kind, or at a rate greater than ordinary, there might be some excuse for finding the question confusing, and for applying to the company's agent for information touching different kinds of insurance contracts, or as to the difference between ordinary and special rates, and some excuse if misled by technical insurance terminology into making an untrue answer. But no such facts existed in Smith's case. No policies of any kind were ever issued upon his applications. He had been rejected out and out. This he knew. This Duffey was told. These facts made the question most simple. As men of average sense, they both knew that this fact of three former rejections was most vital. They knew that the grounds for this action would be investigated, and the whole history of the applicant unearthed. How can it be said that the answer "No" given to this question was either "true, full, or complete"? Yet no explanation was offered. Smith knew that this written application would constitute the basis of the proposed contract. Yet he was willing to accept the fraudulent suggestion of an unfaithful agent, by which a most pregnant fact was to be withheld from the knowledge of the company. Through the suppression of this fact, Smith obtained his policy, and Duffey his commission. The company was thus imposed upon, and induced to make a contract which in all human probability it would not have made if this history had not been suppressed. The facts bring the case fully within the spirit and letter of Insurance Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, and Maier v. Association, 47 U. S. App. 322, 24 C. C. A. 239, and 78 Fed. 566. The meaning and interpretation of this question were for the court. It was not ambiguous, and required no technical knowledge as aid to its understanding. The facts did not make a case where a verdict could have been sustained, based upon a finding that the falsity of this answer was wholly due

to either the ignorance or fraud of Duffey. In the case of Insurance Co. v. Fletcher, 117 U. S. 519-529, 6 Sup. Ct. 837, heretofore cited, it was sought to avoid the consequences of a breach of warranty arising out of certain untrue answers made by the insured in his written application by evidence that the answers of the insured had not been correctly written down by the company's agent, though it appeared that the application as filled out by the agent had been signed by the insured. To this the court said:

"It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail, and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove, not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it is stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing, and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed."

In the same case the previous cases of Insurance Co. v. Wilkinson, 13 Wall. 222, and Insurance Co. v. Mahone, 21 Wall. 152, were referred to and distinguished, the court saying:

"In neither of those cases was any limitation upon the power of the agent brought to the notice of the assured. * * * When such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies."

There are also a class of fire insurance cases, of which the case of Insurance Co. v. Fischer (decided by this court at this term) 92 Fed. 500, is a type, which in no wise conflict with the doctrine upon which the present decision must rest. In the case referred to, the insurance company was held to be estopped as a consequence of the knowledge of the existence upon the property insured of a chattel mortgage, notwithstanding a provision of the policy which rendered it void if the insured then had any other contract of insurance not indorsed thereon. The agent had authority to write and deliver the policy, and was thus representing his principal, with knowledge of the actual facts of the case. The case of Insurance Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87, is not in point. That case was decided upon a statute of the state of Iowa. The view entertained by this court of the scope of that case as an authority is stated in Maier v. Association, 47 U. S. App. 322-332, 24 C. C. A. 239, and 78 Fed. 566, and that view need not be repeated.

The objection that no defense going to the original invalidity of the contract can be made without tendering back any premium re-

ceived remains to be considered. This is not a suit by the company for the cancellation of the policy, but is an action by the beneficiary, based upon it as a valid contract. The general rule is that, if a risk never attaches under a policy, the premium is not earned, and, if paid, may be recovered, unless the insured has been guilty of fraud. *Jones v. Insurance Co.*, 90 Tenn. 604, 18 S. W. 260; *May, Ins.* § 4. But we know of no rule which prohibits the defense here made except upon condition of a previous tender of the premium paid. In *Insurance Co. v. Fletcher*, cited above, there was a statute of Missouri which provided that no such defense could be made, unless the premium paid should be tendered back. In that case, as this, the defense was a breach of warranty in the application, and touching this question of the repayment of the premium the court said:

"In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. As the present action is not for such a cancellation, the only recovery which the plaintiff could properly have, upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premium paid; and to that only would he be entitled by virtue of the statute of Missouri."

Here the policy provides that this defense may be made, provided discovery is made and notice communicated to the insured within two years from the date of the policy. The facts show that the insured was notified of the falsity of his answer, and that this rendered the policy null and void. The first communication to the insured was in May, 1895, by a telegram. On July 10, 1895, the company repeated the communication by letter, in which, among other things, it was stated that:

"The policy provides that under such circumstances all premiums paid become forfeited to the company, and we notified you promptly by telegraph, as above, on receiving the foregoing information, in order that you might not incur any loss by payment of premiums to our agent on account of this insurance, if you had not already made such payment, as we are informed that you had not at that time. We instructed our agent Mr. Gwathmey to get the policy from you and return it to us. He has not yet done so. We write this to confirm our telegram above quoted, and to advise you that we will under no circumstances recognize any liability whatever under or by reason of the issue of this policy."

The policy was not returned, and in September following the insured died. Within a few days after this death, the beneficiary having notified the company of the death of the insured, the company wrote her of the previous communications to the insured, and again avowed their purpose to treat the policy as null and void. No demand was ever made for a return of the premium. Upon the contrary, counsel for the company, in open court, pending the trial below, stated that the company had no knowledge of the payment of the premium to their local agent until testified to by the agent on the trial, and then offered to tender and pay the premium so paid. This was objected to by counsel for the beneficiary, and disallowed by the court. Under these circumstances, we think this tender was made in time, even if the repayment of the premium could have been legally demanded. But this policy, on its face, provides that, "whenever this policy shall become null and void from any cause, all payments made hereunder shall become forfeited

to the company." Inasmuch as no premium was paid after discovery of the fraud of the insured, we think this forfeiture clause may be enforced, the policy having been obtained through the fraud of the insured. May, Ins. (1st Ed.) § 4; Jones v. Insurance Co., 90 Tenn. 604, 18 S. W. 260. Certainly the company will not be precluded from making the defense of fraud in the obtaining of the policy by its failure to make other tender than that made, in view of this clause in the policy. In no view of the case could a verdict for the plaintiff below have been supported. The untrue and material character of the answer of the insured in reference to former applications upon which policies had not issued was established beyond controversy. Unless, therefore, the fact that the agent of the company had suggested this answer with knowledge of the truth would operate as an estoppel, there was no question for the jury, and no issue of fact for settlement. In view of the undisputed facts, the court should have instructed for the defendant below; there being no reasonable view of the facts which would, under the law, justify a verdict for the plaintiff.

The conclusion thus reached upon the falsity of the answer of the insured in respect to previous applications for insurance makes it unnecessary to consider his answers in respect to the diseases with which he was afflicted, or any of the other questions discussed by counsel. Reverse the judgment, and remand for a new trial.

In re ROMANOW et al.

(District Court, D. Massachusetts. March 10, 1899.)

No. 654.

1. BANKRUPTCY—ASSIGNMENT FOR CREDITORS.

A general assignment for the benefit of creditors, though an act of bankruptcy, and liable to be avoided by the subsequent adjudication of the assignor as a bankrupt, is not void originally, but only voidable. It remains valid until such adjudication is made.

2. SAME—PETITIONING CREDITORS—ESTOPPEL.

Creditors who have assented to a general assignment by their debtor, and voluntarily become parties thereto, cannot maintain a petition in involuntary bankruptcy against him, alleging such assignment as an act of bankruptcy.

3. SAME—CREDITORS JOINING IN PETITION.

Under Bankruptcy Act 1898, § 59f, providing that, in involuntary cases, creditors other than the original petitioners may enter their appearance, and join in the petition, creditors so joining in a petition subsequent to its filing may be reckoned in making up the number of creditors and amount of claims required by the act to support the petition.

4. SAME.

If a petition in involuntary bankruptcy was filed by creditors within four months after the commission of the act of bankruptcy charged, it is immaterial that certain other creditors, who joined in the petition subsequent to its filing, and before an adjudication thereon, and who are reckoned in making up the requisite number of creditors and amount of claims, did not enter their appearance, for the purpose of such joinder, until more than four months after the act of bankruptcy.

In Bankruptcy.

Sumner H. Foster, for petitioning creditors.
A. S. Cohen, for respondents.

LOWELL, District Judge. This case raises several interesting questions concerning the right of certain alleged creditors of the respondents to file a petition in involuntary bankruptcy against them. The act of bankruptcy alleged is a general assignment made October 4, 1898. One or more of the petitioners assented to this assignment, and the respondents object that persons so assenting cannot be parties to the petition. The objection is valid. By accepting the assignment, the creditors released their claims against the respondents, and, in place thereof, accepted claims under the assignment. Though the assignment is an act of bankruptcy, and is avoided by the adjudication, yet it is not a void instrument, but only a voidable one. Until the adjudication it is valid, and the assenting creditors are bound by their assent thereto. Hence it follows that, until adjudication, the persons who had assented to the assignment had ceased to be creditors of the respondents. If this argument be thought too technical, then it may be said that those who have become voluntary parties to the assignment, and have thus agreed to a settlement of the respondents' affairs thereunder, cannot equitably repudiate their agreement. This view was taken in the only case bearing upon the subject which I have been able to find,—Perry v. Langley, 19 Fed. Cas. 282, 283 (No. 11,006):

"If the proof was that Perry had advised the making of the assignment, or after its execution had expressly given his assent to it, as a creditor of Langley, he would have been precluded from insisting on it as an act of bankruptcy, and could not have maintained a standing in this court as a petitioning creditor."

The petition was filed January 28, 1899. On February 14th, Breitstein, a creditor of the respondents, appeared and sought to join in the petition. The respondents object that he cannot be counted in making up the necessary number of creditors required by section 59 of the bankrupt act. Paragraph f of that section reads as follows:

"Creditors other than original petitioners may, at any time, enter their appearance, and join in the petition, or file an answer, and be heard in opposition to the prayer of the petitioners."

Those who are permitted to "join in" a petition, by so doing commonly become parties to it; and the words "join in the petition," as used in paragraph e and paragraph b of the same section, plainly carry that implication. It is urged by the respondents that, if this construction be given to paragraph f, an insufficient number of creditors, or creditors having an insufficient amount of claims, may file a petition against a debtor, and obtain an adjudication by subsequently procuring other creditors to join with them, such joinder being possible at any time before the petition is dismissed. This practice, it is said, would permit a petition, at the time of its filing insufficient in substance as well as in form, to be made good by subsequent acts. It must be admitted that there is weight in this argument, but the language of the act is clear; and the inconvenience, if inconvenience there be, was not deemed by congress a controlling

consideration in the act of 1867 (see Rev. St. §§ 5021, 5025), nor in some cases, at least, under the act of 1898. See section 59b. I think, therefore, that creditors, otherwise competent to appear and join in a petition subsequent to its filing, may be reckoned in making up the number of creditors and amount of claims required by section 59.

The respondents further object that Breitstein's appearance was entered more than four months after the act of bankruptcy complained of; but this seems immaterial. Section 3b provides that the petition may be filed within four months of the act of bankruptcy. The petition was filed on January 29th, and that remains the date of its filing, though some petitioners have joined in it subsequently thereto. For instance, the date of bankruptcy is defined by section 1, subd. 10, to be the date when the petition was filed. If an adjudication is made in this case, the date of bankruptcy will be January 29th, though the adjudication be made upon the petition of one or more creditors who joined therein in the month of February. Respondents adjudged bankrupt.

In re HOLMAN.

(District Court, S. D. Iowa, E. D. February 27, 1899.)

No. 708.

1. BANKRUPTCY—OPPOSITION TO DISCHARGE—KEEPING BOOKS.

A failure to keep proper books of account in a business from which the bankrupt retired six years before the enactment of the bankruptcy law, is no ground of opposition to his discharge, since such failure could not have been "in contemplation of bankruptcy," within the meaning of section 14 of the act (30 Stat. 550).

2. SAME.

The court will not refuse to discharge the bankrupt, unless creditors appear in opposition to the discharge, file written specifications sufficiently alleging the grounds of their opposition, and sustain the burden of proving the grounds specified.

3. SAME—SUFFICIENCY OF SPECIFICATIONS.

Specifications in opposition to the discharge of a bankrupt must not be mere statements of legal conclusions, but adequate statements of issuable facts. They must be distinct, specific, and definite, not vague or general.

4. SAME—AMENDMENT OF SPECIFICATIONS.

If specifications filed in opposition to the discharge of a bankrupt do not sufficiently allege the grounds of opposition, they may be ordered amended; and if the amended specifications do not show sufficient grounds for refusing the discharge, they may, on motion of the bankrupt, be stricken from the files, and the bankrupt's application for discharge will then stand as unopposed.

In Bankruptcy. On objections to application for discharge.

C. F. Howell, for bankrupt.

Vermillion & Vermillion, for opposing creditor.

WOOLSON, District Judge. The bankrupt having applied for his discharge, upon the day set for hearing such application the Wheeler & Wilson Sewing-Machine Company filed its appearance in opposition to such discharge, and its grounds of such opposition. On

motion of the bankrupt, this court, finding such grounds insufficiently stated, sustained the objections thereto filed by the bankrupt; whereupon said opposing creditor filed its amended grounds of opposition to discharge. The bankrupt now, objecting to same, moves to strike from the files this amendment, for the reason that it states no facts which would prevent a discharge, and, further, that it is not such an amendment as required by the order of the court in its ruling as to original grounds proposed. Both parties have favored the court with briefs.

First, as to that part opposing the bankrupt's discharge on the ground that said bankrupt, "with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, and failed to keep books of account," etc. At the instance of said opposing creditor, the bankrupt was examined at length before the referee, and his testimony is among the files, and submitted with this motion. It is therein shown that the bankrupt, in 1892, was carrying on the business of a retail grocer and restaurant keeper, and that he sold out his business in that year, and has not been since engaged in any business bearing a mercantile character beyond that of attending county fairs, and thereat, and at like gatherings, selling lemonade, peanuts, etc., at what is commonly called a "peanut stand." It is also shown that he has at times assisted the man to whom, in 1892, he sold his said business and property, by overseeing repairs, at request of such man, on some of the property, for which he was from time to time allowed something on his (the bankrupt's) rent as it accrued on that part of such sold property which the bankrupt had rented for his residence from his said vendee. The specified grounds of opposition do not allege any facts as occurring or having occurred since 1892 with regard to said books of account. It becomes unnecessary to determine whether this specified ground of opposition is sufficiently pleaded. It cannot be that a failure, if it existed, in and prior to 1892, to keep proper books of account, is, within the true meaning of the present bankruptcy act,—which was approved and went into effect July 1, 1898,—a "failure to keep," etc., in contemplation of bankruptcy. At that date no bankruptcy statute was in effect. It is impossible the bankrupt, six years before the passage of the act, then had in contemplation that he would commit any act of bankruptcy as defined in such act, or that he would avail himself of the provisions of the act. Collier, in his excellent treatise on the Law of Bankruptcy, asserts (page 136) that the failure to keep, etc., books of account by one in contemplation of bankruptcy is, under the statute, necessarily limited to acts committed after the passage of the present statute. The conclusion necessarily follows that the specified grounds are insufficient.

I have carefully read and re-read the specified grounds which attempt to defeat discharge because of his failing to schedule in his schedules filed, and failing to surrender to his trustee herein, certain real estate described in said specified grounds. It is averred that "the legal title to such real estate is held by some party, whose name is to this creditor unknown, in trust for the bankrupt,

and said bankrupt is the real owner thereof," etc. The further allegation charges that the bankrupt made false oath to his schedule in this respect, and "knowingly, willfully, and fraudulently failed to attach to his petition schedule of such property as belonging absolutely to him, or as held in trust for him." It will be noticed that the present statute contains peculiar phraseology (section 14): "The judge shall hear the application for a discharge * * * and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided, or (2) with fraudulent intent," etc., "and in contemplation of bankruptcy, destroyed," etc., "books of account." Unless, then, the judge finds one of these two conditions exists, he "shall discharge the bankrupt." The court will not, of its own volition, set in motion the machinery to prove either of such conditions exists. *In re Schuyler*, 3 Ben. 200, Fed. Cas. No. 12,494; *In re Rosenfeld*, 2 N. B. R. 117, Fed. Cas. No. 12,057. Objections must be made by proper parties interested, or the discharge passes. General order 32 provides that the opposing creditor must enter his appearance in opposition to the discharge, and file a specification in writing of the grounds of his opposition. On the creditor opposing discharge is (1) the duty of alleging sufficiently specified grounds of such opposition, and (2) the burden of proving such grounds. Rule 12 of the rules in bankruptcy proceedings adopted in this district conforms to this view:

Rule 12.

(1) Application for a discharge on behalf of a bankrupt (see general form No. 57) shall be verified by the bankrupt and be filed with the clerk of the district court, and shall, by said clerk, be forthwith sent to the referee having charge of the bankruptcy proceedings of said bankrupt. Upon receipt of said application in proper form, the referee shall forthwith notify the creditors by mail of the filing of said application, and that if they propose to show cause against such application, an appearance in opposition must be entered in writing before the referee at the place and on or before the date fixed in said notice; and said notice shall be published once (unless the referee for good cause shall order farther publication), in the newspaper wherein was published notice of first meeting of the creditors of said bankrupt. Notice of the time and place thus fixed, and that he is required then and there to attend, shall also, by said referee, be mailed or given in person to said bankrupt, and it shall be the duty of the bankrupt to attend accordingly.

(2) If no appearance in opposition to such application for discharge is filed with said referee on or before the time thus fixed, said referee shall forthwith mail to the clerk of the district court at Des Moines the application for such discharge, with his certificate showing that due notice of the filing of application for such discharge had been given to said creditors, and duly published as directed; that no appearance in opposition had been filed on behalf of anyone; the amount, if any, of costs and expenses, remaining unpaid to the referee or trustee, and also certifying whether the bankrupt has or has not fully complied with the requirements of the bankrupt act, so far as known to the referee.

(3) If an appearance in opposition to said application for discharge is filed, the referee shall retain the matter until the expiration of the ten days allowed (see general order No. 32),—after date fixed in said notice,—for filing specifications of the ground of opposition, (see general form No. 58); and at the expiration of said ten days, the referee shall send to the clerk of the district court at Des Moines, the application for such discharge, with his certificate showing the action had before him, and also showing so far as applicable, the several matters by last preceding paragraph required to be

certified. Thereupon the judge will fix the time and place for hearing the issues thus presented and will prescribe the notice to be given thereof.

(4) If no appearance in opposition to the application for a discharge is filed before the referee, or, if filed, no specifications in support thereof are filed before the referee within the ten days allowed therefor, said application for discharge will then be for hearing before the judge without further notice to the parties. And unless a different time and place are fixed by a special order of the judge, such hearing will be had before the judge at chambers in Des Moines, at 10 o'clock, a. m., on the rule day (rule day being the first Monday in each month) next after the filing of the referee's said certificate with the clerk, or upon any succeeding rule day when the judge may be present in chambers at Des Moines.

This rule contemplates that, when questions of fact are put in issue in these specifications of opposition, the judge will separate them out, and refer such issues of fact to the referee for the taking of testimony relating thereto, and his report of the facts thereby proven. But this all contemplates the specifications of grounds of opposition will of themselves be sufficient. Else it is useless to refer them to the referee, or for the judge in person to attempt a hearing. These specifications must not be mere statements of legal conclusions. They must be adequate statements of issuable facts. "While the objections are not to be pleaded with the strictness of common-law pleading, yet it is necessary that the facts be alleged, and that such allegations be distinct, specific, and definite, so as to clearly inform the bankrupt what he is to disprove. If they are vague or general, the court will dismiss them, or compel the objecting party to be more definite." Coll. Bankr. 138, and cases cited. The court required the opposing creditor herein to make more specific, etc., his grounds of opposition. He has attempted to comply. And counsel, in his brief, states the inability of such creditor to more specifically state the facts than they appear in the grounds of opposition as amended. If these are insufficiently stated now, it is useless to direct further amendment.

The examination of the bankrupt was had before the referee some weeks prior to the filing by the creditor of his amended grounds of opposition. The testimony, as certified up, shows the examination to have been searching and exhaustive. A part of such testimony bears directly on the specified grounds. The court may, therefore, apply the grounds to the testimony. It must be conceded that, in any decision reached at the present stage of the case, the court must consider the specified grounds, and the testimony referred to, in the light most favorable to the opposing creditor of which they are properly susceptible. And if, when thus considered, there appears no sufficient ground, under the statute above quoted, for refusing the discharge, the court should sustain the motion to strike out the grounds as specified, and enter order granting discharge. This latter course would be here permissible, since, no other creditor having appeared to oppose discharge, if the specification of grounds as filed by this opposing creditor are stricken out, the matter stands as though no specification of such grounds had been filed; and therefore, under the fourth paragraph of rule 12, above quoted, the order of discharge follows as of course, unless the court shall find some defect or informality of such a nature as to require the

court to decline to grant discharge until said defect or informality is corrected, and properly supplied.

Without here taking the time to state in detail the reasons impelling me to such conclusion, I may say that I have carefully considered each of the specified grounds of opposition as contained in the objections filed by the opposing creditor. No useful purpose would be subserved by here taking up and considering in detail the specified grounds. I find that none of them are sufficient, under section 14 of the act, to justify refusing discharge. The motion to strike out the specifications of grounds of opposition as filed by the opposing creditor must be sustained. This leaves the application for discharge of the bankrupt as unopposed, and the same, under rule 12, will regularly come before the court for action on the next rule day.

AMERICAN GRAPHOPHONE CO. v. HAWTHORNE et al.

(Circuit Court, E. D. Pennsylvania. February 25, 1899.)

No. 42.

PATENTS—INFRINGEMENT—SALE OF MACHINE PRODUCING INFRINGING ARTICLE.

A person who sells a machine which is useful only for making a patented article, or makes such sale with knowledge that the thing sold is to be used to produce an infringing article, is himself liable as an infringer.

This was a suit in equity by the American Graphophone Company against Ellsworth A. Hawthorne, Horace Sheble, and others, for alleged infringement of letters patent No. 341,214, issued May 4, 1886, to C. A. Bell and S. Tainter, for an invention relating to devices for recording and reproducing sounds. The cause was heard on motion for preliminary injunction.

Philip Mauro, for complainant.

E. Clinton Rhoads, for respondents.

DALLAS, Circuit Judge. This is a motion for a preliminary injunction in a patent cause. The only legitimate purpose of such an injunction is to preserve the existing state of things until the rights of the parties can be thoroughly investigated and disposed of upon final hearing, and any unnecessary expression of the views of the court should, in the meantime, be avoided. The complainant is, in my opinion, entitled to the order he asks, upon facts which the proofs, as now presented, clearly establish; and therefore no others will be discussed. The letters and the bill of the defendants Hawthorne and Sheble to the Allen Phonograph Company show a sale by the former to the latter of a machine which cannot be used for any purpose except to make duplicates of sound records described and claimed in the patent in suit; and the validity of the patent, and that the unlicensed making of such sound records would violate it, being conceded, there is no room for question that this sale of a machine, which it is admitted by the affidavits of Hawthorne and of Sheble was a duplicator, constituted an infringement. Their letters plainly show

that they perfectly well understood that the purchaser intended to use it for making sound records; and, this being so, the statement in Hawthorne's affidavit that his firm did not make it, and did not themselves make any records upon it, is wholly immaterial. Where a person sells a machine which is useful only for the purpose of making a patented article, or makes such sale with knowledge that the thing sold is to be used to produce an infringing article, the seller is himself liable as an infringer. Walk. Pat. (3d Ed.) § 407. Careful consideration of the affidavits has also fully satisfied me that the defendants Snediker and Carr have made for their co-defendants Hawthorne and Sheble phonographs, or at least parts thereof, with knowledge that they were to be used, or to be put together for use, as duplicators to make sound records. Without the affidavit of James P. Bradt, the proof of this fact would, I think, be complete, and that affidavit places it beyond possibility of question. It is to the effect that Mr. Snediker admitted that his firm had made parts of such machines for Hawthorne and Sheble, and that he understood that they were parts of phonographs. This is a distinct statement of fact, which, if false, could, with equal distinctness, have readily been denied; but no denial of it has been made. In considering this motion I have regarded with solicitude the familiar principle that a preliminary injunction should be awarded with extreme caution, and never where the right is doubtful or the wrong uncertain; but here the right is admitted, and of its invasion there can be no reasonable doubt. The complainant's motion for a preliminary injunction is granted.

EGBERT v. ST. PAUL FIRE & MARINE INS. CO.¹

(District Court, S. D. New York. February 10, 1896.)

MARINE INSURANCE — TOWER'S LIABILITY POLICY — EXPENSES OF DEFENDING SUIT—COUNSEL FEES.

A policy of insurance was issued on a steam tug to cover tower's liability for loss or damage arising from collision or stranding, for which the tug or its owners should be legally liable, and provided that the insurer should not be liable unless the liability of the tug for such loss or damage should be determined by a suit at law. In an action upon the policy, the assured sought to recover, as a part of the loss, his expenses in defending the suit which established the liability of the tug for a loss by collision. *Held*, that the insurer was liable on the policy for such expenses, but excluding counsel fees.

This was a libel by Alice P. Egbert against the St. Paul Fire & Marine Insurance Company to recover upon a tower's liability policy. On settlement of the decree for libellant.

Nelson Zabriskie, for libellant.

Chas. C. Burlingham, for respondent.

BROWN, District Judge. On the settlement of the decree a further question is presented whether the defendant is liable to make good as a part of the loss, the libellant's expenses in defending the

¹ Case edited by Leroy S. Gove, of the New York bar.

suit which established the liability of the Morris. The policy required the liability of the steam tug for the accident to be established by suit.

In the case of *Xenos v. Fox*, L. R. 3 C. P. 630, on a policy insuring the ship Smyrna, but containing also a running-down clause, that is, covering any liability of the ship for running down another vessel, it was held that the costs and counsel fees incurred by the owners of the Smyrna in successfully resisting a damage claim for collision could not be recovered under the policy. But this was put upon the ground that the collision liability was a wholly independent subject of contract, and that the terms of this part of the contract could not be made to include such costs, the agreement of the insurers being only to pay a certain "proportion of what the assured should pay in pursuance of any judgment recovered." Manifestly that agreement did not embrace the costs of a successful defense, since there was no payment under any judgment recovered.

In the present case, the policy declares that the insurers are "to fully indemnify the assured for loss and damage arising from or growing out of any accident caused by collision," etc., "for which said steam tug or its owners may be legally liable." This clause, I think, embraces the necessary expenses of the suit which the insured was by the policy required to resist, in order that the liability of the steam tug for the accident might be legally determined. The owners are "legally liable" for those expenses. The expenses are also a "loss and damage" necessarily growing out of the accident, because the policy requires those expenses to be incurred before any claim can be made under the policy. The case in this regard differs from the numerous class in which such expenses are disallowed, as having been voluntarily incurred, and hence at the suitor's risk. Unless the insurers pay the expenses of the suit, which they have themselves required, they do not keep their agreement "to fully indemnify the assured" for this item of "loss and damage growing out of the accident."

The subsequent clause does, indeed, say that the company shall not be liable unless the liability of the said steam tug for such loss or damage shall be determined by a suit at law, etc.; and the first description of the insurance is also "against such loss or damage as the steam tug may become legally liable for." If the intent of the policy was to limit the company's liability to charges for loss and damage which were a lien upon the tug, the expenses and counsel fees incurred in resisting the suit evidently would not be covered by the policy; for such charges, incurred by the owners, are no lien upon the tug.

I do not think, however, that the phrase "liability of the steam tug" is used in this policy in this specific sense; for the main body of the policy that sets forth specifically what the insurers are "content to bear and take upon themselves," states that the "insurance is to fully indemnify the assured for loss and damage growing out of any accident," etc., "for which said steam tug, or its owners, may be legally liable." This is an express extension of the insurance beyond what constitutes a lien on the vessel, to any and every personal

liability that "grows out" of the accident. Had it been the intention to limit the insurers' liability to charges which were a lien on the vessel, that language would naturally have been employed. The subsequent provision that the liability "of the steam tug" must be determined by suit, is complied with when it is shown by the result of a suit that the steam tug is responsible for the accident. When that is established the previous clause requires that the insurers shall indemnify the assured for any loss, damage or expense for which the "owners may be legally liable," growing out of the accident. In no other way can the inharmonious language of the policy be satisfied.

The expenses are allowed.

On further argument I am satisfied that the counsel fees incurred by the assured in defending the suit are not within the terms of the policy, and cannot be constructively included within its intention. Such expenses are, therefore, disallowed.

THE ALICE BLANCHARD.

(District Court, N. D. California. February 17, 1899.)

No. 11,777.

SEAMEN—CONSTRUCTION OF SHIPPING ARTICLES—TIME OF REPORTING FOR DUTY.

Shipping articles, which required a seaman to report on board on a day named, but specified no hour, are to be construed most favorably to the seaman; and where he reported for duty on the day named, several hours before the time fixed for the vessel to sail, he will be held to have complied with the contract. The fact that, after the articles were signed, the master told him verbally to report at an earlier hour, cannot affect the construction of the contract.

This was a libel by J. Downs against the steamer Alice Blanchard to recover damages for an alleged breach of a contract of employment as cook.

D. T. Sullivan, for libellant.

Edward J. Pringle, Jr., for respondent.

DE HAVEN, District Judge. The libellant signed articles to serve as a cook on the steamer Alice Blanchard, bound on a voyage from San Francisco to Clipperton Island, off the coast of Mexico, and thence to San Diego, Cal., and on two other voyages between San Diego and Clipperton Island, and upon their completion to return to the port of San Francisco. The articles provided that he was to present himself on board of the steamer, for service, on June 29, 1898, but at what hour was not stated. The oral evidence tends to show that after the articles were signed he was told by the captain to be on board on the morning of that day in time to cook breakfast. The libellant replied that he might not be able to come so early, and he did not in fact go on board the steamer until between the hours of 12 and 1 o'clock of the day named. The captain was then on shore, and did not return to the steamer until late in the afternoon, when he refused to accept

the services of the libelant, and compelled him to go ashore. The steamer left San Francisco at 8 o'clock p. m. of that day, the hour appointed for her departure. The libelant claims that he was wrongfully discharged, and seeks in this action to recover damages therefor. The contention of the claimant is that the libelant was in fault in not going on board the steamer on the morning of the day upon which he was to commence work, and that he thereby forfeited his right to proceed upon the voyages for which he had shipped.

Section 4511 of the United States Revised Statutes furnishes the rule to be observed in the shipment of crews on vessels bound from the United States to foreign ports not therein excepted, and also for the shipment of crews on vessels engaged in trade between the United States and Mexico (26 Stat. 320), and is applicable to a vessel bound on the voyages named in the shipping articles signed by the libelant. That section provides that a master, before proceeding upon any of the voyages covered by its provisions, must make an agreement in writing with each member of the crew, and that such agreement shall specify, among other matters, "the time at which each seaman is to be on board to begin work." As before stated, the shipping articles signed by the libelant did not specify the precise hour of the day at which he was to be on board to commence work,—whether on the first minute of that day, or at the hour of 5, 6, 7, or 8 o'clock a. m., or any other particular hour. Upon the part of the claimant it is argued that the articles should be construed as requiring the libelant to be on board, ready for work, at the usual hour for the commencement of work on the morning of the day named therein; while the libelant insists that in reporting himself ready for service on the day named in the articles, and several hours before the time appointed for the steamer to proceed on her voyage, he substantially complied with his agreement. It is apparent that neither contention is clearly unreasonable, and much can be said in favor of both. In such a case it is the duty of the court to adopt that construction of the shipping articles which is most favorable to the seaman. *Goodrich v. The Domingo*, 1 Sawy. 182, Fed. Cas. No. 5,543; *Jansen v. The Theodor Heinrich, Crabbe*, 226, Fed. Cas. No. 7,215; *The Disco*, 2 Sawy. 474, Fed. Cas. No. 3,922. The duty of putting the written agreement with seamen in plain and unambiguous language is one which devolves upon the shipowner or master; or, to state the rule in the language of *Deady, J.*, in delivering the opinion in *The Disco*, above cited: "Shipmasters and owners have ample means and facilities for putting their contracts with seamen in plain language; and so the law, both in Great Britain and America, intends and requires." If it is the desire of the owner or master to have the seaman to become bound to go on board to begin work at some particular hour of a day named, the shipping articles should so state. If, through negligence or design, the articles executed do not make such special provision, the court is not authorized by construction to supply such omission, and hold that a seaman who reports himself ready for duty on the day named in the articles, and several hours before the time appointed for the departure of the vessel, has forfeited his rights under the articles because he did not appear at an earlier hour of

the day. In my opinion, the libelant substantially complied with his agreement in tendering his services on the day named in the articles signed by him, and the master was not justified in refusing to allow him to go to work. The fact that the master, after the articles were signed, directed him to be on board the steamer in the morning in time to cook breakfast, cannot be allowed to change the legal effect of the articles; that is to say, the articles cannot be read as if such direction of the master were written therein. The libelant was to receive \$50 per month as wages, and under section 4527 of the United States Revised Statutes he is entitled to recover in this action a sum equal to the amount agreed to be paid him as wages for one month, and costs of suit. So ordered.

THE DEFIANCE and THE EDWIN DAYTON.

(District Court, S. D. New York. March 15, 1899.)

COLLISION—TUG AND Tow—RIGHT OF WAY—FAILURE TO OBSERVE SIGNALS.

The steam tug Defiance, with two canal boats lashed to her side, on approaching the gap leading into the Atlantic Basin, Brooklyn, while some distance away, gave the usual long whistle to indicate that she was going in, and again, when near the entrance, twice signaled by two whistles. The tug Dayton, with a tow, was approaching the gap from the inside, and when the second signal was given by the Defiance was from 100 to 200 feet from the entrance. She did not stop, and there was a collision between the tows in passing in the gap, without fault in navigation on the part of the Defiance. *Held*, that the Defiance was the privileged vessel, entitled to the right of way, and the Dayton was alone in fault for the collision, in failing to observe the signals, and to keep inside until the Defiance had passed through the gap.¹

This is a libel by Edgar Van Buren against the steam tug Defiance and the steam lighter Edwin Dayton, for collision.

Cowen, Wing, Putnam & Burlingham, for libelant.

Davies, Stone & Auerbach and Herbert Barry, for the Dayton.

James J. Macklin, for the Defiance.

BROWN, District Judge. At about 11 o'clock in the forenoon of September 15, 1898, as the steam tug Defiance was passing through the gap at the entrance of the Atlantic Basin, Brooklyn, with two canal boats lashed to her starboard side, the starboard boat came in contact with a scow on the starboard side of the tug Edward Dayton, which was then coming out of the gap. The libel was filed to recover the damages thereby sustained by the libelant. The wind at the time was high from the N. W. and the ebb tide strong, which swept down directly in front of the gap. These circumstances, made it impossible for the Defiance to go upon a straight line through the gap. More or less of swinging was unavoidable, and the line of her entrance was necessarily more or less uncertain. Some little time before

¹ As to signals of meeting vessels, see note to The New York, 30 C. C. A. 630.

reaching the outside of the gap, the Defiance had given the usual long whistle to indicate that she was coming in, and when near and at the entrance she twice gave a signal of two whistles. The evidence leaves no doubt that when the long whistle was given the Dayton was inside the basin and 500 or 600 feet distant from the gap, and that at the first signal of two whistles she was 100 or 200 feet back of the gap. In this situation, there is no doubt that the Defiance was the privileged vessel and had the right of way. It was the duty of the Dayton and her tow to keep within the basin and not enter the passage of the gap. As the Dayton in her answer denies knowledge of the long whistle given by the Defiance, it is probable that it was not heard by the Dayton; but it was heard by other vessels in the immediate vicinity, and if not heard by the Dayton, it was through negligence and inattention. It is plain also that the Dayton did not reverse as soon as the two whistles of the Defiance were heard, and that this was before she had entered the gap.

As respects the navigation of the Defiance in entering the gap, I am satisfied, not only from her own witnesses, but by the testimony of the mate of the Dayton, that her navigation was such as was usual and proper under such circumstances.

I find, therefore, that the collision arose from the fault of the Dayton in not giving proper attention to the signals of the Defiance, and in not keeping out of the gap until the Defiance had passed through, and that it was without fault of the Defiance.

Decree for the libellant against the Dayton with costs, and dismissing the libel as to the Defiance with costs.

THE WILLIAM J. LIPSETT.

THE JOHN R. PENROSE.

(Circuit Court of Appeals, Third Circuit. January 17, 1899.)

No. 26.

COLLISION—NEGLIGENT NAVIGATION.

The schooner P. weighed anchor to the west of the channel of the Delaware river, and started to turn around, and proceed down stream with the tide, before a strong wind. The schooner L. was sailing in full view down the east side of the channel, with a space of half a mile in width in a straight line between P. and the line on which L. was sailing. P. made a wide circle in turning, and, though L. bore off further to the eastward, the vessels collided. When the collision was imminent, nothing was done by the navigators of P. to avert it, though, if her main peak had been dropped, the collision would probably have been averted. Experienced navigators testified that P. should have been turned in the space of less than a quarter of a mile. Held, that the collision was the result of the bad navigation and negligence of the P., and that she could not recover for injuries sustained.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Curtis Tilton, for appellant.
Horace L. Cheyney, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

ACHESON, Circuit Judge. During the night of February 15, 1894, the schooner John R. Penrose lay at anchor, heading up stream, at a point westward of the ship channel of the Delaware river,—outside the channel, and to the westward of it,—about one mile below Ship John light. She was a three-masted vessel, 138 feet 4 inches in length, and on this occasion was loaded, drawing 15 feet of water. At 9 o'clock on the morning of February 16th the anchor of the Penrose was raised, and she commenced paying off, or turning around, eastwardly, to proceed down the river. The tide was ebbing, and a strong wind was blowing down stream. The mate of the Penrose testified that the strong wind blowing down the river and the ebb tide aided the schooner to pay off quickly. That the wind and tide both favored the movement of the Penrose in wearing around must be accepted as an established fact in the case. There is not a particle of evidence in this record to the contrary. The assumption of the nautical expert, whose judgment as to the conduct of the Penrose the learned district judge took, that the state of the tide did not aid the Penrose in rounding, but tended to hinder her, rests upon a misapprehension of the testimony, and we are compelled by the proofs in the case to reject his opinion as to the management of the Penrose. Three masters of schooners, navigators of large experience, and disinterested witnesses, here testified, without contradiction (unless by the master and mate of the Penrose), that a space of one-quarter of a mile in width would afford the Penrose, in the circumstances in which she was on the occasion, the amplest room to pay off in, and get on her course down the river, if she were handled in accordance with the usual practice of seamen, and properly; and that they would not expect her to occupy so much space as a quarter of a mile. The testimony of these witnesses is full, clear, and convincing. Under all the evidence we are entirely satisfied that on this occasion the Penrose could readily have gone around within six or seven times her own length, if she had been navigated in the usual manner, and with ordinary diligence.

On the morning of this 16th day of February the schooner William J. Lipsett, laden with a cargo of coal, was going down the Delaware, drawing 19 feet 9 inches of water. She was a large four-masted vessel. All her sails were set, and she was making about nine knots an hour. She was steering down the usual channel course on the eastern side of the mid-channel. Her master had charge of her deck. At the time the two schooners sighted each other, the Penrose had not yet weighed anchor. When the Lipsett was about one mile off, up stream, the anchor of the Penrose broke ground, and she began to pay off. At that time the Penrose was at a point not less than half a mile westward of the line upon which the Lipsett was sailing; in other words, the course which the Lipsett was then pursuing gave

the Penrose a clear space of fully one-half mile in width in which to wear around. Instead of paying off, and heading down the river upon a curve within the space of a quarter of a mile from her place of anchorage, which was more than sufficient, and more than usual, the Penrose kept moving eastwardly upon a much larger curve, gradually coming nearer the line upon which the Lipsett was sailing. The Lipsett held her original course until the vessels were within about one-half mile of each other, and then changed her course to eastward a point, and soon afterwards kept off eastwardly another point. Then, after a very short interval, the Lipsett kept off still further eastwardly (indeed, all she could bear without danger from jibing). Nevertheless, before the Penrose had completed her rounding, a slight collision between the vessels occurred, the jib boom of the Penrose fouling with the stern rigging of the Lipsett. The rigging lapped the tip end of the jib boom some feet. This was the extent of the collision. The bowsprit of the Penrose did not touch the Lipsett at all, and the damage to the Penrose would have been trivial had not her bowsprit proved to be rotten and unseaworthy. According to the preponderance of the evidence, the place of the collision was more than half a mile in a direct line eastward of the place where the Penrose had anchored, and considerably eastward of mid-channel. The mate of the Penrose himself testified that the Penrose sailed from a position over to the westward of the channel, and outside of the channel, to a point at least in mid-channel, and perhaps to the eastward of mid-channel.

It is conceded that the Lipsett went as far to eastward as was practicable. She has been condemned for not changing her course to the westward, and going under the stern of the Penrose. In determining whether this condemnation is just, regard must be had to the circumstances existing at the time the Lipsett acted. Now, when the master of the Lipsett, at the distance of a mile above, saw the Penrose in the act of turning around to go down the river, the Lipsett was upon a course which gave the Penrose an unobstructed space not less than half a mile wide in which to make the movement. The situation as then seen was entirely free from risk of collision should the Penrose pay off in the usual and the proper manner. This the master of the Lipsett might well presume the Penrose would do. The Lipsett was plainly seen by the Penrose coming down the river upon the regular channel course. We cannot agree with the district court that the master of the Lipsett "was not justified in supposing the Penrose would turn earlier than she did." He was, we think, entirely justified in assuming that the Penrose would turn around in the usual manner, and within the usual distance. He was not bound to anticipate and take precautions against an unnecessary departure by the Penrose from the ordinary practice of seamen. The Free State, 91 U. S. 200. It is quite certain that, had the Penrose rounded in the usual way and within the ordinary space, by the time the Lipsett had overtaken the Penrose the two vessels would have proceeded down stream upon parallel courses, not less than a quarter of a mile apart. This the master of the Lipsett testified is what he expected, and that he gave the Penrose ample room to insure it. The

testimony of the three experienced navigators already referred to fully sustains the judgment of the master of the Lipsett as sound, and his course of action as seamanlike. It is clear to us that, save for the bad navigation of the Penrose, no situation would have arisen involving the contingency of the Lipsett's crossing either the bow or the stern of the Penrose. We are of opinion that the sailing course taken by the Lipsett originally was entirely safe for the Penrose, and that the Lipsett was blameless in pursuing it as she did.

Was the Lipsett culpable in not turning to westward at the time she changed her course to eastward? We think not. The evidence convinces us that the then situation of the vessels with respect to each other was such that a change to the westward would have been very perilous to both. It probably would have resulted in a most serious collision. The master of the Lipsett, we think, exercised a wise judgment in keeping off further to the eastward. This move would have prevented any collision had the Penrose even then been rightly handled; but she was not. The evidence is conclusive that the Penrose would have turned around more quickly if her main peak had been dropped. This her master admits. The dropping of the main peak is a common thing, and the work of a moment. Undoubtedly, this simple expedient would have swung the Penrose around to a position of safety. It was not resorted to. The evidence shows that other measures of protection were available to the Penrose. Yet nothing whatever was done by her navigators to avert collision. The Penrose had no lookout. Her officers and crew were engaged in other duties. Her master admits that he gave no close attention to the Lipsett until a collision was imminent. It is not to be doubted, under the proofs, that after the Lipsett's change of course to eastward there was sufficient space and time to have completed the safe turning around of the Penrose if proper attention had been given to her navigation. It is our judgment that the Lipsett was without fault, and that the collision was due altogether to the bad navigation and negligence of the Penrose. The decree of the district court (86 Fed. 696) is reversed, with costs to the appellant, and the cause is remanded to that court, with direction to enter a decree dismissing the libel, with costs to the schooner Lipsett, the respondent, and her owners.

THE ALBERT N. HUGHES.

THE LOTTIE K. FRIEND.

(Circuit Court of Appeals, Third Circuit. January 25, 1899.)

No. 23.

COLLISION—TUG AND TOW—NEGLIGENCE OF THE TOW—PRESUMPTION.

Where a tug, having a heavy schooner in tow, safely passed a schooner lying at anchor at a distance of at least 55 feet, and the officers of the tow admitted that none of them saw the anchored schooner until they were "right into her," it will be presumed that the collision was the result of the negligence of the tow, and the tug will not be liable therefor.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

John F. Lewis, for appellant.

Henry R. Edmunds, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

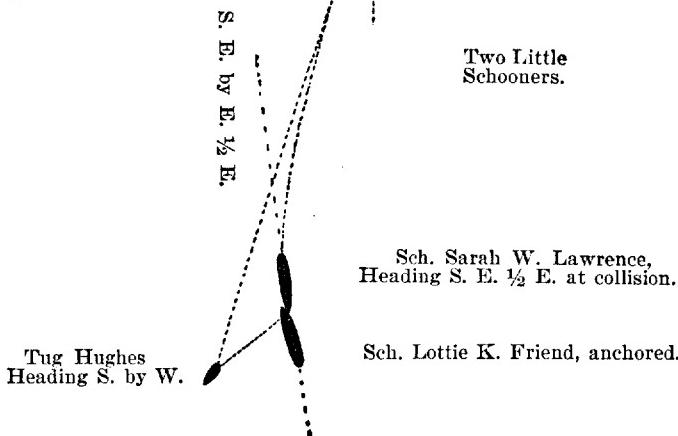
KIRKPATRICK, District Judge. The tug Albert N. Hughes, with the schooner Lawrence in tow on an 85-fathom hawser, was proceeding down the Delaware Bay on the evening of September 21, 1895, when the schooner Lawrence came in collision with the schooner Lottie K. Friend, riding at anchor. The Lottie K. Friend had her lights burning at the time, and is admittedly faultless. The only question presented to the court is whether the tug Hughes is responsible, for she alone has been libeled. The record shows that it was early in the morning, as the tug and tow were proceeding down the bay about in the regular ship channel to the west of Ship John light, on the prescribed course of S. E. by S. $\frac{1}{2}$ S., that the mate who was in charge of the tug sighted the red and white lights of a small schooner getting under way, and the white riding lights of two vessels at anchor, all being about straight ahead. The two small schooners were near together, about in mid-channel; and the other vessel, showing the white anchor light, and the one furthest away from the tug, was the Lottie K. Friend. She was lying to westward of mid-channel, and about a quarter of a mile to the southward of the other vessels. For the tug to have held her course would have resulted in a collision with the nearest vessels, so that, as was his duty, the mate of the tug blew one whistle, ported his helm, and went to the westward side of the channel. That the tug blew one blast of the whistle at this time is testified to by the master, the mate, and the assistant engineer of the tug, and by David Martz, the keeper of the Ship John light; and Calmin, the anchor watch on the schooner Friend, admits having heard a whistle at this time, presumably that of the tug. This whistle was a signal to the vessel getting under way, as well as to the tow Lawrence, that it was the intention of the tug to pass to the westward of the two small schooners. As a fact, both tug and tow did so pass them safely, and at a considerable distance. A quarter of a mile away lay the Friend at anchor, a little to the westward of mid-channel, and on the port bow of the tug. The testimony produced by the libelants tends to show that the tug approached the Friend almost head on, or perhaps on a course to the eastward, and that, unexpectedly discovering the situation, she turned suddenly to the westward, and passed from starboard to port, directly across the bows of the Friend, and distant about 45 feet away; that the tow, up to this time, had been following the tug, but was unable to make the sudden change of course necessary to cross the bow of the Friend; and that, as a result, the tow struck the Friend on the starboard side between the fore and main rigging abreast the main hatch. The version of what took place is contra-

dicted by the testimony of the captain of the tow Lawrence and the men at her helm, all of whom were called on the part of libelants, and say that there was not any such sudden or abrupt change of course on the part of the tug as would be involved in such a maneuver; and also by the captain and mate and assistant engineer of the tug Hughes. These latter testify that the course of the Hughes was changed at the time of the blowing of the one whistle (which was before the little schooners were passed) from S. E. by S. $\frac{1}{2}$ E. to S. by W., and that the Hughes continued going gradually to the westward on that course until the time the tow collided with the Friend. It is apparent from a consideration of the relative situation of the vessels at the time the schooners were first sighted by the tug Hughes (as shown on the annexed diagram) that this was the natural

Original Course Tug and Schooner
S. E. by S. $\frac{1}{2}$ S.

Tug's change of course:
From S. E. by S. $\frac{1}{2}$ S. to S. by W.,
 $3\frac{1}{2}$ points= $39\frac{5}{8}^\circ$ to the W.

Schooner's change of course:
From S. E. by S. $\frac{1}{2}$ S. to S. E. $\frac{1}{2}$ E.,
 $5\frac{1}{2}$ points to the E. of the tug!
2 points= $22\frac{1}{2}^\circ$ more to the E. or
port, than original course!



and proper thing for the tug to do, and that, if it had been done by both the tug and tow, no collision would have occurred. To enable them to clear the Friend, nothing was required but to hold the course made necessary to avoid the small schooners. The pathway to the westward was free, and water was plenty. The same conditions pre-

vailed to the eastward of the Friend. The tide was on the ebb, and at this point setting to the southeasterly. If the tug were approaching the Friend nearly head on, and danger of collision seemed imminent, it seems to us that she would have attempted to take advantage of the set of the tide to pass the Friend to the eastward, rather than have tried to pull the heavily laden schooner across the bow of the Friend against its influence.

In *The Sagua*, 42 Fed. 461, the court says that, "when a collision occurs between a vessel in tow and a third vessel, which the tug has passed in safety, the presumption of fault is against the tow"; and this court has held, in *The Invertrossachs*, 8 C. C. A. 87, 59 Fed. 194, that in such cases "the burden of proof is upon the petitioner to establish the tug's alleged negligence." In the case at bar the master and lookout and helmsman of the Lawrence had her in charge. Their duty was to exercise reasonable care, prudence, and skill to avoid collision; yet, according to their own evidence, not one of them saw the Friend until they were "right into her." They say they were, as in duty bound, following the tug, yet the tug, continuing her course, without, as they admit, sudden change, cleared the Friend to the westward by at least 55 feet on a course S. by W., while the Lawrence struck the Friend on the eastward side while upon a course S. E. $\frac{1}{2}$ E. Whether the cause of the collision was, as has been suggested on the argument, that the persons in charge of the tow Lawrence mistook the anchor light of the Friend, which they say they did not see,—though it must have been in plain view,—for the lights on the tug, by which they should have directed their course, must be a mere matter of conjecture. Certain it is from their own account that they thought the tug directly ahead of them up to the time of the collision, when in fact she was far to the westward. Upon a consideration of the whole evidence, we are of the opinion that the cause of the collision was not in any way attributable to the fault or neglect on the part of the tug Hughes. The decree of the district court (79 Fed. 383), should be reversed, and the record remitted, with directions to dismiss the libel, with costs.

TRUAX v. ESTES.

(Circuit Court, D. Oregon. March 15, 1893.)

No. 2,395.

1. DAMAGES—BREACH OF CONTRACT—RULE IN EQUITY.

A court of equity, in a suit brought to reform a contract for the purchase of cattle, which were not to be delivered for several months after the date of the contract, and to recover damages for its breach, will not enforce the strict rule of law, which permits a party to disregard notice that a contract will not be performed, and to wait until the time for performance, and recover damages as of that date, where the plaintiff was notified within a week from the making of the contract, and before he had suffered any damage, by defendant, that it would be impossible to furnish the cattle at the prices named, of which fact the plaintiff was aware when the contract was made, but the defendant was not.

CONTRACT—ENFORCEMENT IN EQUITY—FRAUD IN PROCUREMENT.

Defendant signed and delivered to plaintiff's assignor a memorandum prepared by the latter, by which defendant proposed to furnish cattle,—the number, price, and date of delivery being stated therein; the option to be accepted within 30 days. Defendant testified that the agreement was that the writing was to be merely a memorandum, to serve as a basis for a future contract; that he was to have 30 days to ascertain whether he could furnish the cattle, and the other party, who was a freight agent for a railroad, and interested only in procuring the shipment of the cattle over his road, to ascertain whether he could dispose of them; that defendant, owing to his defective sight, could read the writing but imperfectly, but, seeing that it provided for 30 days, thought it in accordance with the agreement, and signed it. The other party had in fact previously made an arrangement to dispose of the cattle to plaintiff, and telegraphed his acceptance the following day, following this by a letter stating that he would be there within 30 days "to make the contract, as per our understanding." Defendant replied that he had been through the country, and found the stock could not be bought at the price named. It further appeared that both parties knew at the time the memorandum was signed that it was doubtful whether the cattle could be so bought. Held, that the evidence sustained defendant's contention, and that in a suit in equity brought by plaintiff to reform the writing as to the number of cattle therein sold, and to recover damages for breach of contract, the writing would not be enforced against the defendant as a completed contract according to its terms.

This was a suit in equity by Daniel W. Truax against Hardin W. Estes to reform a written contract, and to recover damages for its breach.

A. L. Veazie and Zera Snow, for plaintiff.

John L. Rand and L. R. Webster, for defendant.

BELLINGER, District Judge. This is a suit to reform a written contract for the sale of cattle, and for damages for a violation of the contract. The contract consists of a written offer to one Langley by Estes, and acceptance by the former, who afterwards assigned the contract to the plaintiff. The writing is as follows:

"Baker City, Oct. 23, 1896.

"I, H. W. Estes, agree to furnish B. H. Langley or order five hundred yearlings and five two year old steers, delivered in Baker City stock yards June 1st, 1897, at \$10.00 and \$15.00, respectively. All to be A-1 stock. No Jerseys or Holsteins or lame or diseased animals. Cash on delivery. This agreement to be accepted in thirty days.

H. W. Estes."

It appears that it was the intention of this option to provide for the delivery of 500 two year old steers, instead of 5, as written. The plaintiff claims that he has been damaged, by defendant's failure to deliver the steers contracted for according to this writing, in the sum of \$7,000. The defendant admits signing the memorandum referred to, but alleges that this was a mere memorandum, to serve as a basis for a contract, if defendant should find that the cattle named could be purchased, and if Langley should succeed in negotiating a sale of them to some third person; "that it was never intended, either by Langley or by the defendant, that said writing should be obligatory upon either of them, and, on the contrary, it was agreed and understood that said writing should not be of any force or effect whatever until and unless within thirty days thereafter it was voluntarily accepted by both parties, and that in no event and under no circumstances was said writing itself to be or become a contract for the sale of said cattle, or to be or become operative between them for that purpose." The facts attending this memorandum of agreement are as follows:

Langley is a railroad man,—a freight solicitor for the Great Northern Railway. According to his testimony, his purpose in what was done was to secure freight shipments over the road which he represented. Prior to this contract he had had some business, or business correspondence, with Estes. He met Estes at the Hotel Washauer, in Baker City. There was present with the latter a man named Wickersham, who lived with Estes, and who carries on the business of a butcher. Langley testifies that he had some conversation with Estes and Wickersham at the hotel:

"Q. What was the result of that? Was any agreement reached there? A. No, sir. Q. What did you say and do then with reference to leaving or breaking off from all conference with them? A. Mr. Wickersham had some conversation and talk in regard to it, and I remarked that I would have nothing to do with him in any way whatever, and got up and left. Q. You got up and left? A. Yes, sir. Q. What did you do then? A. I went to the station. Mr. Estes went with me. Q. At whose instance or solicitation did Mr. Estes go with you to the station? A. Well, I don't know whether I suggested that he ride down to the station with me, or not."

Upon arriving at the depot the agreement was signed by Estes. Wickersham testifies that in the conversation at the hotel between Langley, Estes, and himself, he told Langley, in Estes' presence and hearing, that the cattle could not be bought for the prices Langley proposed to pay (being the prices named in the agreement signed by Estes at the depot); that thereupon Langley got up and said, "I will not have anything more to do with you. I will do my business, or talking, with Mr. Estes," that Estes started to go home with witness, when Langley called him back, whereupon Langley and Estes got into the hotel bus together. Estes testifies that he met Langley on the train as he was returning from Lagrange to Baker City; that Langley requested Estes to meet him at the hotel in Baker City; that upon his return home he went to the hotel, taking Wickersham, whom he had requested to go with him. There had been some negotiations, but without reaching an agreement, between the parties, prior to this time, with reference to the purchase of calves. Estes, testifying as to

the transaction which led up to the signing of the option in question, says that Langley wanted 500 head of yearlings and 500 head of two year olds by the 1st of June, 1897. Estes answered:

"And I told him I didn't want that kind of a contract. I told him that we had hard winters, and them two classes of cattle was hard to buy on the range, and I didn't care about that kind of a contract."

He further says that, as the bus drove up to the hotel for the train (it being train time), he and Mr. Wickersham came out of the hotel, and started towards home; that Langley asked him if he would not get in the bus, and go with him down to the depot, which the witness did; that after arriving at the depot they walked down to the platform, and Langley proposed that he would give Estes 30 days to look over the range, to see whether these cattle could be bought at the prices named, stating that he wanted 30 days to look around and see whether they could be sold, providing it was all right with Estes; that while he (Estes) was waiting for the train, and was standing by the door of the telegraph office at the depot, Langley came up to him, and laid a couple of papers on the table, and asked him whether he would sign them or not. Estes says:

"I picked them up, and I looked at them, but I didn't have my glasses along with me, and I could not see it very well; but I could see enough, by holding the papers up to the light, that there was thirty days down on the paper, and five hundred head of cattle,—I could see that,—and I thought the days was all right; and then I signed one of the papers, but I ain't positive whether I signed both of them. I might have signed both of them, but I don't recollect of signing but one. Q. Well, was there anything said about the entering into a contract at any time,—about when it should be done? A. Well, if it was agreeable, and I could deliver the cattle, why, then, we would close the contract. He said he would come down at the end of thirty days, and we would fix it up."

Estes, according to his testimony, understood that the arrangement left it open to both parties to determine at the end of the 30-days whether a contract for these cattle would be entered into between them; that he (Estes) was to have this 30 days in which to make inquiries, and ascertain if the cattle could be bought, and that Langley was to have the same time to ascertain if he could dispose of the cattle as he was desirous of doing. Langley, in rebuttal, testifies that after the paper, which was executed in duplicate, was given to Estes, he put it in his pocket; that Langley put his copy in his own pocket, and they went out on the platform, and were talking over different things; that at last Estes said to the witness, "I will give you \$50, if you will let me off on this option;" that he (Langley) answered, "What kind of a man do you think I am? I won't let you off for \$500. I am securing these cattle for other parties."

This is the substance of all the testimony touching the signing of the option referred to, and the circumstances leading up to it. The option, as already appears, was signed on the 23d day of October, and by its terms Langley was to have 30 days in which to signify his acceptance. On the 24th of October, Langley telegraphed Estes, at Baker City, as follows:

"Will accept offer for the five hundred yearling steers and five hundred two year old steers, delivered June first next at prices agreed upon. Will be there soon as possible to execute contract within thirty days sure."

Two days later, and on October 26th, Langley wrote the following letter to Estes:

"Confirming my message of 24th regarding the purchase of the five hundred head of yearling steers and five hundred head of two year old steers, delivered at the Baker City stock yards on the first of June, 1897, at ten dollars (\$10.00) per head for the yearlings and fifteen dollars (\$15.00) per head for the two year olds, as per agreement. I will be there to make the contract as soon as possible, at least within thirty days, as per our understanding, you can go right along and secure the stock. Hoping to see you soon, I am,

"Yours truly,

B. H. Langley."

To this letter, Estes, under date of October 29, 1896, answered as follows:

"Your favor of the 26th received. In regard to the purchasing of those five hundred head of yearlings and five hundred twos, will say that it will be impossible for us to get them. We have already looked over three counties, and find that that class of stuff is scarce, and hard to buy. I am now going further west and south, to see what I can do in that country. Will let you know soon whether we can do any business or not."

And again, on the 7th of November following, Estes forwarded to Langley the following letter:

"Yours of Oct. 26 at hand, and in reply will say that I do not believe the class of stock that you desire can be secured in this country. I have seen a number of the prominent stockmen of this and Malheur counties, and they are not disposed to sell that class of cattle. Inclosed you will find a letter from the man that I sent to Grant Co., which indicates that the same condition prevails over there. Taking everything into consideration, I would not care to take a contract to furnish you with 1,000 head of that class of cattle."

This correspondence was followed by a visit by Langley and Truax, to whom Langley had on November 2, 1896, assigned the option in question. Langley says that on the occasion of this visit he introduced Truax to Estes as the gentleman to whom he had assigned the agreement for the purchase of the cattle; that Mr. Estes remarked that he could not furnish the cattle. Langley then said to Estes, "This is a very curious thing," and inquired of Truax if he had the contract. The latter said he had, and took it out of his pocket. Langley held the agreement up to Mr. Estes, and said: "Do you recognize this paper?" The latter said: "Yes, sir. That is your signature? Yes, sir. Mr. Estes, when you signed that paper, did you sign it in good faith? Yes, sir. When you signed that, didn't you intend to furnish the cattle? Yes, sir; but I can't do it." Truax gives substantially the same version of what took place on this occasion. Estes says that he was excited, and hardly recollects what he did say; that he did say he thought the signature on the writing was his; and that he did not state that he considered himself bound by the writing, or that he intended to deliver the cattle on its account. Langley further testifies that while at Baker City he consulted an attorney, and, as a result of the advice he received, he (Langley) went to the bank, and got \$500, to be used as a payment to Estes upon the option in question; that he did this simply because the attorney consulted told him it was necessary; that he did not tell the attorney that his understanding was that he was to pay Mr. Estes this amount, but that he did tell him that, in the previous conversation in regard to this matter, he (Langley) had suggested to Estes that, if a formal

contract was made, he might ask \$500 to bind the bargain. Langley's testimony as to this payment proceeds as follows:

"I had suggested at the time, if a formal contract was necessary, that they might suggest paying \$500. Q. Who might suggest paying \$500? A. I suggested it. Q. Now, Mr. Langley, if this contract contained all of the agreement, and was the contract, why did you go to Baker City in order to tender to Mr. Estes, or make arrangements to tender to him, \$500, if it was not necessary for you to do it? Mr. Snow: I object to that. That is assuming a fact that is not proven in the case. Court: I understand the witness to say that, in conversation which he had at the hotel, it was understood that Mr. Estes might demand \$500 upon the execution of a formal contract. That is the statement you make? A. Yes, sir; that was our talk at the hotel."

The conduct of Langley and Truax in providing \$500 to be paid Estes; the statement in Langley's telegram and letter of acceptance of the option of October 23d and 26th, respectively, "Will be there soon as possible to execute contract, within thirty days sure," and "I will be there to make the contract as soon as possible, at least within the thirty days, as per our understanding, you can go right along and secure the stock,"—are inexplicable, upon plaintiff's contention as to the facts in the case. If the option and its acceptance were to constitute a contract between the parties according to its terms, no tender of money was necessary, nor was it necessary that a contract should be made "within the thirty days." According to Langley, the 30 days was merely the limit of his option to accept the terms of the writing which he had prepared and Estes had signed; but Langley had made haste to telegraph his acceptance the next day after the option had been signed by Estes, and confirmed his acceptance by a letter two days later: "I will be there to make the contract," "at least within the thirty days, as per our understanding." This reference to an understanding which included the making of a contract within 30 days from the date of the so-called option is not explained by Langley, and it admits of no explanation consistent with his testimony. It is consistent with Estes' statement, to the effect that there was an understanding by which Estes was to have 30 days to "look over the range," and see whether the cattle in question could be bought at the prices named, and Langley would in the meantime ascertain whether he could dispose of them; the latter having, according to his own statement, no other interest to serve than that of controlling the shipment of the cattle over the line of road for which he was soliciting freight; and he had prior to this time been conferring with buyers of cattle, without, as he states, having reached a definite conclusion, to ascertain how and in what way he could place these cattle, should he make a contract for them. Under these circumstances, nothing could be more natural than such an understanding as Estes testifies was had. To bind himself irrevocably then, without knowing whether the cattle could be had, would have been an act of incredible folly on Estes' part. Langley testifies that Estes said he already had half the cattle required, but Estes denies this, and Wickershaw's statement at the hotel to Langley that the cattle could not be bought for those prices tends to corroborate Estes. In any event, a large part of these cattle would have to be bought on the range, and, if Estes had not already appreciated the uncertainty of getting them,

Wickersham's statement would have warned him. Wickersham and Estes lived together, and their relations were probably intimate. Wickersham accompanied Estes, at the latter's request, to the hotel to meet Langley. This goes to show that Estes relied upon Wickersham's judgment and advice, and, in view of Wickersham's opinion, expressed to Langley in Estes' presence, that the cattle could not be bought for the prices named, renders it all the more improbable that Estes should have intended to commit himself, as claimed by Langley. Moreover, the acts of the parties immediately following the understanding point to the truth of the matter. Estes, according to his letter of October 29th to Langley, had "already looked over three counties," and found "that class of stuff scarce and hard to buy," and he said, "It will be impossible to get the cattle." Now, while he might have conducted this energetic search to find cattle which he had already agreed to furnish, it is apparent from this that, at the time the option was signed, Estes did not have the cattle to furnish under his offer, and he knew that he had no assurance of getting them. The only answer to this letter was the appearance of Langley and Truax at Baker City on the 9th or 10th of November, where they consulted a lawyer, who advised them that it was "necessary" to make Estes a tender of \$500. This advice, to have been warranted, must have resulted from some representation of facts different from those relied upon on the hearing. Estes testified that, when they were "talking about the thirty days," he told Langley "that if there should be a contract effected on these cattle, if they could be bought for those figures," he (Langley) "would have to pay some money down on them." And in another part of his testimony he says that when they were talking about the cattle he told Langley that there would have to be \$500 put up any way. Langley's explanation as to this tender is that he told his attorney that in a previous conversation in regard to this matter he (Langley) had "suggested that, if a formal contract was made," he (Estes) might ask "\$500 to bind the bargain." This explanation is worse than none. There is only one reasonable explanation of this tender or proposed tender of \$500, made under the advice of counsel, "to bind the bargain," and that is that the written option did not contain the understanding between the parties; and the conclusion is irresistible that the truth is, as Estes states, that by their understanding it was left open to the parties to enter into a contract in the future, and in the event of such a contract one of its conditions would be an advance payment of \$500 to Estes. I am satisfied that Estes was imposed upon in signing the option of October 23d. His own testimony as to this is corroborated by the circumstances attending the transaction. When, at the hotel, Wickersham said that the cattle could not be had at the figures named, Langley refused to continue the conversation in Wickersham's presence. The parties left the hotel together. Estes started to go home with Wickersham, when Langley called to him; and at the latter's request Estes got into the hotel bus, and the two rode to the depot together. Wickersham and Estes both testify to this effect, while Langley says he cannot recollect whether he asked Estes to go with him or not. It is apparent that Langley wanted to get Estes where he would be

without Wickersham's advice and influence. There is something sinister in this maneuver by which Estes was separated from Wickersham, and was induced to sign the memorandum hurriedly prepared at the depot by Langley,—a writing which, not having his glasses, Estes could only read imperfectly, and which Langley at the time, according to his testimony, considered so favorable to him that he told Estes, who had already repented his action, and offered \$50 to be released, that he would not let him off for \$500. Truax, the plaintiff, testifies that he had arranged with Langley to take these cattle before the option was signed. What took place between them after the option was signed is explained in Truax's testimony, as follows:

"Q. And at the time he talked with you first, the option in this case had not been taken at all? A. I think not. Q. Now, when was it that he came back and said he had an option? A. Well, I don't know that I can give you the date, but it was the very last of October, when he was going through East. Q. He was going through, and he met you, and says, 'I have got an option'? A. Yes, sir. Q. Did he show it to you? A. No, sir; not then. Q. When did you first see it? A. I didn't see it until on his return. He told me then he would have it properly assigned over to me when he came back, and when he came back he delivered it to me at the depot."

Truax paid nothing to Langley. There was no understanding or agreement or payment between them after Langley obtained the option. Langley, in passing through Tekoa, where Truax lived, on his way East, saw the latter at the depot, and told him he had an option. On Langley's return he again saw Truax at the same depot, as the train was passing through, and delivered the option, properly assigned. This assignment is dated at Helena, Mont., November 2d; and so it must have been made while Langley was at that place during his trip East. This shows that the 30 days reserved to Langley in which to accept the option was to serve some other purpose than the one pretended. The real purpose of this 30-days option was to deceive Estes into believing that each of the parties had 30 days in which to decide with reference to a contract; that he had this time to hunt the ranges, and see if the cattle could be had at the prices offered, and Langley the same time to ascertain whether he could dispose of the cattle, if they were to be had. These unfavorable impressions are confirmed by a comparison of the two men as they appeared on the witness stand. Making due allowance for the change that two years may have made in Estes' health, he still could have been no match for Langley. It was the case of a man advanced in years, broken and infirm, with impaired sight, slow to think, easily dominated by a stronger will, in the hands of a man of whom it is enough to say that his appearance and manner justify his selection by a great railroad to compete for business with its rivals. I am satisfied that Estes was deceived by Langley into signing the option, and that Langley's purpose was to keep this writing in reserve for use if Estes should decline to execute a contract for the sale of the cattle wanted by Langley within the 30 days agreed upon. There is no other explanation of Langley's conduct in writing Estes after the option was signed, and after he had telegraphed his acceptance, that he would be in Baker City "within the thirty days" "to make the contract," "as per our understanding," and in providing for a tender of \$500,

after taking the advice of an attorney that this would be "necessary to bind the bargain."

Plaintiff contends that, under the pleadings and evidence, there is no room for any claim of fraud or undue influence. It is true that this defense is not made in terms. The answer admits the execution of the writing, and alleges, in effect, that it does not set out the understanding of the parties, and it shows this by stating what that understanding in fact was; and Estes' testimony supports these allegations. From his testimony it appears that the understanding had between himself and Langley was different from that embodied in the writing, and it shows, furthermore, that Estes was, at the time he signed the writing, ignorant as to its terms. He says that he didn't read the writing "all over"; that he has only one eye, and cannot see well out of that; that he was without his glasses when he signed the option, and could not see it very well; that, by holding the writing up to the light before signing it, he could see "that there was thirty days down on the paper, and five hundred head of cattle," and, thinking "the days was all right," he signed the paper; that if he could have read it "all over, and got the whole sense of it," he never would have signed it, because it was not the agreement. The effect of this is that Estes believed the writing embodied the understanding that both parties had 30 days to decide as to an engagement to sell and purchase cattle. He had no occasion to be particular as to the other provisions of the instrument, so long as it was open to him for this period to go on with the deal or not, as he might determine, within the prescribed time. I am of the opinion that the allegations in the answer are sufficient to admit this proof, and that it is not necessary that the defendant shall allege in terms that he was deceived as to the terms of the writing; that it suffices if he alleges, and shows by the facts set out, that the writing does not contain the understanding of the parties. I do not think it a fair inference from the allegations of the answer that the parties intended that the language of the option should have a meaning different from its import, or, in other words, that the defendant understood the terms of the instrument, but relied upon a contemporaneous verbal understanding to control their meaning. I am not free from doubt as to this, and, if the question had been raised upon exception to the answer, the intendment against this pleading would have been stronger than it is now, after the evidence has been gone into and a final hearing had.

Aside from these considerations, and upon the facts as claimed by plaintiff, his demand is unconscionable. At the time when Estes notified Langley that it would be impossible to furnish the cattle, six days after the signing of the option, Langley had suffered no damages. At this time there was a breach without damage, so far as appears. It is immaterial that at law Langley or his assignee might, notwithstanding this breach, wait until the time for performance arrived, and recover their damages then accrued. The plaintiff has seen fit to go into a court of equity, where the harsh rules of the law are not enforced. What is prayed for here is in character a penalty, —a judgment in equity for \$7,000, because there is that much difference between what plaintiff claims he was to pay for the cattle

in question and the price at which these cattle could have been sold at the date specified for delivery, without reference to their price on the day of the alleged contract, or of its breach a week later. What testimony there is on that point shows that the cattle could not be bought at the time of the alleged contract for the prices specified, and that Langley and Truax were advised of this. They did not, therefore, lose an opportunity to purchase at these prices in reliance on the alleged agreement. They parted with nothing, lost nothing, and were in no wise affected, by the alleged promise of Estes; for they were advised immediately of the impossibility of supplying these cattle, if they did not know of it at the time, as I am convinced Langley did. The case is not within the rule which permits a party, when there has been a breach of contract, to disregard a notice from the other party of his repudiation of the contract, and recover damages as of the date fixed for performance. The reason for that rule is that the other party is not permitted to choose his own time to discharge himself from liability, and moreover he may reconsider his determination to repudiate. This is a case where the contract is impossible of performance, and was so when it was made, and Langley knew it. If Langley's statement is true,—that Estes, immediately after he had signed the option, regretted his act, and offered \$50 to be released, and that Langley said in reply to this request that he would not release him for \$500,—it tends strongly to show that Langley believed that he had overreached Estes. In morals, if not in law, the effect of Estes' request was to rescind the option,—a thing he had a right to do, in any view of the case, as long as Langley did not accept it. This conduct on Langley's part places him in a most unfavorable light. Estes says nothing of the kind occurred, and, if this is true, then Langley has willfully stated an untruth in order to make it appear, from Estes' alleged anxiety to be released, that he understood the terms of the option at the time he signed it. If Estes was deceived in signing the option, or if, signing it with knowledge, he immediately signified his anxiety to be released, at a time when, Langley not having accepted, it was his right to withdraw, but through ignorance of his right he omitted the necessary formality to effect such withdrawal, in either event the demand of the plaintiff is inequitable, and must be denied.

BROWN v. HOWARD et al.

(Circuit Court, S. D. Iowa, C. D. February 27, 1899.)

JUDGMENTS—PERSONS CONCLUDED—PARTIES.

Where, in a suit against one as administratrix, her individual rights in the subject of the action were directly involved, and she, residing beyond the seas, executed a power of attorney to other defendants to represent her individually, and she was represented by counsel, who had previously represented her personally, and who assumed to represent her individually as well as administratrix, in the case which was prosecuted to the United States supreme court on the theory that she was personally a party, she cannot claim that she is not individually bound by the decree.

N. T. Guernsey, for complainant.

Henry S. Robbins, for defendant Howard.

WOOLSON, District Judge. Owing to an illness of some weeks, and an accumulation of official work meanwhile, I may not attempt a statement in detail of the issues herein, and the reasons impelling me to the conclusion reached. Should I soon find time and opportunity to give at length such reasons, I will so state them. The decree sought herein to be vacated was entered in Equity 2,285, entitled "J. H. Walker, William B. Howard, and Others against Anna L. Brown and Others, as Administratrix, etc." A decree was entered in this court on October 20, 1893. The decision of this court leading to such decree is found in 58 Fed. 23. An appeal was taken by defendants therein to the United States circuit court of appeals for the Eighth circuit, wherein said decree entered in this court, as aforesaid, in October, 1893, was affirmed. The decision of said circuit court of appeals leading to such affirmance is found in 11 C. C. A. 135, 63 Fed. 204. Thereafter defendants applied to the supreme court of the United States for a writ of certiorari, which said writ was duly issued, and thereafter said supreme court reversed the said action taken by said circuit court of appeals and this court, the opinion of said supreme court being found in 165 U. S. 654, 17 Sup. Ct. 453. Following closely upon the filing in this court of the mandate from said supreme court, to wit, on June 22, 1897, defendant Anna L. Brown applied for leave to amend her answer theretofore filed in said suit, which leave was denied, and thereupon judgment and decree was entered on said mandate against said Anna L. Brown, whereupon said Anna L. Brown filed her petition in the pending suit, and was granted temporary injunction against enforcing said judgment and decree pending this suit.

The decisive question herein is as to whether said Anna L. Brown, in her individual right, was, in law, a party to said suit, Equity 2,285, so that she is bound by the decree therein. Upon careful consideration of the matter, I have arrived at the conclusion that this question must be solved in the affirmative. Without attempting to state all the reasons impelling me to this conclusion, the following may be stated:

1. She was represented therein as administratrix by highly reputable members of the bar of this court, whose authority to represent her is proven beyond question. The member, since deceased, of said firm, who personally had charge of this matter for her, is shown to have also represented her in her own right in various other legal proceedings and matters about the same time. That on the face of the pleadings she is such a party in her individual right, there can be no question. That the opposite party in good faith accepted the appearance of counsel as her legal appearance is unquestioned, as well as that counsel who so appeared for her thus appeared in good faith, believing he was authorized so to do.

2. Mrs. Brown left the United States, and took up her residence in Europe, about the date of the commencement of said suit, and was continuously beyond the seas until final decree in said suit had been entered in accordance with the mandate of the supreme court. Upon September 19, 1892 (and previous to the said appearance of counsel for her personally), Mrs. Brown executed a power of attorney in favor

of E. L. Marsh and Willis S. Brown (who were her co-defendants in said suit). This instrument is apparently as broad and comprehensive in its terms as it could possibly be made. One clause empowers her said attorneys in fact "to appear or to authorize any attorney to appear for me in any proceeding which may be instituted against me, or to which I may be made a party, in respect to my interest in said estate, or in respect to any property which I may receive therefrom, or which I may own, whether real or personal, situated, located, or being in the state of Iowa; and to appear in any and all such proceedings hereinbefore named, or other proceedings to which I may be made a party, in which it is proper that I should appear as a party, without service of process upon me; they being hereby authorized to appear for me in all such proceedings, whether instituted by them in my name, or whether I am made a party thereto, in any form, or in which they may deem it necessary that I should be a party." The evidence shows said Marsh and said W. S. Brown were present when said amendment was made and said counsel appeared for Mrs. Brown in her own right, were present at the trial in this court, wherein one of the material issues discussed was as to the right of plaintiffs or of Mrs. Brown in her own right to the bonds involved, read the briefs, etc., printed and used on appeal to circuit court of appeals wherein the suit was, among others, entitled against Mrs. Brown in her own right, and that issue—right to bonds and proceeds—as between plaintiffs and Mrs. Brown in her own right was the material issue involved and discussed. The same is true as to petition for certiorari, briefs, etc., before the supreme court of the United States. So that the authorized attorneys in fact of Mrs. Brown were cognizant, during the entire progress of the case, from the time plaintiffs amended and made her a party in her own right, that the counsel managing the case for defendants were assuming to represent her in her own right, and that plaintiffs were in good faith relying thereon as being an authorized representation.

3. In June, 1897, preceding by some months the entry of decree now sought to be vacated, counsel who had been representing Mrs. Brown during the later progress of the case presented an application on behalf of Mrs. Brown for an order permitting her to file in this cause an amendment to her answer herein. This application is sworn to by said E. L. Marsh. This application, amendment sought to be filed, and affidavit all proceed on the theory that Mrs. Brown is already and regularly in this suit in her own right. It is true that the evidence shows that neither Marsh nor Brown had authorized, or knew that Mrs. Brown had not personally authorized, Mr. Kauffman to appear for her, and that they, as well as her counsel, up to the time of entry of final decree, were apparently acting in perfect good faith. But it is also true that, if counsel had no authority to appear for Mrs. Brown individually, the trials in this court, in the circuit court of appeals, and in the supreme court worked great injustice to the plaintiffs, who, in complete good faith, were relying on such authority having been conferred as fully as the same was assumed and exercised by counsel. With the broad and comprehensive terms of the letter of attorney, above partially quoted, with their attorneys in fact actively taking

part in, and being fully informed of, the progress of the suit through the different courts, and that Mrs. Brown in her individual right was regarded by all persons immediately engaged therein as duly and fully represented by counsel, and especially the regularly presented application for leave to amend, based on the affidavit of Mr. Marsh, it seems in no wise unjust to Mrs. Brown to hold that she was in law a party to said suit, and is bound by final decree therein. To hold the contrary seems gross injustice to plaintiffs in the original action, whose reliance, in good faith, on the assumed, as being the duly-authorized, appearance for Mrs. Brown, is unquestioned. And further, Mr. Kauffman, the counsel representing Mrs. Brown on the trial in this court of the original action, is now dead. If he was assuming to represent Mrs. Brown, and knew he had no authority so to do, he would have been guilty of grossly unprofessional conduct. But counsel on either side in the argument of the pending suit heartily and in most positive terms exonerated the late counsel from any such imputation. To the court, who had so well and so long known such counsel, and who could most warmly indorse the high tributes which counsel on either side in argument herein paid to his personal and professional ability and integrity, the mere suggestion of conduct on his part inconsistent with the highest character for uprightness personally or professionally could not for a moment be entertained. We do not have his explanation as to how and whence he obtained, or believed he had obtained, the authority he exercised to appear for Mrs. Brown. Under the circumstances, the evidence ought to be clear and convincing before the decree is set aside. But no injustice is done to Mrs. Brown. Through her attorneys in fact, who were fully cognizant that her personal, individual rights as to said bonds were involved, she has had opportunity to present her full defense, and able counsel attempted so to present it. That which she now asks to present as a defense to the original claim was then in existence, and known to her attorneys in fact, as well as, apparently, to her counsel. Had the record herein shown personal service of subpoena on her as to her individual matters, her opportunities to present such defense would not have been larger than was the case on such trial. If counsel, employed, as she concedes, to represent her in her capacity as administratrix, erred, and went beyond the terms of his employment, and represented her individually, the loss resulting therefrom ought to fall on her, rather than on plaintiffs in such action, who are in no manner chargeable with complicity therewith.

I will not suggest further. The conclusion is that the equities of the case are with defendants, and that the bill must be dismissed, injunction dissolved, etc.

RAILROAD EQUIPMENT CO. v. SOUTHERN RY. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 618.

1. APPEAL—NECESSITY FOR CITATION.

Where an appeal is taken from the circuit court at a term subsequent to that of the decree, a citation is necessary to bring in the parties; but, if the appeal is docketed at the next ensuing term of the circuit court of appeals, a citation may be issued and served at any time before the close of that term, though the time for taking the appeal has expired.

2. SAME—NECESSARY PARTIES.

Where the basis of one of the contentions of an appellant on the appeal is that a corporation joined in the court below is a necessary party to the suit, the appellate court is without jurisdiction to consider the appeal on the merits, unless such corporation is brought in as a party to the appeal.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This is a bill in equity filed in the state chancery court at Knoxville, Tenn., by the Railroad Equipment Company, created under the laws of the state of New Jersey, complainant, against the Southern Railway Company, a corporation created under the laws of Virginia, the East Tennessee, Virginia & Georgia Railway Company, a corporation created under the laws of Tennessee, and Charles M. McGhee and E. J. Sanford, citizens of Knox county, Tenn. The complainant averred that it had recovered a judgment against the East Tennessee, Virginia & Georgia Railway Company for \$255,597.22; that on the 10th of June, 1897, execution had issued and was returned nulla bona; that the judgment remained unpaid; and that the East Tennessee, Virginia & Georgia Railway Company had no property, within the jurisdiction of the court or elsewhere, out of which the judgment might be recovered. The bill then proceeds to detail the history of the East Tennessee, Virginia & Georgia Railway Company, averring that a large part of its bonds and stocks were owned by the same persons who owned the stock and bonds of the Richmond Terminal Company; that such persons entered into a plan by which, under other foreclosures and sales in the various federal courts of the districts through which the railway owned or controlled by the two companies ran, such railways should be sold under decrees, and purchased by a new company, to be known as the Southern Railway Company, which, by a plan of reorganization, should issue bonds and stock, and distribute the bonds and stock among the bondholders and stockholders of the old companies, without making any provision for the unsecured creditors of the East Tennessee, Virginia & Georgia Railway Company; that these plans were carried out with the connivance and consent of the board of directors of the East Tennessee, Virginia & Georgia Railway Company and its stockholders; that the property was sold at an upset price, much less than sufficient to pay the mortgage bonds, which were foreclosed, and the property was passed free from apparent incumbrance by the foreclosure sale to the Southern Railway Company; that the unsecured debts, part of which complainant owned, were wholly unpaid. Complainant charged in his bill that this plan and its execution operated as a fraud in law upon the creditors of the East Tennessee, Virginia & Georgia Railway Company, in this, to wit: that the stockholders of the East Tennessee, Virginia & Georgia Railway Company received the profit or benefit out of the property of that company, by virtue of this plan, to the prejudice of the unsecured and unpaid creditors of the company. The bill charges that the Southern Railway Company is a mere consolidation of the properties of the Richmond Terminal Company and the Richmond & Danville Company and system, and the East Tennessee, Virginia & Georgia Railway Company and system; that the Southern Railway Company, being a successor of the East Tennessee, Virginia & Georgia Railway Company,

is liable for all the indebtedness and demands outstanding against that company, and not provided for in the plans of reorganization; and that "complainant is therefore entitled to prosecute its demands against the Southern Railway Company in this court, making all requisite parties thereto, to the end that the liability of the said Southern Railway Company for and on account of complainant's said judgment may be established by the judgment and decree of this court." "(3) That the plan of reorganization and consolidation as above set out is a fraud in law upon the rights of complainant and other creditors of like class; and that complainant is entitled, in any event, to reach in the hands of the defendant, the Southern Railway Company, the value of the interests of the shareholders in the said East Tennessee, Virginia & Georgia Railway Company, preserved to them under said plan of reorganization, or as much thereof as may be necessary to discharge complainant's said judgment and costs, and the costs of this proceeding. The names of the shareholders in the East Tennessee, Virginia & Georgia Railway Company, whose rights were thus preserved, are unknown to complainant, and they are too numerous and too widely scattered to be made defendants in person to this action; but complainant believes and charges that the defendants C. M. McGhee and E. J. Sanford are shareholders in said company, and were beneficiaries in said plan, and they were made defendants hereto as representatives of said shareholders, as a class, and said East Tennessee, Virginia & Georgia Railway Company also represents its shareholders as a defendant, as well as being the judgment debtor in complainant's original proceedings." "Complainant prosecutes this demand, not only for itself, but for and on account of all other creditors of said East Tennessee, Virginia & Georgia Railway Company, not provided for and protected under said plan of reorganization, who may choose to come forward and have themselves made parties to these proceedings." It then prays process "against the East Tennessee, Virginia & Georgia Railway Company, against the Southern Railway Company, and against the individual defendants; asks that the bill may be taken and treated as a creditors' bill for and on behalf of this complainant and all persons of like interest who may ask to intervene"; "that after a necessary accounting, and upon final hearing, the Southern Railway shall be declared to be a consolidation of the railroad properties and corporations entering into the plan of reorganization, and, as such consolidated corporation, it be declared to be liable for the amount due to the complainant upon its judgment and decree." "(4) If the court shall be of the opinion that the relief prayed for in paragraph 3 cannot be granted, then complainant prays that an account be taken of the value of the equity preserved to the shareholders of said East Tennessee, Virginia & Georgia Railway Company, under the reorganization of said road and the merger of its property into the Southern Railway Company, and that said equity be subjected by proper decree to the payment of complainant's said judgment and costs."

Process was issued and duly served upon the four defendants. Thereupon the Southern Railway Company appeared and filed its petition for the removal, as follows: "Your petitioner, the Southern Railway Company, respectfully shows unto this honorable court that it is one of the defendants in the above-entitled cause, and that the matter in dispute therein, and in that portion of this cause in which your petitioner is interested, exceeds, exclusive of interest and costs, the sum and value of two thousand dollars; that said suit is of a civil nature; and that there is in said suit a controversy which is wholly between citizens of different states, and is between them alone, and which can be fully determined as to them, namely, a controversy between your said petitioner, Southern Railway Company, and the complainant, Railroad Equipment Company. Your petitioner further avers and shows that it, the Southern Railway Company, was, at the time of the commencement of this suit, and still is, a corporation organized in, and chartered by, the state of Virginia, and was then, and is still, a resident and citizen of the state of Virginia, and was not then, and is not now, a citizen or resident of the state of Tennessee; and the complainant, Railroad Equipment Company, is a corporation chartered and organized under the laws of the state of New Jersey, and was, at the time of the commencement of this suit, and still is, a resident

and citizen of the state of New Jersey. The said controversy between the complainant and your petitioner is of the following nature, viz.: The complainant seeks to have this petitioner, Southern Railway Company, declared and held liable for a judgment rendered by the chancery court of Knox county, Tenn., against the East Tennessee, Virginia & Georgia Railway Company, a defunct Tennessee corporation, and in favor of the complainant herein. This petitioner has at no time, however, either in the past or present, had any connection with said defunct corporation or said judgment; and it is not, and never has been, liable in any way for said judgment, or any part thereof. Said bill further seeks, in the alternative event of the complainant failing to foist said judgment upon this petitioner, to make certain alleged former stockholders of said East Tennessee, Virginia & Georgia Railway Company liable to complainant therefor; but the attacks and charges against them are purely in the alternative, and are in nowise involved in or connected with the dispute between this petitioner and the complainant. In fact, complainant does not state any cause of action against the individual defendants, McGhee and Sanford; but, on the contrary, states in its bill that it does not know who the stockholders of the East Tennessee, Virginia & Georgia Railway Company are, and it does not even allege that the individuals named as defendants to its bill are or were stockholders of said company. Your petitioner therefore avers that this suit is one in which there can be a final determination of the controversy between it and the complainant, without the presence of any of the other defendants as parties in the cause. The East Tennessee, Virginia & Georgia Railway Company, named as defendant, is, in fact, only a nominal defendant, against whom no relief is sought in this action, relief to the full extent of the law having already been obtained against it as alleged in complainant's bill; and, if said East Tennessee, Virginia & Georgia Railway Company has any interest in the present suit, its interest is identical with that of complainant. Your petitioner offers herewith a bond, with good and sufficient surety, for its entering in the circuit court of the United States for the Northern division of the Eastern district of Tennessee, on the first day of its next session, a copy of the record in this suit, and for paying all costs which may be awarded by said circuit court, if said court should hold that this suit was wrongfully or improperly removed thereto. Petitioner therefore prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept said bond and surety, and cause the record herein to be removed into said circuit court of the United States in and for the Northern division of the Eastern district of Tennessee, and it will ever so pray."

Tully R. Cornick and Alex. C. King, for plaintiff in error.

Leon Jourolmon and Francis L. Stetson, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. The removal of this cause to the court below was sustained on the ground that there was a separable controversy between the Railroad Equipment Company, a corporation and citizen of New Jersey, and the Southern Railway Company, a corporation and citizen of Virginia; that the East Tennessee, Virginia & Georgia Railway Company was a nominal party only, and that the cause of action, if any, stated against McGhee and Sanford, citizens of Tennessee, was in the alternative, pressed only in case the main contention against the Southern Railway Company could not be maintained, and therefore a distinct controversy from the main one, which could be settled in a separate suit. The appellant brings this appeal, and assigns as one error the failure of the court below to remand, insisting that the East Tennessee, Virginia & Georgia Railway Com-

pany was a necessary party defendant to the issue between the equipment company and the Southern Railway Company, and that its presence would prevent removal.

The difficulty which the appellant meets at the threshold of the cause is that it has not made the East Tennessee, Virginia & Georgia Railway Company a party to the appeal by serving a citation upon it. The appeal was taken at the term of the circuit court succeeding the one at which the decree appealed from was entered. Therefore it was necessary, in order to bring the parties in as appellees, to issue and serve citations upon them.

In *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, the chief justice, speaking for the supreme court, said of the practice in the matter of appeals:

"It must be regarded as settled that (1) where an appeal is allowed in open court, and perfected during the term at which the decree or judgment appealed from was rendered, no citation is necessary; (2) where the appeal is allowed at the term of the decree or judgment, but not perfected until after the term, a citation is necessary to bring in the parties; but if the appeal be docketed here at our next ensuing term, or the record reaches the clerk's hands seasonably for that term, and legal excuse exists for lack of docketing, a citation may be issued by leave of this court, although the time for taking the appeal has elapsed; (3) where the appeal is allowed at a term subsequent to that of the decree or judgment, a citation is necessary, but may be issued properly returnable, even after the expiration of the time for taking the appeal, if the allowance of the appeal were before; (4) but a citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the ensuing term of this court, and not waived, the appeal becomes inoperative."

The next ensuing term of this court, after the allowance of the appeal in this case, was the present term, that of October, 1898, which will not end until October, 1899. There is still time in which to issue a citation and bring in the East Tennessee, Virginia & Georgia Railway Company before the end of this term. *Altenberg v. Grant*, 54 U. S. App. 312, 28 C. C. A. 244, and 83 Fed. 980. Until such a citation is issued, however, and the missing party brought into this court, it is not proper for this court to take any action in the cause. *Mendenhall v. Hall*, 134 U. S. 559, 10 Sup. Ct. 616. It is true that the appellees who are before the court contend that the East Tennessee, Virginia & Georgia Railway Company is merely a nominal party, and, if so, that the failure to bring it in as a party to the appeal is immaterial. But the burden of maintaining jurisdiction of this appeal is upon the appellant, and, as the very basis of appeal on the merits is that this company is a necessary party to the cause, we cannot proceed to hear the appeal until the absent company is brought before us.

The order will be that the cause stand over for the purpose of giving the appellant an opportunity to apply for a citation against the East Tennessee, Virginia & Georgia Railway Company, and that, if said citation is not applied for and issued before the end of the present term, the appeal shall stand dismissed.

GAGE v. JUDSON.

(District Court, D. Connecticut. March 13, 1899.)

No. 1,159.

JUDGMENT—WHAT CONSTITUTES—RECORD ENTRY.

A memorandum on the minute book of the judge to the effect that an award of arbitrators in a certain sum is approved and accepted does not constitute a judgment.

C. W. Comstock and A. W. Page, for petitioner.
De Forest & Klein and Canfield & Judson, for respondent.

TOWNSEND, District Judge. This is a hearing on a motion to deny, for want of jurisdiction, a motion to open a judgment entered on January 3d, approving and accepting an award of arbitrators. The original motion to open said judgment was filed during the term in which said judgment was entered. Counsel for defendant contend that this court has no jurisdiction, because the award was presented to the court during the preceding term, and they claim judgment was then rendered thereon. In support thereof, they rely upon the following entries in the minute book of the judge:

"Oct. 5, 517. Gage, Secy. Treasury, vs. Judson. Award of \$32,000 in favor of Judson, and U. S. is satisfied with award, and asks report be accepted and discontinue as to others. Order discontinuance granted. Balance continued.

"Oct. 7. U. S. Gage vs. Judson. Award approved and accepted, \$32,000."

These minutes are not, in any sense, the entries of a judgment. They are the mere memoranda of the judge as to the proceedings in court, and as to the course to be pursued when the judgment file shall be presented. The motion to deny for want of jurisdiction is refused. Counsel may have 10 days in which to file briefs, on the further claim that the court has no jurisdiction to accept and approve said award.

KEELER V. ATCHISON, T. & S. F. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1899.)

No. 1,070.

1. RAILROADS—LIABILITY OF RECEIVERS ON CONTRACTS OF EMPLOYMENT OF COMPANY.

In the absence of an order of court, a contract of employment of a railroad company is not binding on receivers afterwards appointed for it, within a clause of a subsequent deed of the railroad providing that the conveyance is made subject to "any and all indebtedness, obligations, or liabilities which shall have been legally contracted or incurred by the receivers."

2. SAME—FORECLOSURE—REORGANIZATION—LIABILITY OF NEW COMPANY.

Under Sess. Laws Kan. 1876, c. 110, § 1, providing that purchasers of a railroad at foreclosure sale may organize a new company, etc., but "that such organization shall in no wise affect any liability against the old corporation existing at the time of the organization of said new company," a contract of employment of the old company, existing when the new company is formed, does not become a liability of the latter.

B. SAME—PLEADING.

Even if it were otherwise, a complaint against a new company on a contract of an old organization should show that the new company was formed under said statute.

In Error to the Circuit Court of the United States for the District of Colorado.

This is an action by F. L. Keeler against the Atchison, Topeka & Santa Fé Railway Company for breach of a contract of employment. A demurrer to the complaint was sustained, and a final judgment was entered in favor of defendant, and plaintiff brings error.

A. J. Abbott (E. C. Abbott, J. S. Jaffa, and J. J. McFeely, on the brief), for plaintiff in error.

Charles E. Gast, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case was disposed of in the lower court on a demurrer to the complaint, which was sustained, and a final judgment was thereupon entered in favor of the Atchison, Topeka & Santa Fé Railway Company, the defendant below and the defendant in error here. The case made by the complaint, which was adjudged insufficient, was as follows: Prior to September 24, 1878, F. L. Keeler, the plaintiff in error, had been in the employ of the Atchison, Topeka & Santa Fé Railroad Company, the predecessor of the defendant, as a railroad engineer, and had sustained certain personal injuries. By way of settlement and compromise of a claim made against it by the plaintiff on account of said injuries, the Atchison, Topeka & Santa Fé Railroad Company on the day last mentioned entered into a contract with the plaintiff, whereby it paid him \$1,720 in money, and agreed "to employ the said Keeler to work for said company in such capacity as he is capable of filling, so soon as he is able to perform the duties thereof, and to pay him the same wages for such services as the said railroad company from time to time may pay others for like services; and so long as the said Keeler shall remain and be able to perform the duties and services from time to time given him to do, and he shall remain faithful, honest, competent, and obedient, to continue him in its employ, and to treat him in all respects, as to promotion, as other employés of said company are treated." From that time forward until December 23, 1893, when receivers were appointed for said railroad company in a suit to foreclose a mortgage on its road, the plaintiff continued in its service as a locomotive engineer. He was also employed by the receivers after their appointment until about June 20, 1894, when he left their service temporarily on account of sickness. On August 15th of the same year he applied to the receivers for reinstatement in their service, but they declined to further employ him. All the property and franchises of the Atchison, Topeka & Santa Fé Railroad Company were sold on December 10, 1895, under a decree of foreclosure which was entered in the aforesaid foreclosure suit, at which sale its property and franchises were purchased by Edward King, Victor Morawetz, and Charles C. Beaman, who subsequently conveyed the same property and franchises to the defendant, the Atchison, Topeka &

Santa Fé Railway Company, which latter company was organized on December 12, 1895, under the laws of the state of Kansas. The deed by which the property was thus conveyed to the defendant company was made subject to "any and all indebtedness, obligations, or liabilities which shall have been legally contracted or incurred by the receivers * * * before delivery of possession of the property sold, and also any indebtedness and liabilities contracted or incurred by said Atchison, Topeka & Santa Fé Railroad Company in the operation of its railroads prior to the appointment of said receivers, which are prior in lien to said general mortgage, and payment whereof was provided for by the order of said court dated January 10, 1894; and filed January 16, 1894, and which shall not be paid or satisfied out of the income of the property in the hands of said receivers, upon the court adjudging the same to be prior in lien to the said general mortgage, and directing payment thereof." The complaint also pleaded the provisions of section 1, c. 110, Sess. Laws Kan. 1876, which was then in force and unrepealed. This section provides, in substance, that, when a railroad is sold in pursuance of a judgment foreclosing a mortgage or deed of trust thereon, the person or persons acquiring title under the sale, and their successors or assigns, may thereafter exercise all the rights, privileges, and franchises which belonged to the company making the mortgage, so far as they pertain to the portion of the road sold, and that they may organize a new company, elect directors, and dispose of stock in the same name as the old company, or may adopt another name, and may conduct their business generally as provided in the charter of the original company: provided, however, that the new company shall exercise no greater powers than were exercised by the old company: and provided that the new company shall file in the office of the secretary of state a certificate setting forth the facts required to be set forth on the organization of a new company: and provided, further, that the new company shall be subject to the same obligations to the state or the public as the original corporation, and "that such reorganization shall in no wise affect any liability against the old corporation existing at the time of the organization of said new company." Such, in legal effect, were the allegations of the complaint upon which the plaintiff relied for a recovery.

We agree with the circuit court that the complaint stated no cause of action, and that the demurrer thereto was well taken. The complaint did not set out any of the provisions of the order under and by virtue of which the receivers originally took possession of the property of the Atchison, Topeka & Santa Fé Railroad Company, or the provisions of any order subsequently made which required the receivers to adopt and continue in force such contracts of employment as at the time of their appointment were in existence between the old company and its employés. Neither did the complaint count upon any provision of the deed whereby the mortgaged property was conveyed by the master who conducted the foreclosure sale to the purchasers at that sale, nor the provisions of the decree of foreclosure, nor the terms of any order whereby the possession of the mortgaged property was relinquished by the receivers to the purchasers thereof,

or to the defendant company. In other words, the complaint fails to show that by any order of court made in the course of the foreclosure proceedings the contract existing between the plaintiff and the old company, for a breach of which by the receivers the present action is brought, ever became obligatory upon the receivers; and, in the absence of such a showing, it is obvious that they did not incur a liability by refusing to employ the plaintiff on August 15, 1894, which was cast upon the defendant company by virtue of the clause of the deed, heretofore quoted, under which the defendant acquired title. To make out a case against the defendant company under the assumption clause contained in the deed by which it acquired title, it was necessary for the plaintiff to have shown that his contract with the old company became binding upon the receivers; and this essential fact his complaint failed to disclose.

Besides the contention that the receivers incurred a liability by refusing to employ the plaintiff on August 15, 1894, it seems to be claimed in his behalf that his contract with the old company became a liability of the defendant company by virtue of the provision of the Kansas statute heretofore quoted (section 1, c. 110, Sess. Laws Kan. 1876), without reference to any orders made in the foreclosure suit. It is observable, however, that the statute in question does not say that, when a reorganization takes place after a sale under a decree of foreclosure, the liabilities of the old corporation existing at the time the new company is formed shall become liabilities of the new company; and such could not have been the legislative intent, as a law of that character would render foreclosure proceedings wholly meaningless and futile. The clause of the statute in question merely provides "that such reorganization shall in no wise affect any liability against the old corporation existing at the time of the organization of said new company"; and it was probably inserted, through abundant caution, to avoid a possible inference that the organization of a new corporation in the mode provided by the act worked a dissolution of the old corporation, and thereby extinguished its debts. Moreover, the complaint in the present case does not show by proper averments that the defendant company was organized as a corporation under authority conferred by section 1, c. 110, Sess. Laws Kan. 1876, as it should have shown, if it was intended to claim that by virtue of the provisions of that act the defendant company is liable to discharge all contracts, of whatsoever nature, that may have been made by the former company. We think, therefore, that no ground of recovery was disclosed by the complaint, and the judgment is hereby affirmed.

UNITED STATES, to Use of ANNISTON PIPE & FOUNDRY CO., v. NATIONAL SURETY CO.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1899.)

No. 1,079.

PRINCIPAL AND SURETY—RELEASE OF SURETY BY CHANGE IN CONTRACT—BOND FROM CONTRACTOR FOR PUBLIC WORK.

The bond from a contractor for public work, provided for by 28 Stat. 278, c. 280, is intended to perform a double function: First, to secure to the government the faithful performance of the contract; and, second, to protect third persons from whom the contractor may obtain labor or materials in the prosecution of the work. In its second aspect, the bond, by virtue of the statute, contains a separate and distinct agreement between the obligors and such third persons, as to which the agency of the government ceases when the bond is given and approved, and subsequent changes in the contract or specifications agreed upon between the government and the contractor, though without the knowledge or consent of a surety, where the general nature of the work and materials remains the same, will not release the surety from liability to persons who supply labor or materials thereunder.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

This suit was brought by the Anniston Pipe & Foundry Company, the plaintiff in error, in the name of the United States, against the National Surety Company, the defendant in error, on a bond executed by the defendant on July 15, 1895, as surety for T. J. Prosser, the bond having been executed pursuant to the provisions of an act of congress approved August 13, 1894 (28 Stat. 278, c. 280), which is as follows:

“An act for the protection of persons furnishing materials and labor for the construction of public works.

“Be it enacted,” etc., “that hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: provided, that such action and its prosecution shall involve the United States in no expense.”

T. J. Prosser, the principal in the bond, had entered into a contract with Charles B. Thompson, assistant quartermaster of the United States army, who acted for and in behalf of the United States of America, for the construction of a boiler and pump house, pumping machinery, and connections, water mains, steel trestle, and water tank, etc., for the water-supply system for the new military post near Little Rock, Ark.; and the bond contained a condition, in substance, that if said Prosser, his heirs, executors, and administrators, should in all respects duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by said contract agreed to be observed and performed by said Prosser, according to the true intent and meaning of said contract, as well during any period of extension of said contract as

during the original term, and should make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract, then the obligation should become void, but otherwise remain in full force and virtue. The plaintiff company sued to recover of the defendant, as surety in said bond, the sum of \$842.98, with interest and costs, being the value of certain water pipe which it had supplied to Prosser, subsequent to the execution of the aforesaid bond and contract, to enable him to execute his agreement with the government, and which pipe so supplied he had actually used for that purpose, but had not paid for. For a defense to the action the defendant pleaded, and the trial court so found, that subsequent to the execution of the aforesaid bond, and the contract which it was given to secure, the government had entered into a further agreement with Prosser, modifying the terms of the original contract, or, more accurately, the specifications thereto attached, in such a manner that Prosser was required to lay only 1,866 linear feet of six-inch water pipe in place of 3,850 feet, as specified in the original contract, and that this change in the terms of the original contract, or rather in the plans for its execution, was made without the knowledge or consent of the surety company. In view of the change in the plans for the execution of the contract which lessened the amount of water pipe necessary to be supplied and used, the trial court ruled that the plaintiff could not recover. It accordingly rendered a judgment in favor of the defendant, to reverse which the record has been removed to this court by a writ of error.

Truman A. Post, for plaintiff in error.

J. E. McKeighan (Shepard Barclay, M. F. Watts, and G. A. Vandevere, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is a familiar rule of law that the contract of a surety must be strictly construed, and that it cannot be enlarged by construction, and that when a bond, with sureties, has been given to secure the performance of a contract, and the principal in the bond and the person for whose benefit it was given make a material change in the contract without the consent of the surety, the latter is thereby discharged. For present purposes, it may be conceded that the finding of the lower court in the case at bar discloses such a modification of the original contract between Prosser and the United States as would fall within the rule last stated, and release the defendant company from its liability, if the United States was suing for its own benefit for a breach of some provision of the contract, the due performance of which the bond was intended to secure. Such, however, is not the case. The suit is not brought by the United States to recover any damage which it has sustained; neither is it brought to enforce any provision of the contract which was entered into between the United States and the principal in the bond. On the contrary, the action is one to enforce a stipulation found in the bond, and only in the bond, which was intended solely for the protection of laborers and material men who might furnish labor and materials while the contract was being executed by Prosser. The United States is merely a nominal plaintiff, and as such, under the provisions of the act of congress, it cannot be held liable even for costs. The real plaintiff is the corporation for whose use the suit was brought, and it sues to enforce an obligation which congress required to be inserted in the bond for its protec-

tion and for the protection of others who might furnish labor or materials while the work was in progress.

The real question to be considered, therefore, is whether the act of congress under which the bond in suit was taken constituted the United States the agent or representative of the persons who supplied labor and materials after the contract and bond were executed, in such a sense that its action in consenting to a modification of the contract with Prosser must be imputed to the laborers and material men, and held to deprive them, as well as the government, of all recourse against the surety.

The act of congress of August 13, 1894, does not authorize the United States to bring suits of its own motion against the obligors in such bonds as are therein provided for, to recover what is due to laborers and material men. It is not empowered to act in their behalf in that respect, but such actions can only be brought at the instance of persons who furnish labor and materials, who are authorized, without previous leave being obtained from any executive department, to sue in the name of the United States, and control the litigation precisely as they might control it if the suits were brought in their own name. It is also noticeable that in its title the act professes to be one for the benefit "of persons furnishing materials and labor," and that in the body of the act the form of the condition to be inserted in the bond for the benefit of the United States is not in terms prescribed, the only provision in that regard being that the bond shall be "the usual penal bond"; meaning, evidently, such an obligation for the government's own protection as it had long been in the habit of exacting from those with whom contracts were made for the doing of public work. On the other hand, the condition for the benefit of persons who might furnish materials or labor is carefully prescribed. Obviously, therefore, congress intended to afford full protection to all persons who supplied materials or labor in the construction of public buildings or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be, for the labor and materials so supplied. There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the government. The bond which is provided for by the act was intended to perform a double function,—in the first place, to secure to the government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, the one for the benefit of the government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience.

In view of these considerations, we are of opinion that the sureties in a bond, executed under the act now in question, cannot claim exemption from liability to persons who have supplied labor or material to their principal to enable him to execute his contract with the United States, simply because the government and the contractor, without the surety's knowledge, have made some changes in the contract, subsequent to the execution of the bond given to secure its performance, which do not alter the general character of the work contemplated by the contract or the general character of the materials which are necessary for its execution. When the government has executed the contract and taken and approved the bond, it ceases to be the agent of third parties whom the contractor employs in the execution of the work or from whom he obtains materials, and the rights of such persons under the bond are unaffected by subsequent transactions between the government and the contractor. If such were not the case, it would be possible for the contractor and some officer of the United States, by making some change in the contract or specifications, to deprive laborers and material men of all recourse against the sureties in the bond after they had supplied materials and labor of great value in reliance upon its provisions. It is not probable that such a result was contemplated by the lawmaker. On the contrary, the act bears every evidence that it was intended to provide a security for laborers and material men on which they could rely confidently for protection, unless they saw fit, by their own dealings with the contractor, to relinquish the benefit of the security. We are confirmed in these views by the following authorities: *Dewey v. State*, 91 Ind. 173; *Conn v. State*, 125 Ind. 514, 25 N. E. 443; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Kaufmann v. Cooper*, 46 Neb. 644, 65 N. W. 796; *Steffes v. Lemke*, 40 Minn. 27, 41 N. W. 302. The first two of these cases are very much in point. Bonds were given to the state of Indiana as obliged for the doing of public work, in pursuance of a statute of that state, which bonds contained conditions requiring—First, the faithful performance and execution of the work undertaken by the contractor; and, second, the prompt payment by the contractor of all debts incurred by him in the prosecution of the work for labor and materials supplied by third parties. It was held, in substance, that for any breach of the second condition of the bond by the contractor the right of action was in the laborer or the material man, and that such right of action could not be defeated or prejudiced by any act done by the obligee in the bond after the bond had been taken and approved. It was accordingly ruled that changes made in the contract by the parties thereto, to wit, the contractor and the public authorities, after the bonds had been executed and accepted, would not deprive material men of their right to recover against the sureties in the bond. It results from what has been said that the judgment of the circuit court was erroneous upon the facts found by that court, and should be reversed. It is so ordered, and that the case be remanded for a new trial.

TEXAS & P. RY. CO. v. EASON.

(Circuit Court of Appeals, Fifth Circuit. February 28, 1899.)

No. 780.

1. RAILROADS—INJURY TO PERSON ON TRACK—FAILURE TO GIVE SIGNALS.

The purpose of train signals, by bell or whistle, is to warn persons of the approach of the train, and the purpose of stopping a hand car proceeding on the track to look and listen, or of sending a flagman forward, is the same, and a failure to observe either of such precautions cannot be held the cause of an injury by a train to one who knew of its approach in time to have avoided the injury.

2. MASTER AND SERVANT—INJURY TO SERVANT—LIABILITY OF MASTER.

A railroad company cannot be held liable for an injury to a section man, who, with others, was trying to lift a hand car from the track in front of an approaching train, and was struck by the train, merely because the foreman did not expressly direct him to let go of the hand car and save himself, when it does not appear that the men were acting by order of the foreman in attempting to remove the hand car.

3. TRIAL—DIRECTION OF VERDICT.

When the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, it is the duty of the court to direct a verdict for the defendant.

4. APPEAL—REVIEW—REFUSAL TO DIRECT VERDICT.

While the direction of a verdict is a matter resting in the legal discretion of the trial court, its action in refusing to direct a verdict is subject to review, where the evidence is before the appellate court.

In Error to the Circuit Court of the United States for the Northern District of Texas.

T. J. Freeman, for plaintiff in error.

Thos. D. Ross and H. M. Chapman, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

McCORMICK, Circuit Judge. J. D. Eason, the defendant in error, sued the Texas & Pacific Railway Company, the plaintiff in error, to recover damages for injuries alleged to have been inflicted on him by the railway company through the negligence of its employés. He alleged that on the 30th of September, 1896, he, with others, was engaged as a section hand in repairing the defendant's track from Brazos station eastward a distance of several miles, and in the work he was under the direction and control of the defendant's foreman, William Wooten; that the foreman commanded him and the other section hands to board a hand car for the purpose of conveying them to the place of work, and that the foreman carelessly, recklessly, and with gross negligence caused the hand car to be propelled along the defendant's track, and around the sharp curves thereon, at a rapid rate of speed; that at a point about two miles east from Brazos station, and when the car was rounding a sharp curve on the track, the foreman sighted the defendant's west-bound train, which was approaching the car at a rapid rate of speed, and he commanded the plaintiff to stop the hand car; that, when the hand car was stopped, the foreman jumped off, and carelessly, recklessly, and without regard for the safety of the

plaintiff, commanded him and others to lift the car from the track; that the plaintiff, not seeing the near approach of the train, and not realizing any danger, as no bell had been rung nor whistle sounded, and relying on the section foreman to warn him in time to avoid danger, in obedience to the command of the foreman, was struggling with the hand car in an attempt, with others, to clear the track, when without warning from the servants of the defendant on the train, or from the section foreman, the plaintiff was struck by the defendant's engine and by the hand car with which said engine collided, and was thereby knocked a distance of 32 feet, and wounded, bruised, and injured severely; that the defendant's servants conducted, managed, and propelled the train in a reckless, careless, and negligent manner, and failed to ring the bell or blow the whistle at a public crossing, which was about 100 yards from the place of collision, and propelled the train around the sharp curve without sounding the whistle or ringing the bell, at a rate of speed equal to 12 miles an hour; that the foreman caused the hand car to be propelled at a rapid rate of speed along the track around the sharp curves, and failed to send forward a flagman on approaching the sharp curves, as was the custom on the road, and failed to stop the hand car on approaching the curve, and listen for the approaching train, which could and would have been heard had the hand car been stopped; that the foreman had theretofore admonished the plaintiff for his haste in what he termed unnecessary hurry in lifting the hand car from the track to avoid collision with a train, and on many such occasions had told the plaintiff not to be in fear, as he would always have ample time to get the hand car off the track; and that by these and other expressions and conduct of the foreman the plaintiff, who was inexperienced, had been induced and persuaded to trust to the guidance of the foreman, who was an old railroad hand, with much experience; and that the said careless, reckless, and grossly negligent acts and omissions of the foreman caused the collision of the hand car with the train, and caused the plaintiff's injuries, to his great damage, for which he prayed judgment. The defendant submitted a general demurrer, and pleaded the general issue, and that the plaintiff was guilty of contributory negligence, which proximately caused his injury, in this: that he saw, or might have seen, the approaching engine in time to have gotten out of its way, but he negligently failed to do so. The case was submitted to a jury, and there was a verdict and judgment for the plaintiff.

When the proof was all in, the defendant requested the court to charge the jury to return a verdict for the defendant, which request was refused, and this ruling is assigned as the first ground of error for which the judgment of the circuit court is sought to be reversed.

The plaintiff, on the witness stand, testified as follows:

"On the morning this injury occurred, the foreman commanded us to go to work, and we got on a hand car at Brazos station. Our work was east of Brazos station. We went between one and two miles, when we came to a sharp curve, and were running along. The foreman bid me throw on brakes, and I did so. He did not say what for, but just called for brakes. I put on the brakes, and before I got off the car—there were two men behind me—I turned my head, and saw them pick up the end of the car, and start

around, and I supposed there was something up then. I got off, and took hold. I think I helped get the car off. We got it around—about half around. That is about all I know. I never knew whether we got the car off. I cannot state the reason. I don't know myself. I never knew anything for about four days afterwards. That was on Wednesday, and it was about Sunday before I knew anything. The accident occurred about a mile and a half east of Brazos. The cut is just a little limestone cut about six or ten feet deep. As well as I can guess, it is about one hundred and fifty yards long. The road curves to the south going east. As well as I can guess, it is about one hundred and fifty yards—may be a little further—from the point where it begins to curve and turns south back to where it changes and starts east again. From the east end of that curve the track is straight for something like half a mile. Then it curves north through another cut. There is a public crossing at the east end of the cut. The hand car had gotten something near one-third of the way in that cut when it collided with the train. The whole length of the cut is about one hundred and fifty yards, and I suppose we were fifty yards in the cut, to the best of my recollection. I was on the southeast corner of the car when we left Brazos, and was in the same place when the brake signal was given by the foreman. I was on the front of the car, on the south side of that end. The foreman was on the northeast corner. There were four of us in all. The other two men were at the hind wheels. I was at the brake. We did not stop when we approached this curve. No one was sent forward to see whether or not a train was approaching from the direction in which we were going. I heard no whistle or bell from a train. An approaching train could be seen sooner from the northeast side of the car than from the position occupied by me. The curve was south. The command to put on brakes was given this way: 'Sh-e-e-e-e!' It was understood that that was a call for brakes. That was his way of calling for brakes. The best I can tell, the hand car went about half a length of a rail before it stopped after I applied the brakes. We cannot stop a hand car very readily when it is loaded and under headway. We had on that car that morning a lot of tools, and a keg of water, besides the men. The car had not entirely stopped when I saw these men take hold of it at the rear end. Mr. Wood and Mr. Hooper were the men who were with us, and took hold of the rear end. The foreman went back, and took hold with them. I got off then, and took hold of the corner I was on, to help them off with it. When they took hold of the rear end of the car we moved it north. We just got the car around square across the track when the collision occurred. We got the rear wheels off. That threw the front end south. The wheels were about the center of the track. It rolled until the wheels got against the north rails. I was at the northeast [southeast] corner of the car when it started, and when it got square that threw me on the west [southwest] corner. I was trying to help them get the car off. I didn't think of any danger. Didn't know there was any danger near. I don't remember that the foreman gave me any instructions that there was a train coming. It sort of seems like he remarked, 'Let's get her off, boys; yonder comes a train.' It sort of runs in my mind that he said that. I expected him, if there was any danger, to give me warning. I thought that if it was anyways close he would tell us. There is another cut there. It is called 'Nigger Hill.' It is about a half mile from this cut where I was hurt. I had been in the employ of the company about seven months, in the capacity of section hand, under this same foreman. Generally, when there was a train approaching, when we would go to take the hand car off, he would caution us not to get in a hurry,—'Don't be too fast; you have plenty of time.' He spoke it very abruptly. He seemed like he got mad because we got in a hurry. He would tell us not to be too fast; that there was plenty of time. They were on the north side, and I was between the rails, assisting in taking off the car. If he had warned me, I could have jumped back off the track out of the way. No warning was given, that I heard, at all. The foreman was very abrupt, and if a man didn't do to suit him he talked very abrupt, and threatened to 'fire' him. If that hand car had been stopped before entering that cut, we could have heard a train approaching. There was no precaution taken to see whether there was a train approaching or not. I don't know exactly what time we

left Brazos that morning, but from what they told me I suppose it was about 6:30, probably a little later. I think it was earlier than the usual hour. I don't know the time myself; I was on his orders; but from what they told me it was ahead of time. That was a freight train. I don't know at what rate of speed they were running. The whistle could have been heard at that road crossing very distinctly, and the bell could by a person not on the hand car. If the hand car is loaded with tools, it makes a racket,—the shovels, picks, and bars jolt, and make a racket." Being asked, "What were the regulations about sending some one of your men ahead around these curves to see whether there was a train approaching or not?" The plaintiff said: "We listened to see if there was one coming. If the wind was still, we could hear a train a mile. It depended on how high the wind was blowing as to how far we could hear a train. We could hear one far enough, even in the cut, to get a car off the track before it got there. There was no other precaution taken to ascertain whether there was a train coming or not, that I know of. We did not stop the car the morning of this accident."

On cross-examination the witness said:

"I cannot tell the rate of speed the hand car was going the morning I was hurt. We were just going at a moderate gait. I don't know how many miles an hour; I never timed it. The nearest I ever came to getting the speed was once we run seven miles in thirty minutes. We were running very fast. The morning of the accident I suppose we were running four or five miles an hour. At the east end of the curve is a public crossing. I call it a public crossing. It was where wagons and buggies cross. It was not a county road, that I know of. It was a settlement road, where everybody on the south side crossed. It was in Palo Pinto county. I never did see the engine that struck me. I had my attention called to the brake, and I was trying to get the car off. The foreman called for brakes, of course, and I put on brakes. He called for brakes this way: 'Sh-e-e-e-e.' I understood what that meant. I understood it was for brakes. I had no idea what it was for. I didn't look to see if there was any danger. I didn't know what he was stopping for at that moment. I saw the men on the rear end of the car get off, and pick up the back end of the car, and start around. I had an idea that there was a train coming, I was on the south side of the track, and couldn't see as far up the track as they could,—as the men on the north side could. There were two men on the west end of the car, but they were nearer the center than I was. I was right on the edge. I had no warning of the approaching train, except, it seems like, as he started back towards the end, he said, 'Let's take her off; yonder comes a train.' I wouldn't say positively, but it just seems like a dream now. Q. Are you testifying from facts or dreams? I just testify the way it seems to me. Yes, sir; I have thought of that before I come here to-day. It was after he called for brakes that he said that, 'Let's take her off.' It was after he got off, and started back, he said that. The other men got out of the way of the engine. We were not engaged long in trying to get the car off the track. If I hadn't taken the time to get the car off, it wouldn't have taken more than a second or two to jump off on the south side. I did not see anything at all to indicate danger. I didn't look up to see a train or an engine. I was watching my foot to keep it on the brake. Sometimes you have to place your foot in a particular way to keep it on. The brake lever is narrow, and you have to watch what you are doing, or your foot will slip off sometimes. I turn my foot crossways with the hollow of my foot on it. I could not look up and down, too. That would be impossible. It looks that way to me. I never did see that train at all. Never have seen it. Since then I have seen what they told me was the same train. I had my foot on the brake. I had been pulling the car. I didn't stand. At that time I didn't know that that was a place of danger. I knew there was danger, of course, but I didn't know the train was so close. I supposed it was coming, from the actions of the other men, but I didn't know it was so close. I couldn't look ahead and attend to my business too. I had been setting the brake for some time. It [the hand car] had only one brake. * * * I had sense enough to know an engine when I saw it coming down the road ahead of me. I could have

gotten out of the way if I had known it was close to me. I didn't have time to investigate anything. * * * I had been in the service of the company about seven months that time. I had worked for them twice before that,—about six months one time, and something over three months another time. Altogether, I had been in the service of the company about sixteen months. I was nothing like an expert. I was just a common section hand. Yes, I had met freight trains before during my sixteen months' service. I met trains several times, but we always got the hand car off in time. Never did get a hand car struck before, when I was with them. I did not say the section boss always stopped the car, and sent a man ahead, until that time. I said he sometimes stopped and listened, and sometimes he would not. I knew sometimes he didn't stop. Certainly, we took the risk if he didn't stop and listen to see if there was a train coming. I knew there was a train somewhere on the way, but didn't know how far or how near. I knew it was somewhere west of Ft. Worth."

On redirect examination the plaintiff said:

"When we were trying to get the hand car off the track, I thought sure the foreman would warn me if there was any danger. I was right on the south edge of the car, and I put my foot on the brake, and stopped the car. There was just room enough to stand on the car and work the lever. I don't know the width of a hand car. I never measured one. The side of the car is inside the wheels. The car is about the width of the track. From the position I was in, I couldn't see a train in the cut more than seventy-five yards if I had looked. I might have seen the smoke at that distance if I had looked, but I couldn't have seen the train. In taking the hand car off, it is necessary to have some one at the front end. It makes it lighter on them. If the foreman had given me warning, I could have gotten off,—could have stepped right back off the track. There was no warning given me that I heard. The other men were on the north side of the track, and at the end of the car, and I was at the southwest corner of the car. I don't know how far I was knocked. I don't know how many times the foreman had told me, when he went to take a hand car off the track for a train to pass, not to be in too great a hurry; that we had plenty of time. He told me that several times."

Recross-examined, he said:

"I never did measure that cut to see how deep it is. I suppose it is between six and ten feet. It is highest near the center of the cut, as well as I remember. I suppose the bed of the hand car is twelve or eighteen inches above the track. I was standing on the top of the hand car. I am something over five feet; I don't remember. That would make me six or seven feet above the track. I don't know how high a smokestack is above the ground."

Again, on redirect examination:

"It is generally downgrade all through the cut, and on down to the bridge. The bridge is about a half mile, I suppose. It is gradual downgrade to the west. It is not a steep grade. The downgrade begins about half a mile east of the cut. From half a mile east of where we were, down to the bridge, is downgrade. We were going upgrade, and the train was going downgrade."

H. B. Hooper, one of the section hands who was on the car, testified:

"It was in a short curve where the accident occurred. The track curves to the southeast; and if a man was standing up on the hand car he could see the smokestack of a train about five hundred feet. It was very seldom that the section boss sent a flagman. Sometimes he did, and sometimes he didn't. We left the depot at 6:50, and went at the rate of six miles an hour. Don't remember that the foreman gave any orders as to going fast or slow. Don't know what speed of a train was directed by the company around a curve. Don't know what speed the train makes, but not so fast as on a

straight track. The train was stopping before I noticed how fast it was going. I heard neither bell nor whistle. There is a public crossing a short distance east of where the accident occurred. I didn't hear bell nor whistle at the crossing. My idea at the time was that the engine was about two hundred feet from the hand car when I first saw it. Wooten, the foreman, whistled for brakes. This was his usual signal. The plaintiff was helping to get the hand car off the track. The foreman was helping to get the car off, too. No orders were given to Eason to desist from his attempt to get the car off before he was hurt, except I called, 'Look out!' * * * We stopped as quick as we could when we saw the train coming, and tried to get the car off. Don't know what part of the car Eason was at when hit. Can't say what position he was in with reference to the car, nor what he was doing with his hands. The hand car was going east; the locomotive going west. A train can be seen about five hundred feet east and a mile west from the place of the accident. The bank on the south of the curve prevented the train from being seen. If we had stopped to listen, we could have gotten out of the way,—could have heard the train. I didn't hear it until I saw it. I got out of the way. I was not hurt. Don't know what hindered Eason from getting out of the way. Don't know what orders are given about running trains."

A. Wood, the other section hand who was on the hand car at the time of the accident, testified:

"The accident occurred about a mile and a quarter east of the station or depot at Brazos. We were working on the section as section hands. William Wooten was the foreman. We started to work that morning at 6:50 a. m., from the depot. Did not use the section house. At the place of the accident the track was curved, and in a cut. After leaving the curve a few hundred yards, the track is straight. Don't know just how far a train can be seen east from the place of the accident. There were no precautions usually taken by the foreman to avoid collision with defendant's locomotives. We left the depot at 6:50 a. m., and were going about five or six miles an hour. The foreman gave no orders as to speed. Don't know the company's orders as to speed of trains at this point, nor what speed they ordinarily make. The train ran its length and two rails before it stopped, after striking the hand car. I don't remember of hearing either bell or whistle. There is a crossing just east of the place where the accident occurred. Didn't hear any bell or whistle there. I think I saw the engine three hundred feet before it struck the hand car. There were no orders given in reference to the hand car, that I remember. The foreman was trying to get the car off, and I was helping. Eason was trying to get the car off the track. The foreman was helping. I didn't hear any orders to Eason to desist from getting the car off the track just before the accident. * * * We could have heard the train if we had stopped and listened at the right time. I got out of the way. I was not hurt. I was at the end of the car that was off the track, and Eason at the end between the rails. When the foreman saw the train, he gave Eason signal to put on brakes of the hand car. I saw the train. You could see a train west a mile and a quarter. I don't know how far east one could be seen. The curve and cut would prevent a train from being seen from the east. I don't know about the train orders at that or any other point."

I. M. Dean, a witness for the defendant, testified:

"I am an engineer of the Texas & Pacific Railway Company. Have been a locomotive engineer for fourteen years. I went to work for the T. & P. in 1882. I was on the engine that hurt this plaintiff. I was going west. It was a freight train. I think we had about twenty cars; some empty and some loaded. My best recollection is that we had about twenty cars in that train. We never know on the front end what the cars are loaded with. We were going downgrade for about two miles,—a mile and a half or two miles. It was a rather sharp curve. I don't know the degrees. I suppose I was eight or nine hundred feet when I saw him first. That is a rough guess. I suppose I saw the other section hands. No, I didn't give any signals for

that curve. I didn't ring the bell for that curve. I whistled for the crossing, and the brakeman was ringing the bell. That was the first thing that had my attention. I don't know how far I was from the crossing when I whistled. The brakeman reached up and pulled the bell cord, and looked at me, and I looked out the window, and saw the hand car. The brakeman kept ringing the bell until we hit the car. I did what I thought was right to stop the train. I was afraid the hand car might strip the engine and throw the rods through the cab, and that is very dangerous. I didn't call for brakes. I set the air. I didn't have air brakes on all the cars. I don't know how many cars had air. They [the persons on the hand car] must have seen me first, for they were taking the car off the track when I saw them. When I leaned out of the window, they were taking the car off the track, or trying to. The pilot struck it. He was a little nearer the north rail than the center of the track. He was between the center and the north rail. His side was to me—his right side. He had his face to the north. Pickens was my brakeman. I don't know where he is. I think he is on the road. He is running a train now. I am sure he rang the bell, and I whistled for the crossing. I was sitting there, looking straight ahead, and he pulled the bell cord, and looked at me, and I knew there was something. I could not possibly have stopped that train before I struck him. I think the caboose stopped about where the man lay. I didn't get out of the cab until we got to Brazos. I saw them take him, and put him on the caboose. I don't know what rate of speed we were running. I don't think over fifteen or sixteen miles an hour. I couldn't have stopped the train any sooner than I did."

On cross-examination he said:

"I sounded the whistle, and the brakeman rang the bell. I don't know the distance from that cut. It is quite a way from the crossing. It must have been between a quarter and a half mile. I whistled just after I came around the curve at the top of the hill. I had just passed out of the curve when I sounded the whistle. The time-card says, 'Give the signal at eighty rods from a crossing.' I guess I was over eighty rods. I had to lean out of my cab window to see this hand car. I think we were further than four or five hundred feet from it when I first saw it. I was a little excited. The car stood across the track, and it was liable to ditch the engine. I thought my life was in danger. I never thought for a minute about the section men being struck. I thought I might run into the hand car, and that there was danger of a derailment. I thought they would get off. I have seen cars taken off much nearer that that, and no one hurt. I didn't blow the whistle again. I set the brake, and was trying to stop. I first made an ordinary application of the air, and then I applied the emergency air. I was on the north side of the cab. The nearer I got, the plainer I could see. The front of the engine did not obstruct my view. He was trying to get the car off the track. He was in a stooping position. The other men stepped off just before I struck him. I didn't see anything in the world to keep him from stepping off the same as the other men did—he wasn't fastened there. I don't think I can stand in front of a train and tell the speed it is coming at. I could tell whether it was coming fast or not. I don't know how far I missed the section boss,—not much. He got off. I guess I was forty or fifty feet from him when he got off. I was not running fifteen miles an hour when I struck him. I don't think I was running over ten miles. That would be about fourteen feet every second. The train ran about its length after it struck the hand car. I didn't get off the engine. I saw them put him in the car. The bell was ringing, and I was afraid that if I sounded the whistle they might get off the track, and leave the car there. I didn't want to endanger my life. I don't think the car was ever moved after I saw it. I was certainly interested in getting that car off of there. I wouldn't like to see any man hurt. They knew I was coming. That is the reason they were taking the car off the track. The bell was ringing. This accident occurred two minutes after seven o'clock. I looked at my watch as soon as we stopped. We are supposed to look out for hand cars at all times. It was my understanding that that was about the time they usually went to work. I supposed the whistle was sounded enough for the curve. I sounded the whistle back half a mile.

I don't know why I didn't sound it again when I came near that curve. We can't sound a whistle for every curve in the road. It would take all the steam we have. We have plenty of such curves as that. Yes, sir; it is usual for us to keep a lookout for section gangs, and they keep a lookout for us. I think they saw the engine long before I saw them."

On redirect examination:

"I don't know how high an engine is from the track. I suppose fifteen feet to the top of the smokestack. It is quite a little distance. We have no instruction in the world about looking out for section men. We are supposed to look out for hand cars. We have no instruction to look out for men walking the track. The time-card says they are supposed to look out for us. The time-card provides that bridge and section men are to look out for trains."

Recross-examination:

"This was a dewy morning, as well as I remember. The sun was just rising."

The foregoing embraces all of the testimony that was offered on the issue as to the defendant's negligence. The plaintiff testified that he knew before the hand car started that the train was coming, and that the foreman signaled him to apply the brakes in time for him to stop the car and get off to the ground, which he did in ample time to step off the track, and keep out of the way of the train. While he says that he did not see the train himself, he says that he knew from the signal for brakes, and the action of others on the hand car, that the train was there. The other section men who were on the hand car, and whom he called as witnesses, testified that they saw the train. One of them (Wood) said: "I think I saw the engine three hundred feet before it struck the hand car. There were no orders given in reference to the hand car, that I remember." The other (Hooper) said: "My idea at the time was that the engine was about two hundred feet from the hand car when I first saw it." This witness also says: "No orders were given to Eason to desist from his attempt to get the car off before he was hurt, except I called 'Look out!'" The purpose of giving signals, by bell or whistle, of the approach of a train is to warn persons leaving the track or on it, or about to get on it, of the fact that the train is approaching; the purpose of stopping a hand car, that those on it may listen and hear the noise of an approaching train, and the purpose of sending a flagman forward at cuts and curves, which seem to require such precaution, is to warn those on the hand car that the train is coming. But persons who know that the train is coming, and who see it in time to get off the track, or who know it is there in time to get off the track, have the best warning, and do not need and could not be benefited by any kind or amount of previous warning. The testimony of one's own senses in their normal condition is the best evidence of such a fact. Therefore this testimony of the plaintiff, and the undisputed testimony of the witnesses he called, takes wholly from our consideration in this case any question as to the alleged negligence of the servants of the defendant who were in charge of the train, and of the negligence of the section foreman prior and up to the time when he and the section hands who were with him got off the hand car and on the

ground in time to get themselves off the track before the train reached the spot where the hand car was stopped.

The only remaining question is, was the section foreman negligent in not giving the plaintiff an express order to desist from his effort to assist in getting the hand car off the track, and to get himself out of the way? The plaintiff, in his testimony, does not claim that the section boss gave him any direct order to assist in getting the hand car out of the way. He says only, "It seems to me like a dream that I heard the boss say, 'Let's get her off, boys; yonder comes a train.'" It was the duty of the "boys" and of the foreman to "get her off" if they could with safety to themselves. That was, doubtless, the first idea in the mind of the plaintiff, and the inspiration of his "dream"; for the other section hands who were not struck do not testify to having heard it, and they doubtless would have so testified if they had heard it. Wood says expressly that no orders were given, that he remembers. They all did attempt to take the car off. The other three let go, and stepped out of the way in time to escape injury. The plaintiff failed to do this, and was badly hurt. He had been in the service of the railroad for periods aggregating 16 months. Immediately before this time he had been engaged on this section of the road, and under this section foreman, for a period of seven months. For some time previously it had been a part of his work to set the brakes on the hand car. He did that duty well on this occasion. After hearing the foreman signal, he stopped the hand car almost immediately, before it advanced more than half the length of a rail. He was 36 years old. He says that he was tolerably stout and healthy. He says further: "If the foreman had given me warning, I could have gotten off. I could have stepped right back off the track." And again: "If I hadn't taken time to get the car off, it wouldn't have taken me more than a second or two to jump off on the south side." The manner and direction in which the hand car was moved made it easier for those who were at the rear end to keep themselves clear of the track than it was for the plaintiff, who was at the front end. But it is clear, from his own testimony, that there would have been no difficulty in his getting out of the way of the train, if he had tried to do so. His personal conditions and the time and opportunity were ample for this purpose.

It thus appears that the only negligence he can impute to the defendant company is the failure of the foreman to direct him expressly to let the hand car go, and to get himself out of the way. We think the obligation of the company does not go to the extent of requiring it to furnish that degree of attention to the safety of its employés. Their safety would not be promoted by substituting the judgment of the foreman for the judgment of each individual under him as to the time and means of escaping a manifest peril. Such a rule would be utterly impracticable, and therefore it cannot be required that the defendant should in that manner guard its employés against those dangers of which the employé can equally or better take notice, and can best guard himself. In some instances, where

the master, or an agent of a corporation who stands in the place of a master, gives an express order to an employé to do an act that requires him to incur imminent hazard, the servant will be justified in submitting to the authority of the master, because he is presumed to have superior experience and judgment, as well as to occupy a superior position; and, as between the servant and the master touching the duty of the one and the liability of the other, the servant may yield his own judgment to that of his superior. In such a case the habit of obedience to orders—so necessary for the efficient conduct of all important operations—naturally checks the instant exercise of individual judgment in the employé. Railway Co. v. Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699. In this case there is no evidence tending to show the giving of such a command, expressly or by implication. The conditions are not made more favorable for the plaintiff's claim by reason of the fact—conceding it fully to be a fact—that the foreman had on previous occasions, when taking a hand car off out of the way of an approaching train, cautioned the hands not to get in a hurry, not to be too fast, that they had plenty of time, even though he spoke it "abruptly, and seemed like he got mad because the hands got in a hurry," and had, as the plaintiff says in his petition, admonished the plaintiff for his haste, and for what the foreman termed unnecessary hurry in lifting the hand car from the track, or had on many such occasions told the plaintiff not to be in fear, as he would always have ample time to get the hand car off the track. Such admonitions were both wise and kind, even if, in the exigency in which they were given, they were accompanied with an emphasis of manner which the plaintiff calls abrupt. The agitation of fear disturbs the judgment, and unnecessary and improper "hurry does not make haste." The giving of such admonitions to the section hands did not express or imply a command, or even advice, to them to wait for the word from the foreman before looking out for their own safety. On the contrary, it assumes that on all such occasions each person must take care for himself; and on this occasion the foreman had a right to presume that the plaintiff, who had full knowledge that the train was there, and the danger impending, would look to his own safety, and get out of the way in time to escape injury. We conclude that there is no proof in this case from which a jury of reasonable men, properly instructed, could find, by inference or otherwise, that the injury received by the plaintiff was caused, directly or proximately, by the negligence of the defendant or of its servants.

We do not discuss here any question touching the doctrine of fellow servants, either as matter of general law or as affected by the local statute, because, for all the purposes of this case and of our present argument, it may be conceded that the section foreman, in all of his relations to the plaintiff's injury, represented fully the defendant; so to speak, was the defendant. Still, in our view of the law, there is in this case no evidence tending to show on the part of the foreman any negligence that was the direct or proximate cause of the injury to the plaintiff.

It has been said by the supreme court that:

"Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge,—not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." *Commissioners v. Clark*, 94 U. S. 278.

In a later case the supreme court say:

"It is the settled law of this court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. And it has recently been decided by the house of lords, upon careful consideration of the previous cases in England, that it is for the judge to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred; and it is for the jury to say whether, from those facts, when submitted to them, negligence ought to be inferred." *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322.

In each of the cases just cited the trial judge had withdrawn issues from the jury by a peremptory instruction, and his action was affirmed by the supreme court.

In *Southern Pac. Co. v. Burke*, 23 U. S. App. 1, 9 C. C. A. 229, and 60 Fed. 704, we remarked that the language bearing on this subject, so often cited with emphasis, is found in opinions affirming the ruling of the trial judge, or reversing his decision when he had improperly withdrawn the case from the jury; that of the great number of cases in which the question had been raised before the supreme court we then found only two which had been reversed, in which the trial judge had refused to withdraw the case from the jury. These two were *Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397, and *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433. Further on in our opinion we noticed at considerable length the reasons which, in our judgment, should induce trial judges to indulge in the exercise of a liberal discretion in deciding before verdict that the proof in the case on trial will support only one conclusion, and directing the jury to find accordingly; and that, while this discretion is a legal one, and is the subject of review, appellate courts ought, as far as may be, to sustain its exercise.

In *Railroad Co. v. Thomas*, 23 U. S. App. 37, 9 C. C. A. 29, and 60 Fed. 379, we used this language:

"We are constrained to hold that the provision of our constitution which gives parties to an action at law the right to a trial by jury embraces even parties who bring actions at law against railroad corporations, and that the persistent effort to push precedents to the point of requiring trial judges to decide as questions of law the issues most commonly joined in cases where the recovery for personal injuries is sought should not be encouraged."

In *Railway Co. v. Patton*, 23 U. S. App. 319, 9 C. C. A. 487, and 61 Fed. 259, we used this language:

"The exception to the charge of the court and to the refusal of the requested charge having served to bring up in the bill of exceptions a full statement of all the evidence given on the trial, it appears from the face of the record that there was no evidence to sustain the judgment of the circuit court. It is thus manifestly erroneous, and must be reversed."

In Southern Pac. Co. v. Johnson's Adm'x, 44 U. S. App. 1, 16 C. C. A. 317, and 69 Fed. 559, in which Mr. Justice McKenna (then senior circuit judge) presided, and concurred in the judgment, the case was reversed upon the ground of the insufficiency of the evidence as contained in the bill of exceptions to justify the court in submitting the case to the jury at all; the circuit court of appeals for the Ninth circuit saying:

"We think, upon the evidence as presented in the record, that the judge should have instructed the jury to find a verdict for the defendant. The judgment of the circuit court is therefore reversed."

In Southern Pac. Co. v. Burke, *supra*, the senior circuit judge, in a dissenting opinion, said:

"I do not understand that my views of the law in regard to the respective provinces of the trial judge and the jury are at all out of accord with those of the supreme court, or that I differ with my associates in this court except with regard to the application of the conceded rules on the subject. What I insist upon is that where, under the law, the duty of the trial judge is to direct a verdict, this court, in reviewing the case properly shown by the record, should meet the full measure of its responsibilities, and that in such a case it is not sufficient to fall back on the trial judge's opinion as conclusive that reasonable men may fairly differ as to the effect of the undisputed evidence in the case; and in this connection it is proper to say that the observations of the court as to the frequency of personal injury suits, the skill and acumen with which each side is presented, the what used to be called champerty prevailing at the bar, and the general surroundings on the trial of such cases,—all, it is intimated, creating an atmosphere of prejudice above which the trial judge may not always rise,—instead of being an argument in favor of giving great weight to the ruling of the trial judge, who is frequently called upon to act on the spur of the moment, without sufficient opportunity to analyze and fully weigh the testimony, rather point the other way, and really furnish a strong reason, if one is necessary, why this court should look well into every properly presented case of complaint, and see that the trial judge neither trenches on the legitimate province of the jury, nor mistakes nor neglects nor abdicates his duty as judge to the prejudice of the parties."

Though this language is in a dissenting opinion, the conclusion which it announced does not differ from the views entertained by the court as then constituted, and that conclusion has always been concurred in by this court.

We deem it unnecessary to notice any of the questions raised by the other assignment of error. The views we have already expressed will indicate to the circuit court the action proper to be taken on such questions as will probably arise on a new trial. Holding that the trial judge should have instructed the jury to return a verdict for the defendant, the judgment of the circuit court is reversed, and the cause is remanded to that court, with direction to award the defendant a new trial.

FIRST NAT. BANK OF CHICAGO v. MITCHELL et al.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 35.

GUARANTY BY MARRIED WOMAN—VALIDITY—CONFLICT OF LAWS.

Where a married woman in Connecticut executed and delivered to her husband, there, a guaranty, to enable him to obtain credit from plaintiff, in Illinois, to whom the husband sent it by mail, the contract is to be governed by the Illinois law, and is therefore binding on her, though she was incapacitated from making it by the laws of Connecticut.

Lacombe, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Connecticut.

Wm. C. Case and Percy S. Bryant, for plaintiff in error.

Theodore Maltbie and Frank L. Hungerford, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This action was tried in the court below (84 Fed. 90) without the intervention of a jury, and, upon the facts set forth in the stipulation of the parties and found by the court, there should have been a judgment for the plaintiff for the sum indemnified by the guaranty signed by the defendant H. Drusilla Mitchell, if she, being a married woman, was competent to make the contract. In deciding adversely to the plaintiff the court below followed the decision of the supreme court of Connecticut in Freeman's Appeal, 68 Conn. 533, 37 Atl. 420, upon the same facts, in a suit brought by the plaintiff subsequent to the present action to establish the guaranty as a demand against the estate of the defendant in insolvency.

The question in the case is whether a guaranty payable in the state of Illinois, and delivered to the plaintiff there, signed by a married woman, at her domicile, in Connecticut, to enable her husband to procure credit with the plaintiff, delivered by her to her husband, and sent by him by mail to the plaintiff, is a valid contract; she being disqualified by the law of Connecticut from making a contract as surety, and authorized to do so by the laws of Illinois. In other words, the question is whether the incapacity to contract by the law of the state of a person's domicile attaches to his contractual act in another state, where the disability has been removed. This question has been much considered by commentators upon private international law, and has encountered the divergence of opinion which so frequently characterizes their essays. We shall not undertake to rehearse their views or summarize their conclusions, or to discuss the question upon principle. It has been considered and decided in respect to the incapacity of coverture and minority several times by the courts of this country, and uniformly with the same result, except in Freeman's Appeal. The previous authorities are collated in Milliken v. Pratt, 125 Mass. 374, and the opinion delivered is such a complete exposition of them that other references are un-

necessary. That judgment determines the precise question presented in this case. In that case the plaintiffs sued, in Massachusetts, a married woman, domiciled there, who had signed a guaranty for her husband, intended to be used by him to obtain credit with the plaintiffs at Portland, Me. She delivered it to her husband at their home in Massachusetts, and he mailed it there to the plaintiffs, in Portland; and the plaintiffs received it at Portland shortly after. By the law of Massachusetts at the time, a married woman was incapacitated to make such a contract. By the law of Maine, she was not. The court decided that the contract was made in Maine, and controlled by the law of that state; that, as regarded the capacity of the defendant, its validity depended upon the law of that state; and that, as the law of Maine authorized a married woman to bind herself by such a contract, it was a valid contract, and the plaintiffs were entitled to recover.

A case exactly coincident in its facts with the present case, and with *Milliken v. Pratt*, is *Bell v. Packard*, 69 Me. 105, except that, instead of signing a guaranty, the defendant in that case signed a note as surety for her husband. The court decided that the note was a Maine contract, and obligatory upon the defendant.

These adjudications proceed upon the considerations that the instrument was not effective for any purpose until delivered to the party for whose benefit it was prepared, that the place where it became operative was the place where the contract was made, and that the disqualification of the married woman in the state of her domicile did not accompany her in making a contract in a state where the disqualification had been removed. They are a consistent and logical application of that fundamental and most important rule of private international law, that a contract valid by the law of the place where it is made is valid everywhere.

In *Bowles v. Field*, 78 Fed. 742, a married woman domiciled in Indiana went to Ohio, and there executed notes as surety for her husband; she being incapacitated from making such contracts by the law of her domicile, but not by the law of Ohio. The court held the contracts valid, affirming the general proposition that the contract of a married woman, valid by the law of the place where it is made, is valid and binding upon her, notwithstanding that by the law of her domicile she is incapacitated from making such a contract.

These judgments meet our approval, and, upon their authority, we are of the opinion that the court below should have adjudged in favor of the plaintiff.

In Freeman's Appeal the court conceded that the guaranty was a contract made in Illinois. It based the decision upon the ground that the defendant could not constitute her husband her agent in Connecticut to deliver the instrument. The court used this language:

"Had Mrs. Mitchell been within the state of Illinois when she signed the guaranty, it may be that her personal presence would have so far made her a resident of that state as to subject her to its laws, in respect to acts done within its jurisdiction. But, as whatever was done in Illinois to bind her to the bank was done under an agency constituted in Connecticut, it is the law

of Connecticut which must determine as to the authority of the agent; and so as to the validity of the obligation which he, as such, undertook to impose upon her by delivery in Chicago of the paper signed by her in Bristol."

Inasmuch as the only "agency constituted in Connecticut," or the only necessary agency, was the intrusting her husband with a letter for deposit in the mail, we think the reasoning of the learned court to be ingenious, rather than convincing. The interposition of such an agency was not regarded of sufficient importance to require comment in *Milliken v. Pratt* or *Bell v. Packard*.

It is to be observed that the state court did not consider the contract one which ought not to be enforced, because violative of the policy of the state. Indeed, by the statute of 1877 (Gen. St. Conn. § 2796) as to women subsequently married, the disability to make such a contract no longer exists.

We are extremely reluctant to differ with the supreme court of Connecticut in a case involving the same facts, between substantially the same parties, not only because the opinion of that learned tribunal is always entitled to great consideration, but also because it is, in a sense, unseemly that there should be diverse judgments under such circumstances between a federal court sitting in that state and the highest court of the state. But the case is one which concerns the rights of a citizen of Illinois, acquired before the decision of the state court; and its decision depends, not upon the construction of local laws, but upon the application of the principles of general jurisprudence. In such cases the federal courts are in duty bound to exercise their own independent judgment.

In view of the decision of the supreme court of Connecticut, we should be glad to certify the question which we have thus considered to the supreme court for its instructions; but we do not feel authorized to do so, especially as that tribunal, under the power to issue a certiorari, can review our judgment, if it sees fit.

The judgment is reversed, with instructions to the court below to render a judgment for the plaintiff for the amount due by the terms of the guaranty.

LACOMBE, Circuit Judge, dissents.

SWIFT & CO. V. SHORT.

(Circuit Court of Appeals, Eighth Circuit. March 6, 1899.)

No. 1,081.

1. WITNESSES—DISAGREEMENT—IMPEACHMENT.

While a litigant may not impeach the general character of his own witnesses, yet this rule does not prevent him from showing the verity of any fact which he wishes to establish. When witnesses called in his behalf disagree as to a particular fact, the testimony of neither is conclusive; and this, though the party to the suit be one of the witnesses.

2. INJURY—MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff, who was ordered to take charge of defendant's dynamo department, was injured by the detachment of a defective brake on one of

the dynamos. He testified that he was ignorant of that kind of machinery, and had no knowledge of the defect, while defendant's witnesses testified that he knew of the defect, and superintended its repair on the day of the injury, and that he was told by the machinist that it had not been properly repaired. *Held*, that the case was properly submitted to the jury on the issue of defendant's contributory negligence.

3. SAME—RESPONDEAT SUPERIOR.

Where plaintiff, superintendent of defendant's dynamo department, was injured because of the defective repair of the machinery by other machinists in defendant's employ, which repair was neither done by plaintiff nor under his supervision, the rule of respondeat superior applies, and plaintiff is entitled to recover.

4. SAME—INSTRUCTIONS—HARMLESS ERROR.

In an action for injuries received by a superintendent of defendant's dynamo department, by the detachment of part of the machinery, the court instructed the jury that if it was plaintiff's duty to attend to keeping the machinery in a safe condition, or if he had knowledge before the injury that it was unsafe or dangerous, "and was at the same time conscious of his ignorance of that kind of machinery, how to operate and repair it," and yet elected to run it, or to repair it, and take the hazard of injury, he could not recover. *Held* that the charge as a whole not being misleading, the clause quoted in that instruction, if erroneous, was harmless.

In Error to the Circuit Court of the United States for the Western District of Missouri.

O. H. Dean (William Warner, James Gibson, W. D. McLeod, and Hale Holden, on the brief), for plaintiff in error.

Frank P. Walsh (F. F. Rozzelle and William P. Borland, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a suit for personal injuries which was brought by Walter C. Short, the defendant in error, against Swift & Co., a corporation, the plaintiff in error, the injuries complained of having been sustained while Short was an employé of the defendant company. The evidence showed, without substantial contradiction, that while the plaintiff below was in temporary charge of the dynamo room in the defendant company's packing-house plant located at Kansas City, Kan., during the absence of the regular foreman, an iron shoe, which formed a part of a friction clutch, flew off from a rapidly revolving wheel, to which it was attached for the purpose of serving as a brake to the wheel, striking the plaintiff in the head, and inflicting severe injuries; that, for two or three days prior to the accident, there had been a crack in the shoe, or in one of the arms by which it was held in place, which fact was known to those persons in the defendant's service whose duty it was to cause the same to be repaired; that on the day of the accident, and prior thereto, an attempt had been made to remedy the defect in the clutch, by wiring it so as to hold the shoe securely in place, which work had not been properly done; and that, shortly thereafter, one of the shoes which formed a part of the clutch flew off, with the result heretofore stated. There was a controversy before the jury as to whether the defective wiring last referred to was done by the plaintiff himself or under his direction, or whether it was done by other employés in the defendant's service, without the plaintiff's knowledge.

The plaintiff testified in his own favor, and in substance, that he had been ordered to take charge of the dynamo room on the day of the accident, during the temporary absence of the regular foreman; that he took charge thereof, in pursuance of such order, in the afternoon of that day; that shortly after assuming charge of the same, and while standing in line with the wheel to which the clutch was attached, which was then in rapid revolution, the shoe flew off, and inflicted the injuries complained of; that, previously to the injury, he had not assisted in wiring the clutch, and was not aware of any insecurity in the machinery of which he had been appointed to take charge. On the other hand, the defendant company offered evidence which tended to show that the plaintiff took charge of the dynamo room some time during the forenoon of the day of the accident, instead of during the afternoon; that he was advised, at the time of assuming charge of the room, that the fastenings of the clutch were insecure; that he was directed to stop the machinery at noon, and examine the clutch; that he did so, and, finding the shoe insecure, tried to fasten it with wire; that the wiring was not done in such a way as to render the shoe secure, and that he was advised of that fact by the machinists who assisted in the operation, and who worked under his directions.

As the issue of fact last explained was the only one concerning which there was any serious conflict in the testimony, and as the verdict was in favor of the plaintiff, we are satisfied that the jury found that the plaintiff did not assist in wiring the clutch, and was not responsible for its condition at the time of the accident. It is contended, however, that the trial court should have directed a verdict against the plaintiff because of his contributory negligence, or voluntary assumption of a known risk, and that an error was committed in refusing such an instruction. The sole basis for this contention seems to be that the plaintiff was concluded on this issue by the evidence of certain of his own witnesses. It is not denied that the plaintiff's own testimony, if credible, exculpated him from all blame; but it is said, in substance, that inasmuch as two of his witnesses—one of them being the foreman of the dynamo room, whom the plaintiff had temporarily superseded on the day of the accident—made some statements while on the stand which are in apparent conflict with some of the plaintiff's statements, and which also tended to corroborate the evidence of the defendant's witnesses, therefore the plaintiff's evidence which showed that he was free from all blame should have been disregarded, and treated by the trial court as wholly undeserving of credit. Concerning this claim, it is sufficient to say that we are not aware of any such rule of evidence as counsel for the defendant company have invoked. A litigant may not introduce testimony for the purpose of showing that the general character for truth and veracity of one of his own witnesses is bad, but this rule does not go to the extent of preventing him from showing the verity of any particular fact or transaction which he wishes to establish. He may call witnesses to prove a particular fact, although their evidence with relation thereto contradicts the testimony of other witnesses who have previously testified in his favor with

reference to the same transaction. Moreover, under some circumstances, where a party has been deceived by one of his witnesses, who has given testimony which was unexpected, the better view is that the party so deceived may impeach the witness to the extent of showing that the statements made by him on the witness stand are contrary to those made by him before the trial or before he was sworn. Phil. & A. Ev. pp. 904, 905; Greenl. Ev. (15th Ed.) §§ 443, 444, and cases there cited; Melhuish v. Collier, 15 Q. B. 878; Hemingway v. Garth, 51 Ala. 530. In short, when witnesses called in behalf of either party disagree among themselves as to a particular fact or transaction, the testimony of neither is to be accepted as absolutely conclusive; and this rule applies as well where a party to the suit is one of the witnesses, and has testified in his own favor. In all such cases it is the province of the jury to determine, in the light of all the facts and circumstances as developed by the proof, who is most worthy of credence. In the present case, the accident had occurred several years before the trial, and it is not surprising that the recollection of the witnesses varied somewhat as to the details of the occurrence. None of the witnesses can be said to have agreed exactly in their statements as to time, place, and circumstance, when their statements are viewed critically; and yet, when all the evidence is considered, and due allowance is made for the length of time that had elapsed since the accident, it is easy to reach a rational conclusion upon the issues involved in the case, without being compelled to reject the testimony of any witness as entirely false or untrustworthy. The case was one for the jury upon the issue of contributory negligence, and no fault can be found with the trial court for submitting the case to the jury. It would have erred had it acted differently.

It is furthermore insisted in the brief that, in any event, the plaintiff should not have recovered, because the defective wiring of the shoe, if not done by direction of the plaintiff himself, was at least done by his fellow servants, and that the defendant cannot be held responsible to the plaintiff for their negligence. The conclusive answer to this suggestion is that, if the wiring was done by other persons in the defendant's employ, and was neither done by the plaintiff nor under his supervision, then, in the matter of making such repairs, such other servants were performing a personal duty which the master owed to the plaintiff, and the rule of respondeat superior applies. Balch v. Haas, 36 U. S. App. 698, 701, 20 C. C. A. 151, and 73 Fed. 974; Minneapolis v. Lundin, 19 U. S. App. 247, 249, 7 C. C. A. 344, and 58 Fed. 525; Railroad Co. v. Keegan, 160 U. S. 259, 264, 16 Sup. Ct. 269.

This brings us to the final contention that there was error in the court's charge. That part of the charge in which the error is supposed to inhere was as follows:

"Testimony has been introduced tending to show that it was the duty of the plaintiff himself, after he became temporary foreman in that department [the dynamo department], in place of Powers, to attend to keeping the machinery in a reasonably safe condition, and that he knew personally, and had been advised before the injury, of the defective condition of the clutch on the pulley which afterwards injured him, and was advised by different persons of skill and experience in the repairing of such machinery that it was unsafe and dan-

gerous. And he, himself, has testified, in substance, that he was not skilled in machinery of that kind, or in the repairing or running of the same. Now, if you believe it to be true that it was his duty, after becoming foreman, to attend to keeping the machinery safe, or that he knew before he was hurt, either personally or from information, that it was in a broken and defective condition, and was advised by others having skill and experience in such matters that it was unsafe and dangerous, and was at the same time conscious of his ignorance of that kind of machinery, how to operate and repair it, and yet, notwithstanding, elected to run it, or to repair it and run it, and take the risk and hazard of injury, then he should not recover. This is true, gentlemen, without reference to whether the defendant was negligent in not keeping the machinery in a reasonably safe condition. For, if the master failed in that regard, plaintiff cannot complain, and recover, unless he has been injured by reason of that failure. He cannot, in other words, with a knowledge of the fact that the master has been negligent, and after being warned of danger by reason thereof, voluntarily go on and take the chances of injury, and then be heard to say that he would not have been injured if the defendant had not been negligent. Under such conditions, the law holds him to have assumed the risk, and discharges the master from liability."

The court, in its charge, before giving the aforesaid instruction, had recited the substance of the plaintiff's evidence as given on the trial, saying that he had testified that he was ignorant of the condition of the clutch prior to the accident; that no one had informed him prior thereto that it was cracked and had been bound with wire; that he had taken charge of the dynamo room recently, and had only been in the room a short time when the accident occurred, and that he was engaged in repairing a belt, the machinery being in operation, when he was struck and injured. After thus reciting the plaintiff's evidence in substance, the court instructed the jury that if the plaintiff's statements were true, and if the defendant company knew, or by the exercise of reasonable care could have known, of the defective condition of the clutch when it placed the plaintiff in charge of the dynamo room, then the plaintiff should recover. In no part of the charge, however, was any permission or direction given to the jury to return a verdict for the plaintiff unless they found and believed that the plaintiff was in fact ignorant of the condition of the clutch, and ignorant of the fact that it had been wired, up to the moment of the accident. The portion of the charge above quoted of which error is predicated is taken from that part of the charge which presented the defendant's view of the case, and was intended to state the defense on which it chiefly relied; the objectionable part of it being that clause which we have italicized. The trial court's attention was not called to the objectionable clause, nor was it excepted to at the time. If there was an error in the charge, in the respect above indicated, which was saved in such a way that it can be reviewed, then it was only saved by an exception to the refusal of the court to give two instructions that were asked by the defendant, which instructions embodied the substance of that portion of the charge above quoted, omitting only the objectionable clause which is in italics. We are of the opinion that, if there was error in the charge in the respect complained of, and if it was saved in a manner which renders it reviewable, it must be regarded as immaterial, and not of sufficient moment to justify a reversal. As we have before remarked, under the instructions given for the plaintiff, upon

whom rested the burden of the proof, and who was bound to make out his case on the lines indicated by the trial court, the jury were plainly instructed that he would only be entitled to a verdict in the event that they believed his statement that he was ignorant of the condition of the clutch when he took charge of the dynamo room, and was ignorant of the fact that it had been bound up with wire. It must be presumed, in support of the judgment, that the jury obeyed this instruction, and found the facts as therein stated to be true; in which event, as a matter of course, it is immaterial that the court, in stating the facts which would support the plea of contributory negligence, imposed upon the defendant the duty of showing, among other things, that the plaintiff was "conscious of his ignorance of that kind of machinery, and how to operate and repair it." The clause of the charge which has been criticised was probably due to inadvertence, and the court's attention should have been called to it at the time, if counsel regarded it as of any importance, and intended to rely upon the alleged error. We are unable to see, however, that it could possibly have done any harm; and, when a charge as a whole is not misleading, it is not a sufficient ground for reversal that some of the language found therein was not so nicely chosen as to defy criticism. *Railway Co. v. Burr* (Cir. Ct. App. 3d Cir.) 91 Fed. 351. The judgment below is therefore affirmed.

JAMES B. CLOW & SONS v. BOLTZ.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 610.

1. **MASTER AND SERVANT—DANGEROUS PLACE TO WORK—RECIPROCAL DUTIES.**
An employé has a right to presume, when directed to work in a particular place, that reasonable care has been exercised by the employer to see that such place is safe, and is not negligent in relying on such presumption, unless a danger is obvious and should be known to a reasonably prudent employé; and for that reason the degree of care required of the employer is greater than that required of the employé, and the employer may be chargeable with negligence in failing to ascertain a danger, where the employé is not.
2. **SAME—ACTION BY SERVANT FOR INJURIES—ASSUMPTION OF RISK.**
Where the manner of using a machine with which an employé was required to work, and by which he was injured, appeared, in the light of facts disclosed after the injury, on the trial of an action by the employé for damages, to have been obviously dangerous, but the question of its safety had been called to the attention of the employer, who continued the use, and the machine had been so operated for some time without injury to any one, the question of whether the employé, who was a common laborer, had assumed the risk, was one for the jury.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This was a suit at law for damages for personal injury. The plaintiff was employed by the defendant, a corporation engaged in the manufacture of cast-iron pipe. The pipe is made by pouring the molten metal into a mold. The mold is made by sinking a hole deep into the ground, lining it properly, and then inserting in this hole a heavy core. The core is removable. It is

cylindrical in form, and hollow, with short projections or lugs at each end, upon which it is hung or steadied. The core is bound round with hay, which is, in turn, covered with mud, and baked in an oven. It has to be removed from the oven to the pit, and back again, at short periods of time. It is carried on a car running upon a railway track about 35 feet long. The injury to the plaintiff was occasioned by the falling of one of these cores from the car or truck, upon which it was being carried, onto the shoulders and back of the plaintiff. The cores vary in size according to the size pipe to be made. The core which fell in this instance was a core for a 24-inch pipe. The truck upon which the core was carried was made to carry two 36-inch cores and two 20-inch cores. The cores were about 14 feet in length. The truck was a rectangular iron frame, made of railroad iron, on four wheels. At each end was a framework or rack supporting the two 36-inch cores, and on this rack, and rising above it, were two standards, supporting the two 20-inch cores. The 36-inch cores were on the outside of the car, while the 20-inch were in between the two 36-inch cores, but above them. The racks were not pivoted to the cars, nor the standards to the racks. The legs of the racks straddled the frame of the cars, and the legs of the standards straddled the frame of the racks. The 20-inch cores on the standards were about 6 feet from the ground, and weighed 3,000 pounds each. The bases of the standards were broader than their tops, which had grooves, into which the axial lugs of the cores fitted somewhat loosely. The standards had been made to carry but 20-inch pipe. They seem to have been strong enough to carry 24-inch pipe, but when 36-inch pipe were put upon the same car, which was but four feet wide, it was found that the standards, if pushed close together, would not be far enough apart to carry the 24-inch cores without chafing the surface of one against that of the other. As the object of baking in the oven was to prevent this surface from abrading, it became necessary to prevent the two cores from rubbing together. Accordingly, with the knowledge and by the direction of the superintendent and managers of the defendant company's works, wedges were introduced under the inner side of each standard, so as to topple the standard out a little from the perpendicular line. In that way, by using wedges on both standards of sufficient thickness, it was possible to swing the 24-inch cores far enough away from each other not to rub. The cores were loaded onto and off the car by means of cranes, after they had been properly prepared with hay and mud. The car was pushed up an incline into the ovens, where the cores were baked. After they were sufficiently baked, the men operating the car, by means of hooks, pushed and pulled the car slowly down the slightly inclined track to the pit. It was the duty of one of the men to pull, and at the same time to carry a wedge to put under the front wheel of the car, to prevent its running into the pit. This duty was assigned to the plaintiff, John Boltz. He was a common laborer, who had worked in the foundry for six months. He was sometimes called the "first laborer" of the gang. His duties were to assist in loading and unloading the cores, in pushing them in and out of the oven, and in other common labor. The gang was in charge of the core maker, who was an expert in covering and baking the cores. The car had been used for six months, carrying cores for smaller-sized pipe, without any accident whatever. About eight days before the accident, however, heavy orders were received for 36-inch pipe; and, in order to obviate the difficulty of the use of these cores with the 24-inch cores on the same car, the wedges already spoken of were introduced, against the protest of the core maker, who said they were not safe. The core maker adjusted the wedges. The railway track consisted of two ordinary rails, 30 feet in length, supplemented by two rails 6 feet in length. At the joint of the long and short rail on the west side there was a depression in the ground, so that one rail sat higher than the other, and gave a jolt to the passing car. This defect was known to the plaintiff, but an attempt had been made to remedy it by putting an iron plate underneath the joint to hold the two ends level. The great weight of the evidence seems to show that this joint was not the cause of the accident, but it was not of such a character as to justify the court in taking that issue away from the jury. The learned trial judge delivered an elaborate charge, in which he made very clear distinctions between the lia-

bility of the defendant to the plaintiff for negligence in the discharge of the duties which the master owes to the servant, of furnishing reasonably safe appliances, tools, and machinery with which to work, and the nonliability of the master for injuries caused by the negligence of the fellow servants of him who is injured. He left the question to the jury to say whether the car, as constructed, with the wedges, was a machine which a reasonably prudent employer would furnish to his servants to be used in his business. He further charged the jury that if the dangerous character of the machine was so obvious that an ordinarily intelligent laborer of the class of laborers to which the plaintiff belonged must or should have observed its danger, and the plaintiff nevertheless continued in the employ of the master without complaint, he assumed the risk incident to such employment, and was guilty of contributory negligence, should injury occur. He left the question to the jury, for them to decide, as follows: "And these are the questions for you to decide: (1) Was the unfitness and unsafety of this truck and these appliances on this occasion, if you find them unfit, such a defect and danger as was known, or ought to have been known, to an ordinarily prudent and careful employer? (2) If you find that the employer was negligent in this regard, were the defects and danger of a character that an ordinarily intelligent employé should, under the circumstances, have known and realized them? If both these questions are answered in the affirmative, the plaintiff cannot recover. If the first be answered in the affirmative and the second in the negative, the plaintiff can recover. If both be answered in the negative, the plaintiff cannot recover, for then it would be one of those inevitable accidents for which nobody was responsible." There were other questions arising in the case, but they were of such minor importance that the court did not think it necessary to consider them.

Wilcox & Friend, for plaintiff in error.

J. F. Wilkin and James M. Williams, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). The law governing the reciprocal duties of employer and employé with reference to the safe condition of the place where the employé is to work, or of the machinery and tools with which he is to do his work, is well settled. It is the duty of the employer to exercise ordinary care to provide and maintain a reasonably safe place in which the employé is to perform his services, so that the employé shall not be exposed to unnecessary and unreasonable risks. The employé has the right to presume, when directed to work in a particular place, that reasonable care has been exercised by his employer to see that the place is free from danger, and, in reliance upon such presumption, may discharge his duties in such place, unless there are obvious dangers which would lead a reasonably prudent employé either to refuse to work in the place, or to make complaint of the same to his master. If, however, the danger is not actually known to the employé, or would not become known to an employé of reasonable prudence performing the duties imposed on him, he cannot be charged with contributory negligence in the happening of an injury to him by reason of the condition of the place in which he works. *Norman v. Railroad Co.*, 22 U. S. App. 505, 10 C. C. A. 617, and 62 Fed. 727. In the case last cited, we referred to the clear and comprehensive statement of the law by Judge Sanborn, speaking for the Eighth circuit, in the case of *Railway Co. v. Jarvi*, 10 U. S. App. 439, 448, 3 C. C. A. 436, and 53 Fed. 68. In that case the

plaintiff was a miner, who was injured by the falling of a large stone from the roof of a mine; and the question was whether the plaintiff had been reckless, in not knowing or discovering the dangerous condition of the roof from which the stone fell. The learned judge, speaking of the obligation of the servant, said:

"He cannot recklessly expose himself to a known danger, or to a danger which an ordinarily prudent and intelligent man would, in his situation, have apprehended, and then recover of the master for an injury which his own recklessness has caused. * * * But the degrees of care in the use of a place in which work is to be done, or in the use of other instrumentalities for its performance, required of the master and servant in a particular case, may be, and generally are, widely different. Each is required to exercise that degree of care in the performance of his duty which a reasonably prudent person would use under like circumstances; but the circumstances in which the master is placed are generally so widely different from those surrounding the servant, and the primary duty of using care to furnish a reasonably safe place for others is so much higher than the duty of the servant to use reasonable care to protect himself in a case where the primary duty of providing a safe place or safe machinery rests on the master, that a reasonably prudent person would ordinarily use a higher degree of care to keep the place of work reasonably safe, if placed in the position of the master who furnishes it, than if placed in that of the servant who occupies it."

The only point upon which we feel the slightest doubt in this case arises upon the motion which was made by the defendant, at the close of the plaintiff's evidence, to take the case away from the jury and direct a verdict for the defendant, on the ground that the plaintiff must have known the dangers incident to the use of the machine from the use of which the injury happened, and must therefore have assumed the risk. Now that the accident has happened, now that the measurements are given, now that the weight of the cores is accurately known, now that the narrow range of the point of equilibrium in the standards, with the use of the wedges, is clearly shown, it may be difficult to understand how any one with the slightest knowledge of mechanics could fail to appreciate the dangers arising from the use of this car with the cores adjusted as they were. But it must be borne in mind that the plaintiff was a common laborer, that the question of the safety of the machine had been brought to the attention of the superintendent and managers of the foundry, that the car had been operated for six months without injury, and that the plaintiff had a right to assume that his master would exercise due care in his behalf in keeping the machinery and appliances safe. In the light of these considerations, we cannot say that the question of plaintiff's negligence, or the question of the amount of risk which he assumed, was not a question for the jury. It was left to them, with the proper and discriminating statements of the law, and applications of the law to the facts. The jury found that the circumstances were such that he was not charged with the knowledge of the danger incident to the use of that machine. We do not think the course of the court, in leaving this issue open to be settled by the jury, was erroneous.

It is argued further that the plaintiff was guilty of negligence in running by the side of the car at the time of the injury,—a place from which he had been warned by his superior, it was said. The question whether he had been warned from this place, and whether

it was negligence in him to be there, and, indeed, whether it was not necessary, in the discharge of his duty, that he should be there, were all left to the jury by proper charges of the court. The judgment of the circuit court is affirmed.

FIDELITY TRUST & SAFETY-VAULT CO. OF LOUISVILLE v. LAWRENCE COUNTY, TENN.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 627.

STATUTES — EFFECT OF NEW CONSTITUTION — POWER OF TENNESSEE COUNTIES TO PURCHASE RAILROAD STOCK.

Const. Tenn. 1870, art. 2, § 29, contains a provision that no county or municipality shall become a stockholder with others in any corporation except after an election, and upon the assent of three-fourths of the voters participating. Article 11, § 1, continues in force all laws not inconsistent with the provisions of such constitution. Laws Tenn. 1851-52, c. 191, authorized certain counties to subscribe to the stock of railroad companies building therein upon the affirmative vote of a majority of the voters. *Held*, that the constitution of 1870 did not operate as an amendment of such statute by substituting a three-fourths for a majority vote in its requirements, but that the statute was by implication repealed by the constitution as inconsistent with its provisions, and that, it having been held that the constitutional provision was only a limitation on the powers of counties and municipalities, and not a grant of power, no authority existed in such counties, in the absence of subsequent legislation conferring it, to issue bonds for stock in a railroad company.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

This is an action at law to recover \$5,800, the amount of certain coupons of a series of \$50,000 of bonds issued in 1882 by Lawrence county, Tenn., to the Nashville & Florence Railroad Company, in payment of a subscription for a like amount of stock to aid in the construction of a railroad passing through the county. The defendant demurred to the declaration on the ground that it appeared therefrom that the defendant had no power to issue the bonds, coupons of which were in suit. The circuit court sustained the demurrer, and, the plaintiff not wishing to plead further, a judgment was entered for the defendant on the demurrer.

The declaration averred that the county court of Lawrence county by regular proceedings submitted to the qualified voters of the county a proposition to subscribe for \$50,000 of the capital stock of the railroad company, to be paid in the bonds of the county at par, 30 years from date, bearing 6 per cent. interest, payable annually; that upon this proposition an election was held, and more than three-fourths of the votes cast were in favor of the subscription; that the subscription was made, stock was issued to the county, and bonds were issued therefor, payable to the Nashville & Florence Railroad Company, or bearer; that said company sold all of them on the market, and applied the proceeds to the construction of said railroad in Lawrence county; and that the bonds, with said coupons attached, came into the possession of plaintiff, in due course of business, for a valuable consideration. The declaration avers that the railroad company is now being operated through Lawrence county and other counties in Tennessee. The declaration makes profer of all the proceedings in the county court, avers their regularity, and alleges that for 13 years the county has recognized the bonds, paid interest upon them, and has paid \$1,000 of the bonds. The legislative authority to issue the bonds is claimed by the bondholders to exist by virtue

of sections 12 to 14 of chapter 191 of the Acts of Tennessee of 1851-52. These sections are as follows:

"Sec. 12. Be it further enacted, that the respective county courts of the counties of Lawrence, Maury, Williamson and Davidson be authorized and empowered to subscribe for whatever amount of stock of any railroad company chartered to build a railroad through said counties, or either of them, or any part of either of them, the said courts may deem expedient, and to issue the bonds of the respective counties for the amount of stock so subscribed, in the manner hereinafter prescribed: provided, that neither of said county courts shall so take stock until the question of the taking of the same shall first have been submitted to the voters of the county which it is proposed shall subscribe stock, and the majority of such voters shall have decided in favor of taking the stock proposed.

"Sec. 13. Be it further enacted, that upon the application of the president of any railroad company, as aforesaid, or if the company has not been organized, of the commissioners of such company, it shall be the duty of the county court of either of the above-named counties to direct the sheriff of the said county to open and hold an election upon the proposition to take stock in such railroad company, on such day as the court shall order. The election shall be held at the usual places of holding elections in said county, and the tickets used in such elections shall have thereon the word Stock or No Stock. The returns of said election shall be made to the next term of the county court.

"Sec. 14. Be it further enacted, that whenever the majority of the voters of either of the above-named counties shall, upon the question being submitted to them, as contemplated in the previous section of this act, decide in favor of the proposition, that the county shall take stock as proposed, it shall be the duty of the county court of said county to make an order that the chairman of said court shall subscribe for the proposed amount of stock in the name of the county, and obtain the certificate therefor, and that the bonds of the county shall be issued and delivered to the said railroad company for the amount of stock so taken, which bonds shall be payable to said railroad company, shall bear interest at six per cent. per annum, payable semi-annually, and shall fall due in not less than ten nor more than thirty years from date. The same shall be signed by the chairman of said court, and countersigned by the clerk thereof."

The new constitution of Tennessee, taking the place of that of 1834, was adopted May 5, 1870. Section 29 of article 2 of that constitution provided as follows:

"The general assembly shall have power to authorize the several counties and incorporated towns in this state, to impose taxes for county and corporation purposes, respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation. But the credit of no county, city or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder, with others in any company, association or corporation, except upon a like election and the assent of a like majority."

Sections 1 and 2 of article 11 of the same constitution provide:

"Section 1. All laws and ordinances now in force and in use in this state, not inconsistent with this constitution, shall continue in force and use until they shall expire, or be altered or repealed by the legislature. But ordinances contained in any former constitution, or schedule thereto, are hereby abrogated.

"Sec. 2. Nothing contained in this constitution shall impair the validity of any debts or contracts, or affect any rights of property, or any suits, actions, rights of action, or other proceedings in courts of justice."

On January 23, 1871, the legislature passed the following act:

"Section 1. * * * 1st. That all taxable property shall be taxed according to its value, upon the principles established in regard to state taxation.

"2d. The credit of no county, city or town shall be given or loaned to, or in aid of any person, company, association, or corporation, except, first, upon the consent of a majority of the justices of the peace of the county, at a quarterly term of the county court of such county, or a majority of the board of mayor and aldermen, as the case may be, of such city or town, and upon an election afterward held by the qualified voters of said county, city or town, and the assent of three-fourths of the votes cast at said election. The said county court, or board of mayor and aldermen, as the case may be, shall spread upon their records the proposition and the amount to be voted upon by the people, and shall have full power to hold and conduct such elections according to the laws regulating elections in this state; and if the assent of three-fourths of the voters of such county, city or town is had, then the county court or board of mayor and aldermen, as the case may be, shall have full power to make and execute all necessary orders, bonds and payments, in order to carry out such loan or credit voted for as prescribed in this act; nor shall any county, city or town become a stockholder with others in any company, association or corporation, except upon a like election, and the assent of a like majority, as prescribed in this act."

J. M. Dickinson and George T. Hughes, for plaintiff in error.
John J. Vertrees, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). Whatever conclusion this court might have reached upon a construction of the act of 1871, were it a case of first impression, it seems now to be settled by the decision of the supreme court in *Kelley v. Milan*, 127 U. S. 139-154, 8 Sup. Ct. 1101, approving the decision of Mr. Justice Matthews and Judge Hammond at the circuit in *Kelly v. Town of Milan*, 21 Fed. 842, and of the supreme court of Tennessee in *Pulaski v. Gilmore*, reported in a note to the latter case, 21 Fed. 870, that the act of 1871 did not confer power to make subscriptions to the stock of railroad companies, or to issue bonds, but only regulated the mode in which such power, when conferred in other acts, should be exercised. Yielding to this view, counsel for the appellant seek to find the power to issue the bonds and coupons in suit in the act of 1852, and look only to the act of 1871 to regulate the exercise of the power in a constitutional manner. They frankly say that, unless the act of 1852 is in force, and confers the power to issue these bonds, they have no case.

The sole question, then, is whether the act of 1852 is in force. The act of 1852 gave the power to Lawrence county to subscribe for railroad stock, and to issue bonds in payment therefor, if a majority of the voters of the county voting at an election called for the purpose should vote in favor of the subscription. The constitution of 1870 provided that no county, city, or town should be given the power to loan its credit to any corporation, except upon a three-fourths affirmative vote of its qualified voters voting at an election. The legislation of 1852 was, therefore, inconsistent with the limitation upon the power of the county to accept and exercise the right to subscribe for stock and issue bonds, imposed by the constitution of 1870. Section 1 of article 11 of that constitution provided that all laws then in force and in use in the state, not inconsistent with the constitution, should continue in force until they should expire,

be altered, or repealed by the legislature. The necessary implication from the provision, and the necessary effect of the constitution, even without such a provision, must be that laws inconsistent with the constitution were abrogated and annulled. Counsel for appellant advance the idea that the effect of the constitution was not to annul the act of 1852 entirely, but only to put it in a state of suspended animation, in which it still might confer the power to issue bonds, but would remain inoperative so far as justifying its exercise until some new act should regulate the exercise of the power in accordance with the new constitution. The conception of an existing power in a county which has no right to exercise it until subsequent legislation shall confer the right is an elusive one, and difficult to apprehend. Certainly, we should not affirm it to exist in any given case unless peculiar reasons require it. No such reasons are present here. The act of 1852, prescribed as a condition precedent to the possession of power by a county to issue bonds that a majority of the voters should vote for it. The constitution of 1870 said that a county may not possess such power by legislative grant save upon a condition precedent that three-fourths of the voters shall approve it. To impose a new condition precedent without which power may not be enjoyed is to take away all power, therefore, dependent on another and less onerous condition precedent. It leaves no power existing. It destroys that, and only confers upon the legislature authority to confer new power, subject to the new condition precedent. This, in accord with the opinion of the supreme court of the United States, in the case of *Norton v. Board*, 129 U. S. 479, 9 Sup. Ct. 322. The town of Brownsville was authorized, by act passed February 8, 1870, by the legislature of Tennessee, to issue bonds for railroad purposes, and receive stock in exchange therefor, upon a majority vote of the electors of the town in favor of the issuing of the bonds. The new constitution requiring a three-fourths vote in such cases was adopted by the people March 26, 1870, and went into effect on the 5th day of May of the same year. The election in Brownsville was held in June, 1870, and the vote in favor of the bonds was unanimous. The court held that the inhibition imposed by section 29 of the constitution of 1870 operated directly upon the municipalities themselves, and was absolute and self-executing; and, although power was reserved to the legislature to enable them to give or loan their credit, and to become stockholders, upon the assent of three-fourths of the votes cast at an election to be held by the qualified voters, the county, city, or town was destitute of the power to do so until legislation authorizing such election and action thereupon was had. In delivering the opinion of the court, the chief justice said:

"The prohibition of the gift or loan of credit or the subscription to stock without a three-fourths vote is not an affirmative grant of authority to give or loan credit or to become a stockholder upon a three-fourths vote. Prior to the constitution of 1870, the legislature could have conferred on a municipal corporation the power to give or loan its credit, or to subscribe for stock, on such terms and conditions as the legislature chose to impose; but, after that constitution went into effect, the municipality was deprived of any power previously conferred, and could thereafter do none of these things

save by an act of legislature imparting the power as limited by the constitution."

After referring to a number of authorities, the chief justice proceeded:

"These cases sufficiently illustrate the distinction between the operation of a constitutional limitation upon the power of the legislature and of a constitutional inhibition upon the municipality itself. In the former case, past legislative action is not necessarily affected, while in the latter it is annulled. Of course, if an entirely new organic law is adopted, provision in the schedule or some other part of the instrument must be made for keeping in force all laws not inconsistent therewith, and this was furnished in this instance by the first section of article 11; but such a provision does not perpetuate any previous law enabling a municipality to do that which it is subsequently forbidden to do by the constitution. The inhibition being self-executing, and operating directly upon the municipality, and not in itself enabling the latter to proceed in accordance with the prescribed limitation, further legislation is necessary before the municipality can act."

The chief justice concluded his opinion with the statement:

"It will be perceived that we do not assent to the view that when the state government commenced under the new constitution the act of February 8, 1870, was amended by section 29 of article 2, so as to substitute a vote of three-fourths for that of a majority, and re-enacted, so to speak, by the first section of article 11, above quoted. The power of ordinary legislation is vested, under all our constitutions, in the legislatures; and the constitutional convention of Tennessee did not assume to exercise such power. The amendment of a law is usually accomplished according to a prescribed course, and there is nothing here to justify the conclusion that section 29 of article 2 was designed to operate by way of amendment to prior laws, nor can it so operate, nor the act of 1870 be held to have been kept in force, for the reasons already indicated."

Counsel for appellant concede that, if the language of the supreme court in this case is to be given its full force, it necessarily leads to the annulment of the act of 1852; but they contend that it was unnecessary for the court to decide whether the prior act in that case was absolutely annulled, or only inoperative until such an enabling act as that of 1871 was passed. We feel bound to give to the language of the supreme court its full effect, because we cannot regard the distinction which counsel seek to make a sound one. The conclusion is also supported by language of the supreme court of Tennessee in the case of *Nelson v. Haywood Co.*, 87 Tenn. 781, 11 S. W. 885, in which the court, referring to an act similar to that under consideration in the Brownsville Case, said:

"It is claimed by the county, and it is unquestionably the law, that the constitution of 1870, which went into effect on the 5th day of May, 1870, abrogated and annulled the act of February 8, 1870, authorizing the county of Haywood to issue the bonds in question. Const. 1870, art. 2, § 29; *Norton v. Commissioners*, 129 U. S. 479, 9 Sup. Ct. 322; *Aspinwall v. Commissioners*, 22 How. 374."

It may be admitted that this statement was not necessary to the conclusion reached in the case in which it was used, but it is nevertheless very persuasive when announced by the tribunal of last resort in respect to the effect of the constitution of the state.

The judgment of the circuit court is affirmed.

AMERICAN CREDIT INDEMNITY CO. v. ATHENS WOOLEN MILLS.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 629.

1. APPEAL—REVIEW—ACTION TRIED TO COURT.

Where the issues in an action at law, which present mixed questions of law and fact, are submitted to a circuit court, under Rev. St. § 649, and a general finding made, no question arising upon the trial is open to review in the appellate court, under section 700, except rulings made during its progress, and duly excepted to at the time, which do not include the general finding of the court; but error may be assigned in the circuit court of appeals upon a material defect apparent on the record proper, which would have been fatal on a motion in arrest of judgment after verdict.

2. INSURANCE — INDEMNITY AGAINST LOSS BY INSOLVENCY OF DEBTORS—CONSTRUCTION OF CONTRACT.

A bond insuring the obligee, a manufacturer, against loss by the insolvency of its debtors, provided that "no loss shall be proven after its expiration, provided, however, that, in case this bond is renewed, and the premium on such renewal is paid, at or before the expiration of this bond, loss resulting after such date of expiration, on shipments made during the term of this bond, may be proven during the term of the renewal bond next immediately succeeding." *Held*, that as to such a loss, a renewal having been made, in view of the language of both bonds, the question of what constituted insolvency was governed by the terms of the first bond, and not by those of the second, under which the insolvency occurred and the loss was proved.¹

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

J. B. Sizer, for plaintiff in error.

F. H. Mansfield, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This was a bill of complaint filed in the chancery court of McMinn county, Tenn., by the Athens Woolen Mill, a corporation organized under the laws of Tennessee, against the American Credit Indemnity Company, organized under the laws of Missouri, to recover an amount alleged to be due under a policy of credit insurance, or, as it is called by the company issuing it, "a bond of indemnity." The cause was removed, on the ground of diversity of citizenship, to the court below, and was placed upon the law docket, a jury was waived in writing, and the cause was submitted to the court, which entered the following judgment:

"This cause was heard before the Honorable C. D. Clark, judge, etc., without the intervention of a jury, a jury having been waived by stipulation in writing, signed by plaintiff and defendant; and the court, having heard the evidence and argument of counsel, finds the issues joined in favor of the plaintiff, and that the defendant is justly indebted to plaintiff, principal and interest to the present date, in the sum of three thousand one hundred and thirty-eight dollars and eight cents. It is therefore adjudged by the court that Athens Woolen Mill recover of American Credit Indemnity Company said sum of three thousand one hundred and thirty-eight dollars and eight cents

¹ As to credit insurance, see note to *Indemnity Co. v. Wood*, 19 C. C. A. 271.

(\$3,138.08), together with all the costs of this cause, for both of which execution will issue. To which action of the court in finding the issue in favor of the plaintiff, and rendering judgment against the defendant, the defendant excepts; and thereupon the defendant moved for a new trial, which motion, being considered by the court, is overruled, and defendant excepts."

No exceptions to the rulings of the court upon which errors have been assigned were taken in the progress of the trial.

It is well settled that where, in an action at law, issues which present mixed questions of law and fact are submitted to a circuit court of the United States, and are tried by it without a jury, under the provisions of section 649 of the Revised Statutes, and the court makes a general finding, nothing is open to review in the appellate court except the rulings of the circuit court in the progress of the trial, and such rulings do not include the general finding of the circuit court. *Insurance Co. v. Hamilton*, 22 U. S. App. 386, 11 C. C. A. 42, and 63 Fed. 93. In such a cause, however, it is not too late to allege as error in the circuit court of appeals a material defect apparent on the record proper, which would have been fatal upon a motion in arrest of judgment after verdict; but only such material defects, and not the evidence, may be reviewed. *Id.*, 22 U. S. App. 548, 11 C. C. A. 42, and 63 Fed. 93.

The only ground, then, which the plaintiff in error can urge for reversal, is that the judgment was erroneous upon the face of the pleadings. These were the bill, the answer, and the replication, which, though in name and form pleadings in chancery, were in fact, by the order transferring them to the law docket, treated as common-law pleadings. The replication, being according to the form of equity, was one denying all facts averred in the answer, except such as were averred or admitted in the bill. In support of the judgment, it is to be presumed that all the averments of the bill were proven, and that all the averments of the answer not admitted by the bill were disproven. The burden is on the plaintiff in error in this case to show that, upon the face of complainant's bill, the judgment entered was erroneous.

The bill avers that on November 23, 1893, in consideration of \$145, the defendant company issued to complainant its bond of indemnity No. 1,540, guarantying complainant against loss to the extent of not exceeding \$5,000, "resulting from insolvency of debtors, as therein-after defined," over and above a net loss of \$1,125 first to be borne by complainant on total gross sales of \$125,000, to be made between the 1st of January, 1894, and December 31, 1894; that, by the terms of the bond, it expired on December 31, 1894; that, by clause 8 of its conditions, it was provided that "no loss can be proven after the expiration, provided, however, that, in case this bond is renewed, and the premium on such renewal is paid at or before the expiration of this bond, loss resulting after such date of expiration, on shipments made during the term of this bond, may be proven during the term of the renewal bond next immediately succeeding"; that by clause 11 it was stipulated that "the term 'insolvency of debtors,' wherever used in this bond, is agreed to be general assignments of, or attachments against, insolvent debtors, the absconding of debtors, or executions in favor of the indemnified returned unsatisfied during the term of the

bond, or the renewal thereof, as aforesaid." Complainant further averred that it sold and delivered a large amount of goods to Waxelbaum & Son, a business firm in Macon, Ga., during the life of bond No. 1,540; that, before the expiration of the bond, complainant renewed it, paying the required premium, and received bond No. 2,443 in renewal; that in nearly all respects this bond was like the old; that its eighth condition was:

"In case this bond is renewed, and the premium on such renewal is paid, at or before the expiration of this bond, loss resulting after said date of expiration, upon shipments made during the term of the bond, may be proven under such renewal bond, in accordance with the terms and conditions of such renewal. In case this bond is a renewal, and the premium has been paid at or before the expiration of the preceding bond, losses occurring during the term of this bond, on shipments made during the term of said preceding bond, may be proven hereunder."

Complainant further averred that Waxelbaum & Son failed during the term of renewal bond 2,443; that their affairs were placed in the hands of a receiver; that they were so utterly insolvent that their estate would pay but five or six cents upon the dollar; that complainant at once notified defendant, and brought suit upon its claim of \$3,943.97, owing from the insolvent firm, recovered judgment in a Georgia court, and issued execution thereon, which was returned nulla bona, of which defendant was notified; that there has been no final settlement of the Waxelbaum receivership suit, and that the defendant company refused to pay on the ground that the insolvency agreed upon as the ground for recovery had not yet arisen. Complainant further averred that the amount of its sales between January 1, 1894, and December 31, 1894, was \$156,583.91; that the amount due from Waxelbaum was \$4,159.95; that complainant must bear loss of nine-tenths of 1 per cent. of the total sales, which, being deducted, left \$2,750.70 as the amount due from defendant.

The answer set out, as clause No. 11 of bond No. 2,443, the following:

"The term 'insolvency of debtors,' whenever used in this bond, is defined to be: Where a debtor shall have made a general assignment for the benefit of creditors; where an attachment for a debt for merchandise sold during the term of this bond shall have been levied on his general stock in trade; where a writ of execution shall have been issued against him in favor of the indemnified, and returned unsatisfied, except where such execution has been so issued and returned after receiver has been appointed of the property of such debtor; where a receiver of the general stock in trade of a debtor shall have been appointed, and the amount of the claim of the indemnified has been ascertained by decree, in which event the net amount due at the time of adjustment shall be included in the calculation of losses under this bond; where a debtor's general stock in trade shall have been sold under an execution or other legal process in favor of the indemnified."

It is doubtful whether we ought to consider the foregoing clause as before us in reaching a conclusion in this case. The complainant in his bill proposed to file bond No. 2,443 during the progress of the cause, but it was not attached as an exhibit or part of the bill. The averment of the answer that clause No. 11 of bond No. 2,443 was as given above would seem to be denied by the general replication, and so presumably disproven by the evidence. It is not necessary for us, however, to decide this point; because, even if we assume clause No.

11 to be as set forth in the answer, it will not change our conclusion.

The question before us is one of construction. Is the loss guaranteed against under clause 8 of bond 1,540, in case of a renewal, loss resulting from insolvency, as defined in that bond, or as defined in the renewal bond 2,443? If the former, then the judgment is supported by the averments of the bill; if the latter, then, because the affairs of the debtor firm were in the hands of a receiver, a judgment, execution, and nulla bona return are not the test of insolvency, and the plaintiff's case is not made out. The exception as to the receivership was a new provision of bond No. 2,443.

Clause 8 of No. 1,540 was of a somewhat illusory character. It did not become operative and binding until renewal, and it was, of course, possible for the insurer to modify the effect of clause 8 by the terms of the very renewal upon which alone it became his contractual obligation. These contracts of indemnity are merely contracts of insurance, carefully framed, to limit as narrowly as possible the liability of the insurer, and doubtful expressions in them are to be construed favorably to the insured. Supreme Council Catholic Knights of America v. Fidelity & Casualty Co., 22 U. S. App. 439, 11 C. C. A. 96, and 63 Fed. 48; Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co., 47 U. S. App. 91, 26 C. C. A. 146, and 80 Fed. 766. Taking clause 8 of bond No. 1,540 alone, it cannot be doubted that "the loss resulting after such date of expiration on shipments made during the term of this bond," which was to be proven during the term of the next renewal bond, was intended to be the same kind of a loss as that for which the bond was given, to wit, a loss resulting from insolvency, as in bond No. 1,540 defined. This conclusion is enforced by the language of clause 11 in bond No. 1,540, in which it is agreed that insolvency shall be return of judgment executions unsatisfied during the term of the bond or the renewal thereof aforesaid. Does clause 8 of bond No. 2,443 indicate an intention to change the character of the loss upon goods sold during the life of the previous bond, for which the insurer should become liable? The material words of that clause are: "In case this bond is a renewal, * * * losses occurring during the term of this bond on shipments made during the term of said preceding bond may be proven hereunder." Does proof, under the renewal bond, require that the insolvency shall be established according to the definition of that bond? Standing alone, it may be conceded that this would be the natural meaning of the words; but we are to construe this clause with clauses 8 and 11 of bond No. 1,540. We are to consider that, by that clause, it was clearly intended to extend the benefit of the old bond to cover sales of goods made under that bond, though losses thereon did not accrue during its life; and we ought not to defeat that intention and just expectation of the assured, unless the words of the renewal bond necessarily require it. Do they require it? We think not. In the light of the circumstances and the necessity for reconciling the clauses of the two bonds, the words of the clause 8 of bond No. 2,443 may be reasonably construed to mean merely that the formal proof of loss is to be made under the renewal bond and during its life, while clauses Nos. 8 and 11 of bond No. 1,540 shall be given effect by holding that the fact of the loss is

to be settled by the terms of the old bond. Settled in this way, it is not disputed that the averments of the bill are ample to support the judgment. The judgment of the circuit court is affirmed.

In re LITTLE RIVER LUMBER CO.

(District Court, W. D. Arkansas, Texarkana Division. March 16, 1899.)

1. BANKRUPTCY—PREFERENCES.

Where a solvent corporation pledges and delivers to two of its stockholders policies of insurance on its property, with a clause in such policies making any loss thereunder payable to such stockholders "as their interest may appear," as collateral security for loans made by them to the corporation to enable it to enlarge its business, such pledge does not constitute a preference in favor of those creditors, within the meaning of the bankruptcy act, although the policies expired and were renewed, without any new agreement as to the pledge of them, at a time when the corporation was insolvent, and within four months before the filing of a petition in bankruptcy against it; and a loss having occurred before the adjudication in bankruptcy, and the creditors having received the proceeds of the policies, they will not be required to surrender the same, but may prove their claims against the corporation for the balance of the debt.

2. STATUTE OF FRAUDS—PART PERFORMANCE.

A parol agreement between a corporation and one of its stockholders, by which the former agrees to pledge to the latter policies of insurance on its buildings as collateral security for advances to be made to enable it to enlarge its business, executed by the delivery of the policies and the furnishing of the sum agreed, is not within the statute of frauds, requiring written evidence of a contract not to be performed within a year; being saved by part performance.

3. SAME—FRAUDULENT CONVEYANCES.

A contract by which a corporation pledges to one of its stockholders policies of insurance on its buildings as collateral security for advances to be made to enable it to enlarge its business is not within a statute (Sand. & H. Dig. Ark. § 3472) providing that "every conveyance or assignment of any estate or interest in lands, or in goods and chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods, or things in action or upon the rents and profits thereof * * * made with intent to hinder, delay, or defraud creditors," shall be void, as policies of insurance do not fall within any of the classes of property enumerated.

In Bankruptcy. On exceptions to the allowance of the claim of O'Dwyer & Ahern, proving creditors.

The Little River Lumber Company is a corporation organized under the law of Arkansas. O'Dwyer & Ahern are merchants and partners doing business at Texarkana, Ark. They were both stockholders of the Little River Lumber Company, and owned a large majority of the stock. In 1897 O'Dwyer was treasurer. In 1898 Ahern became president, and O'Dwyer continued as treasurer. In the fall of 1897, about October, the Little River Lumber Company, at a meeting of the stockholders, concluded to enlarge its business by running the mill on full time. It was solvent at that time, but to carry out the scheme to enlarge its business it required money. It had no means of raising it, except through the assistance of O'Dwyer & Ahern. It was accordingly agreed by the company and O'Dwyer & Ahern that the company should insert in all its insurance policies the usual clause, making the insurance "payable to O'Dwyer & Ahern as their interest might appear," and deliver them to O'Dwyer & Ahern as collateral security for any advances they might make,

and also to secure them for guarantying the Texarkana National Bank for any moneys advanced by it to the Little River Lumber Company. This agreement was in parol, and was carried out. Accordingly the business was enlarged as contemplated. The company bought large bills of goods from O'Dwyer & Ahern, and drew large sums of money from the Texarkana Bank. During the year 1898, as the old policies expired, new policies were taken out, containing the "loss-payment clause" as before, and delivered to O'Dwyer & Ahern, who continued to guaranty the bank for advances, and to sell goods to the company. On December 29, 1898, the mill burned. At the time it burned, the company was insolvent, and had been since the spring of 1898, a few months after the agreement was entered into. At the time of the fire the company owed O'Dwyer & Ahern for advances made by the bank, and guarantied or taken up by them, and for goods sold, \$18,511.90, and held insurance policies for \$11,950, under the parol agreement referred to. This parol agreement was never expressly renewed, but the parties thereto continued the original arrangement, as stated, up to the fire, in December, 1898. On January 11, 1899, a petition in involuntary bankruptcy was filed against the Little River Lumber Company, and on the 14th day of January, 1899, it was adjudged a bankrupt. O'Dwyer & Ahern now offer to prove up claim against the bankrupt corporation for the full amount of their claim, less the amount of insurance policies. The referee held that they could not prove up their claim until they surrendered their policies. The case is before the judge for review, upon the application of O'Dwyer & Ahern.

Williams & Arnold, for proving creditors.
Kirby & Carter, for opposing creditors.

ROGERS, District Judge (after stating the facts). The question is whether the creditors should be compelled to surrender the insurance policies before they are allowed to prove up their claim. Or, to put it in another form, have they received a preference, within the meaning of the bankrupt law, and therefore not entitled to prove their claim until they surrender the policies, or the proceeds thereof, which in this case constitutes, if at all, the preference? It is important to understand the nature of the contract between the parties. It is settled law that O'Dwyer & Ahern acquired no interest whatever in the policies by reason of what is called the "loss-payment clause," for the reason that it does not appear that they had any insurable interest in the property covered by the policies. The law is believed to be settled in this country and in England that the assured must have an interest in the thing insured, and that, if he has no interest in the property insured when it is destroyed, he is not injured by the destruction, and therefore is not entitled to recover. *Bibend v. Insurance Co.*, 30 Cal. 79, and cases there cited. I do not stop to inquire whether a mere stockholder in an insolvent corporation has such an interest in the property of the corporation as is insurable. I pass both these questions, to look further into the nature of the agreement; for it is evident that while both parties, no doubt, relied, at the time the agreement was made, on the "loss-payment clause," they also looked beyond that, because they agreed that the policies should be delivered to O'Dwyer & Ahern. Delivery was not necessary at all, if the "loss-payment clause" was available to them. So far as that clause was concerned, possession of the policies was wholly unimportant. The clause spoke for itself, and gave the insurance companies notice as to whom the payment should be made. These policies, by the agreement, were to be

delivered, and they were delivered, in the beginning, before the moneys or credits were extended, and afterwards, when renewed, immediately upon the renewal. From this it may be fairly inferred that the original agreement was by both parties regarded as in force when the renewals were made. What was the effect of this agreement? It simply pledged the policies as collateral for the moneys and credits given. It was not a sale of the policies. They were at all times the property of the lumber company, and it had only to pay what it owed O'Dwyer & Ahern, under the agreement, to be entitled to their possession. True, after the fire, the company, by its officers, formally assigned the policies to O'Dwyer & Ahern,—as O'Dwyer says, to facilitate their collection; but if this assignment was void, under the bankrupt law, it did not deprive O'Dwyer & Ahern of the rights vested in them by the pledge. Prior to the fire these policies were not assets, like notes, mortgages, and other choses in action, to which creditors could look for security. Indeed, the company could not collect them. There had been no loss, and their collection depended on the loss. When the loss did occur, O'Dwyer & Ahern held them as collateral, and equity, eo instanti, assigns the proceeds to them, because they held the policies under the pledge. *Cromwell v. Insurance Co.*, 44 N. Y. 42. In *Bibend v. Insurance Co.*, 30 Cal. 86, the court said:

"Courts of equity are in the habit of giving effect to assignments of trusts and possibilities of trusts, and contingent interests and expectancies, whether they are in real estate or in personal property, as well as to assignments of choses in action. Contingent rights and interests are not ordinarily assignable at law, but they are in equity. Assignments of such rights and interests, in being, are upheld and enforced by courts of equity. And, more than this, these courts support and give effect to assignments of 'things which have no present actual or potential existence, but rest in mere possibility,—not, indeed, as a present, positive transfer, operative in *præsenti*, for that can only be done of a thing in *esse*, but as a present contract, to take effect and attach as soon as the thing comes in *esse*.' 2 Story, Eq. Jur. § 1040; *Mitchell v. Winslow*, 2 Story, 638, 644, Fed. Cas. No. 9,673. In *Mitchell v. Winslow*, Mr. Justice Story cites many authorities supporting this doctrine, and refers particularly to the opinion of Vice Chancellor Wigram in *Langton v. Horton*, 1 Hare, 549, as exceedingly cogent in its reasoning and satisfactory in its conclusions, and he then says: 'It seems to me a clear result of all the authorities that wherever the parties, by their contract, intend to create a positive lien or charge either upon real or personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then in *esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy.' The case of *Field v. Mayor*, etc., 6 N. Y. 186, is in support of the cases already mentioned, and is referred to in *Pierce v. Robinson*, 13 Cal. 123, as declaring the settled doctrine of equity on the subject."

Is the equitable assignment thus made, of the proceeds of a policy thus pledged, more than four months before bankruptcy, in violation of the bankrupt act? If so, of what provision? The referee was of opinion that the transaction was in violation of paragraph b of section 3, which is as follows:

"A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the

recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors *or for the purpose of giving a preference as hereinbefore provided*, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, *or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.*"

The referee comments on this paragraph as follows:

"In order to avoid the charge of preference, as made, and to take the transaction from under the jurisdiction of the bankrupt law, the preferred creditor must have had no knowledge of the insolvent condition of the bankrupt; or, where recording or registering is neither required nor permitted, there must have been, somehow or somewhere, in some definite shape, form, or manner, actual notice to the creditors of such transfer or assignment of the property four months before the filing of the petition in bankruptcy, in order that the period allowed after actual notice within which to file the petition has had time to expire. The time of actual notice of the transfer of the property in this case begins to run after the fire, in January, 1899, and within the statutory period of four months required before the filing of the petition. Therefore the act of preference charged against the firm of O'Dwyer & Aherne, and admitted to be true by that firm, and also by the Little River Lumber Company, is clearly within the provisions of section 3, par. b, of the bankrupt law."

To this I cannot agree. The parts of the section relied on by the referee are the parts italicized in the quotation supra. In the first place, these insurance policies were not property, within the meaning of the bankrupt law. They were mere contracts to indemnify the assured in the event there was a loss by fire. The assured could not collect them, unless there was a loss by fire. They were not an asset to which creditors could look for any security until a loss had occurred. *Stout v. Milling Co.*, 13 Fed. 804. They were, however, assignable in equity, and, before the loss, had been hypothecated to O'Dwyer & Aherne as collateral. But, if the policies were property, in order to contravene the section referred to they must have been transferred "with intent to prefer such creditor over his other creditors." *Bankr. Law*, § 3, pt. 2. In my opinion, there is an entire absence of any evidence to establish any such intent at the time the policies were pledged or renewed. Moreover, the company must have been insolvent when pledge was made. *Id.* When the original pledge was made, the evidence shows, the company was solvent. It was insolvent when most of the policies were renewed, and most of them were renewed more than four months prior to the bankruptcy of the company. But I am of opinion that the renewals do not affect the question at all, for the reason that the policies were not property, not an asset to which creditors at that time could look for security, and because I think the renewals relate back to the original agreement made in October, 1897. The renewals were mere substitutions for the originals.

The referee was of opinion that the notice referred to in clause 1, par. b, § 3, *Bankr. Law*, began to run after the fire. To this I cannot agree, even if the policies were treated as property. The transfer of these policies was not required by any law to be recorded or registered in order to give notice. In this case the notice began

when the beneficiary took either "notorious, exclusive or continuous possession," unless the creditors had "actual notice of such transfer or assignment prior thereto." The evidence does not show that "notorious" possession was taken, or that the creditors had "actual notice" before the fire of the transfer of the policies; but it is conclusive that O'Dwyer & Ahern had both "exclusive and continuous possession" of them at all times after they were pledged, and, except as to the last policies renewed, this occurred more than four months before the petition in bankruptcy was filed.

But suppose the court is in error on these questions. The bankrupt law does not require an insolvent to cease business. It does not prohibit him from borrowing money and securing the borrower, or from buying goods and securing the seller. What it forbids is the giving of a preference to an existing or prior creditor, or securing a previous debt. In this case O'Dwyer & Ahern took the security, and then furnished the goods and money. This did not diminish the company's assets, or injure other creditors. The effect of the transaction was that O'Dwyer & Ahern took these policies, which were not at the time assets on which the general creditors could rely for their security, and the value of which, at best, depended on the loss by fire, and in consideration thereof increased, by the amount of the goods sold and money advanced, the real assets to which the general creditors could look as security for their debts. This was certainly no fraud on the estate, and none on the other creditors. *Tiffany v. Institution*, 18 Wall. 375. Sections 60 and 67 of the bankrupt law both have reference also to preferences, but there is nothing in either to change the result. I conclude that nothing done by the company or the creditor prior to the fire was forbidden by the bankrupt law.

It is insisted that the transaction is prohibited by section 3469, Sand. & H. Dig., which is as follows:

"Sixth. To charge any person upon any contract, promise or agreement that is not to be performed within one year from the making thereof, unless the agreement, promise or contract upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized."

The referee correctly decided that the transaction was taken out of the provisions of that statute by part performance.

It is also contended that it is within section 3472, Sand. & H. Dig. (Statute of Frauds), which is as follows:

"Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree or execution, made or contrived with the intent to hinder, delay or defraud creditors, or other persons, of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchasers prior and subsequent, shall be void."

I am of the opinion that this section has no application to a contract of the nature of the one in question, for the reason that the policies of insurance do not fall within any of the class of property

named in the statute, and for the additional reason that there is no evidence that they were pledged with the intent condemned by that statute. *Bibend v. Insurance Co.*, 30 Cal. 88.

Other questions of fact and law have been discussed in the elaborate briefs of counsel, but I do not regard them as affecting the result, and therefore do not notice them here.

Deducting \$11,548.49, the gross amount collected by O'Dwyer & Ahern and the bank on the insurance policies, from the claim of O'Dwyer & Ahern, leaves a balance of \$7,949.74, for which amount the claim of O'Dwyer & Ahern is allowed, and an order will be entered accordingly.

In re NATHAN.

(District Court, D. Nevada. March 13, 1899.)

No. 3.

1. BANKRUPTCY—PREFERENCES—INJUNCTION PENDING PROCEEDINGS.

Where a petition in involuntary bankruptcy has been filed against a debtor, alleging, as an act of bankruptcy, the giving of a chattel mortgage on his stock in trade with intent to prefer the mortgage creditor, and the latter has taken possession of the goods with knowledge that the debtor was insolvent and that proceedings in bankruptcy had been, or would soon be, instituted by other creditors, he may be enjoined from selling or otherwise disposing of the property pending the adjudication in bankruptcy; and it is immaterial that the mortgage was given to secure a debt contracted in good faith before the passage of the bankruptcy act.

2. SAME.

Pending a petition in involuntary bankruptcy, the petitioning creditors prayed for an injunction against the holder of a chattel mortgage on the bankrupt's stock in trade, alleged to have been given as a fraudulent preference, forbidding him to make sale or other disposition of the goods which he had taken into possession under the mortgage. He answered that he had sold such goods before actual notice of the proceedings in bankruptcy, but there was evidence that the sale was simulated, and a mere device to place the property beyond the reach of other creditors, and that he still had control over the property or a portion of it. *Held*, that the injunction should issue as prayed.

In Bankruptcy. Rule to show cause why an injunction should not issue against L. J. Cohn.

On February 22, 1899, Hoffman, Rothchild & Co., Greenebaum, Weil & Michels, and Brown Bros. & Co., creditors of M. Nathan, petitioned this court to have Nathan adjudged a bankrupt under the bankrupt law of 1898. On February 27, 1899, they filed a petition, in said proceedings, against L. J. Cohn, in which, among other things, it was alleged that: "On or about the 21st day of February, 1899, your petitioners, being then and there qualified creditors of said M. Nathan, filed herein a petition praying that said M. Nathan be adjudged a bankrupt, within the true intent and meaning of the acts of congress relating to bankruptcy, upon the ground that the said M. Nathan transferred, while insolvent, all of his property to two of his creditors, with intent to prefer such creditors over the other creditors of said M. Nathan. * * * That said M. Nathan is insolvent, and that, within four months next preceding the date of said petition, the said M. Nathan committed an act of bankruptcy, in that he did heretofore, to wit, on the 14th day of February, A. D. 1899, and on the 15th day of February, A. D. 1899, at the city of Reno, county of Washoe, state of Nevada, and within said district,

being insolvent, transfer all of his property to L. J. Cohn and Washoe County Bank, then and there creditors of said M. Nathan, with intent to prefer such creditors over the other creditors of said M. Nathan. * * * That said transfer to said L. J. Cohn * * * was made with a view to prevent said M. Nathan's property from coming to his trustee in bankruptcy, and to prevent said property from being distributed ratably among his creditors, and to defeat the object of, and to hinder, impede, and delay the operation of, and to evade the provisions of, the acts of congress relating to bankruptcy. That said transfer to said L. J. Cohn was a chattel mortgage, wherein and whereby it was intended by said M. Nathan to secure said L. J. Cohn for a debt in said chattel mortgage alleged to be the sum of \$4,807;" and prayed for an order of this court enjoining and restraining said L. J. Cohn from disposing of or selling any of the said personal property until the further order of this court. Upon the presentation of this petition, the court made an order upon said L. J. Cohn to appear and show cause, on March 6, 1899, if any he could, why the prayer of said petition should not be granted, and in the meantime issued a restraining order. On March 6th, in pursuance of said order, the said L. J. Cohn appeared and filed an answer to the petition denying that the transfer from Nathan to himself "was made with a view to prevent said Nathan's property from coming or going to his trustee in bankruptcy, or to prevent said property from being distributed ratably," or "that the said chattel mortgage was given by said M. Nathan or received by the said L. J. Cohn through collusion or conspiracy between said M. Nathan and said L. J. Cohn, or with the intent or purpose to deprive the petitioning creditors, or other creditors, of said M. Nathan of their just or any rights in the premises, under the provisions of the acts of congress relating to bankruptcy." And further alleged: "That on the 31st day of October, 1896, the said L. J. Cohn and the said M. Nathan had a settlement of their accounts, and there was found due and owing from the said Nathan to the said Cohn the sum of three thousand six hundred and fifty dollars, and on the last-mentioned date the said M. Nathan made, executed, and delivered to the said L. J. Cohn his promissory note, in writing, for the said sum of three thousand six hundred and fifty dollars, with interest thereon at the rate of eight per cent. per annum from date thereof until paid. That no part of the said principal sum, nor the interest thereon, had been paid up to the 14th day of February, A. D. 1899. That on the 14th day of February, A. D. 1899, the said M. Nathan and the said L. J. Cohn had a settlement of all of their said accounts, and including the said note of three thousand six hundred and fifty dollars, and the interest thereon, and the balance due from the said Nathan to the said Cohn for services as a clerk in his said store, there was found due and owing from said Nathan to the said Cohn the sum of four thousand eight hundred and seven dollars. That on the said 14th day of February, 1899, the said M. Nathan made, executed, and delivered to the said L. J. Cohn his promissory note for the sum of four thousand eight hundred and seven dollars, with interest thereon at the rate of eight per cent. per annum from date until paid. That on the said 14th day of February, A. D. 1899, the said M. Nathan, to secure the payment of the said promissory note and the interest thereon, made, executed, and acknowledged and delivered to the said L. J. Cohn a chattel mortgage on the stock of goods and book accounts described in said petition. That on the 15th day of February, A. D. 1899, under and by virtue of the said chattel mortgage, the said L. J. Cohn took possession of the said goods, wares, and merchandise and book accounts, and between the 15th day of February and 23d day of February, A. D. 1899, both days inclusive, and before the restraining order, or any papers issued out of this honorable court, were served upon him, sold and delivered to divers persons the whole of said goods, wares, and merchandise and book accounts described in said petition, and set forth and described in the chattel mortgage from M. Nathan to the said L. J. Cohn." At the hearing the note and mortgage were introduced in evidence. The note was made payable "one day after date." The mortgage contained the clause "that if the mortgagor shall fail to make any payment, as in the said promissory note provided, then the mortgagee may take possession of the said property, using all necessary force so to do, and may immediately proceed to sell the same

at private or public sale, and in the manner provided by law, and from the proceeds pay the whole amount in said note specified." The testimony submitted at the hearing, among other things, shows that Cohn is the brother-in-law of Nathan, and had been a clerk in Nathan's store for several years, and lived at his house. That one day after the execution of the note and mortgage Cohn took possession of all the personal property mentioned therein, and disposed of the entire property, between the 15th and 23d of February. No notice of the sale was given. The greater portion of the goods (all but \$96.25) was sold on February 23d, which was one day after the notice of the filing of the creditors' petition to have Nathan adjudged a bankrupt was served upon Nathan, by leaving the same with his wife. Cohn denied having knowledge of the papers that were served upon Nathan, but admitted knowledge of the service of some papers, and that "he surmised what the papers were." The sale of the goods amounted, in the aggregate, to \$1,444.25. Other facts are stated in the opinion.

Torreynson & Summerfield, for petitioners.

Benj. Curler, for respondent L. J. Cohn.

HAWLEY, District Judge (orally). It has been held that no transfer of property, lien, or incumbrance, by mortgage or otherwise, is to be avoided by any adjudication in involuntary bankruptcy, unless made or created subsequent to the passage of the bankrupt act. *In re Brown*, 91 Fed. 358. But it by no means follows that, because a bona fide debt was created before the passage of the act, a mortgage or lien of any kind could be given after the passage of the act to secure such a debt, so as to avoid any proceeding instituted by the petitioning creditors to have an adjudication in bankruptcy against the party giving the mortgage. *In re Sievers*, 91 Fed. 366, 369. If the mortgage in question was given for the purpose of hindering, delaying, and defrauding other creditors of Nathan, there cannot be any controversy as to the power of the court to enjoin Cohn, pending involuntary proceedings against Nathan, from disposing of any of the property in his possession or under his control. *In re Abbott*, 1 Hask. 250, Fed. Cas. No. 10; *In re Brooks*, 91 Fed. 508. That Cohn knew that Nathan was insolvent, and expected that proceedings in bankruptcy had been, or would soon be, instituted by other creditors of Nathan, is clearly shown by his testimony. The mortgage, as between Nathan and Cohn, was valid; but from the evidence introduced upon this hearing it cannot be said that Nathan executed the mortgage upon all his personal property, and authorized Cohn to sell the same at private sale, for the honest purpose of discharging his indebtedness, and in the confident expectation that by so doing he could continue his business, and it is only upon that theory, if at all, that the transaction could be upheld as against other creditors. *Tiffany v. Lucas*, 15 Wall. 410. The giving of such a mortgage to secure Cohn, and to give him a preference over other creditors, was of itself an act of bankruptcy. Bankrupt Act 1898, c. 541, subc. 3, § 3, subds. a-c; *Id.* subc. 7, § 67. The filing of the petition by the creditors was, as is said in *Bank v. Sherman*, 101 U. S. 403, 406, "a caveat to all the world. It was, in effect, an attachment and injunction. Thereafter all the property rights of the debtor were ipso facto in abeyance until the final adjudication. * * * Those who dealt with his property in the interval between the filing of the petition and the final adjudication did so at their peril." See, also, *In re Brooks*, supra. The law

as declared in numerous cases, under prior acts of bankruptcy (and equally applicable to the act of 1898), is well settled that a sale or other disposition, out of the usual course of business, of all of one's stock in trade, to a person who knows the seller's insolvency, is prima facie evidence that the sale was fraudulent. *Ashby v. Steere*, 2 Woodb. & M. 347, Fed. Cas. No. 576; *Babbitt v. Walbrun*, 1 Dill. 19, Fed. Cas. No. 694; *Id. Fed. Cas. No. 695*; *Lawrence v. Graves*, *Id. 8,138*; *Martin v. Toof*, *Id. 9,167*; *Toof v. Martin*, 13 Wall. 40, 48; *Rison v. Knapp*, 1 Dill. 187, Fed. Cas. No. 11,861; *Wakeman v. Hoyt*, Fed. Cas. No. 17,051.

In *Ashby v. Steere*, *supra*, the court said that:

"If the debtor elected to pay a relative to whom he was indebted; if the transfer or conveyance was done secretly; if it was out of the usual course of business, in a new, extraordinary, or unusual manner; if it was just in the hurry of going into insolvency, a day or two, or an hour or two, before making the petition; * * * or if the debtor should convey away the whole of his property on the eve of bankruptcy,—any of these circumstances would tend to show his intention to prefer the creditor to whom the payment or transfer was made."

In *Toof v. Martin*, 13 Wall. 48, the court said:

"The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy."

In *Wakeman v. Hoyt*, Thompson, Circuit Justice, said:

"Why is giving a preference to be considered a fraud on this act? Because the act contemplates an equal distribution. It is a fraud because it counteracts the policy of the law. Though it may not be fraudulent in a moral point of view, it must be fraudulent if it contravenes the policy of the law. So, when the trader procures the levy of an execution on his property, it is favoring one creditor over the other. This would not be a fraud, if it were not for the bankrupt law. It is precisely as honest an act for the debtor to procure an attachment or execution, to be levied on his property by a creditor, as it is to secure to him a preference by means of the conveyance. It is fraudulent only because it counteracts the policy of the law, and this is equally true in the one case as in the other. I am, therefore, in this view of the case, of opinion that a conveyance or assignment by a trader of all his property, to secure a preference to particular creditors, is, *per se*, a fraud upon the act of congress and an act of bankruptcy."

In the disposition of property among creditors equality is equity. It is the genius and purpose of the act of 1898 to secure this result as far as possible from the moment its aid is invoked, whether by the debtor or by his creditors. Its exercise is vital to the ends of justice, and is necessary in order to enable the courts to enforce and make effective the various provisions of the act. The policy of the bankrupt act is to secure an equal distribution of the assets of the bankrupt among all his creditors, and a court of bankruptcy in which the bankrupt proceedings are pending, in order to preserve the property and protect the rights of all the creditors, has the unquestioned jurisdiction and power to enjoin any disposition thereof which would be in violation of the spirit, intent, and purpose of the act. *In re Calen-*

dar, Fed. Cas. No. 2,308; *In re Camp*, Id. 2,346; *In re Holland*, Id. 6,605; *In re Smith*, Id. 12,993, 12,994; *Bush, Bankr.* 411; *Blake, Moffit & Towne v. Francis Valentine Co.*, 89 Fed. 691, 693, 694, and authorities there cited.

If there had been no sale, or pretended sale, of the goods by Cohn, it is clear that the mere execution and delivery of the mortgage by Nathan, and possession of the property by Cohn, would justify the court, bankruptcy proceedings having been commenced by other creditors against Nathan, in issuing the injunction as prayed for by the petitioning creditors.

But it is seriously argued that no injunction should issue against Cohn, as he had sold all the property included in the mortgage prior to actual notice of the filing of the petition by the creditors against M. Nathan to have him declared a bankrupt. On the other hand, it is contended by the petitioning creditors that there was no sale of the property; that the pretended sale was simulated and carried out as a mere pretense of avoiding and preventing the petitioning creditors from securing the property under the bankruptcy proceeding. There is much in the testimony that tends strongly to sustain this view. The sale was mostly made on credit, to be paid for when the purchaser sold the property. Of the amount of cash received from the sale, to wit, \$403, the sum of \$200 was paid by Cohn to his sister, Mrs. Nathan. He testified that he gave her the money because she was in immediate need of funds on account of her husband's serious illness. He also paid his attorney the sum of \$120, and to the physician in attendance upon his brother-in-law, Nathan, the sum of \$40. He sold to Hausman, who is not engaged in merchandising, a bill of goods for \$875, receiving therefor, in cash, the sum of \$10, the balance to be paid when the purchaser sold the property. This property was stored in a cellar of one Manheim, and the purchaser soon after the sale departed on a visit to the East. The purchasers to whom Cohn delivered the property have not been made parties to this proceeding, and no order has been asked for against them. Under the circumstances above stated, taken in connection with all the facts produced at this hearing, it is not by any means clear that Cohn has made such a disposition of all the property that it can be said he has no longer any control over it. In the light of all the facts, I am of opinion that the injunction against Cohn should be issued as prayed for by the petitioners. It is so ordered.

CARTER v. HOBBS et al.

(District Court, D. Indiana. March 10, 1899.)

No. 5,945.

1. BANKRUPTCY—TRUSTEE'S PETITION TO AVOID PREFERENCES—MULTIFARIOUSNESS.

A petition, by a trustee in bankruptcy, against the bankrupt and one of his creditors, to procure the setting aside of a mortgage on land, a chattel mortgage, and a lease of real and personal property, all made by the bankrupt at different times to the defendant creditor, and alleged to be fraudulent as to other creditors, and to have been given and ac-

cepted with the intent to prefer the creditor receiving the same, is not demurrable for multifariousness.

2. SAME—EFFECT OF ADJUDICATION.

An adjudication in bankruptcy operates *in rem*, and places the bankrupt's entire estate, including property previously transferred in fraud of creditors, in the custody of the law, and under the jurisdiction of the court of bankruptcy, in which court alone all persons claiming rights in the estate, or seeking to participate in it, must assert their claims.

3. SAME—JURISDICTION OF BANKRUPTCY COURT.

A mortgage creditor of the bankrupt, though he does not prove his claim, is a party to the proceedings in bankruptcy, and subject to the jurisdiction of the court of bankruptcy; and the trustee, seeking to set aside the mortgage as a fraudulent preference, may proceed by petition or bill in the court of bankruptcy, and will not be compelled to resort to the state court, or federal circuit court, which otherwise would have jurisdiction of such an action against an adverse claimant.

4. SAME.

Notwithstanding the provision of section 23b of the bankruptcy act (30 Stat. 552), that "suits by the trustee shall only be brought or prosecuted in the courts in which the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted," the court of bankruptcy has jurisdiction of a petition by the trustee against the bankrupt and a creditor to set aside alleged fraudulent preferences, for such a suit is not one which the bankrupt himself could have instituted or maintained.

5. SAME—CONSTRUCTION OF STATUTE.

On questions of the construction of the bankruptcy act, opinions expressed by individual members of congress in the debates on the passage of the act, as to the object and effect of its particular clauses, are entitled to little or no weight.

In Bankruptcy. On demurrer to petition by plaintiff, as trustee in bankruptcy, against the bankrupt and another, to set aside certain conveyances alleged to have been fraudulent and preferential. Demurrer overruled.

Gifford & Coleman, for plaintiff.

Gavin & Davis, for defendants.

BAKER, District Judge. On November 19, 1898, Beecher Goodykoontz filed his voluntary petition in bankruptcy, and on the same day he was duly adjudged a bankrupt. On December 6, 1898, Walter Carter was duly appointed a trustee of the bankrupt's estate, and on December 10, 1898, he filed his bond, and duly qualified, and assumed the duties of his trust. On March 2, 1899, he filed in this court his amended petition or bill against the bankrupt and Zachariah T. Hobbs, in which he alleges, in substance, that the bankrupt, in his schedule filed herein, transferred as a part of his assets two certain parcels of real estate specifically described, situated in Hamilton county, Ind., and also certain specifically described horses, harnesses, and hogs; that on August 22, 1898, the bankrupt executed to Hobbs a mortgage on this real estate to secure a note of even date, due in 30 days, for \$2,150, and that this was done within 4 months prior to the filing of his voluntary petition to be adjudged a bankrupt; that the indebtedness evidenced by the note and attempted to be secured by the mortgage was in existence more than 4 months before the petition in bankruptcy was filed, and the mortgage was executed

by the bankrupt and accepted by Hobbs with the fraudulent intent to give him a preference over the other creditors of the bankrupt, and with the intent to hinder, delay, and defraud them; that the bankrupt and Hobbs, at the time said mortgage was executed, knew that the bankrupt was insolvent, and that his property, at a fair valuation, was not sufficient to pay his bona fide indebtedness in full, and that the purpose of both parties in executing and accepting the mortgage was to give Hobbs a preference over the other creditors of the bankrupt. The petition also seeks to set aside as fraudulent a chattel mortgage on the personal property of the bankrupt, executed November 14, 1898. The allegations of the petition assailing the chattel mortgage are the same, in substance, as those relating to the real-estate mortgage hereinbefore set out, and therefore need not be further mentioned. The petition also assails as fraudulent a certain lease of real and personal property, executed August 17, 1898, by the bankrupt to Hobbs, and seeks to compel him to account for the fair rental value of the property. The grounds upon which the lease is assailed are the same as those set out above.

No question is made but that the petition states facts sufficient, if established by the evidence, to justify and require the court to grant the relief prayed for. The bankrupt has neither answered nor demurred. Hobbs has filed a demurrer, in which it is alleged (1) that the petition is multifarious, (2) that the court is without jurisdiction.

The grantor and grantee are proper parties to a suit brought by creditors to set aside a fraudulent conveyance. The objection that the petition is multifarious is untenable. Although the defendants are charged with different acts of fraud affecting different parts of the estate of the bankrupt, still their acts are charged to have been done with a common fraudulent purpose; and the object of the petition is simply to clear the estate of the bankrupt, which has passed into the possession of the trustee, from apparent incumbrances and leasehold interests placed upon it by the mortgages and leases sought to be avoided. That the petition is not multifarious is shown by the cases of *Boyd v. Hoyt*, 5 Paige, 65; *Fellows v. Fellows*, 4 Cow. 682; and *Platt v. Preston*, Fed. Cas. No. 11,219. The trustee stands in the place of the creditors of the bankrupt, and has the same rights, and may pursue the same remedies in their behalf, as they had or would have been entitled to if there had been no adjudication of bankruptcy. He may, therefore, embrace in his petition all such matters and causes of action as might have been included by the creditors in a creditors' bill against these defendants. The fraud charged against the defendants is that by a fraudulent combination between them certain real and personal property of the bankrupt has been leased and mortgaged to Hobbs with the intent to prefer him in fraud of the rights of the general creditors. The object of the petition is single, and seeks to accomplish but a single purpose, namely, to clear the bankrupt's estate from the fraudulent claims placed upon it by the defendants. The frauds alleged are the same. The one matter charged is fraud in the incumbrance and disposition of the property of the bankrupt. Each defendant has a common interest centering in every

point in issue. In the case of *Fellows v. Fellows*, ubi supra, it was held that the joinder in a creditors' bill of three persons, to whom separate deeds of conveyance for separate parcels of real estate had been executed at the same time by a debtor, with the intent to defraud his creditors, did not make such bill multifarious.

It is next insisted that this court is without jurisdiction, and that the bankrupt's estate, which has passed into the custody of the court, and is now in the possession of its trustee, can only be cleared of the fraudulent incumbrances placed thereon by a suit brought in a court of the state. The trustee is vested by operation of law with the title of the bankrupt as of the date of the adjudication, among other things, to all property transferred by him in fraud of his creditors, as well as to all property which, prior to the filing of the petition, he could, by any means, have transferred, or which might have been levied upon and sold by judicial process against him. Bankruptcy Act, § 70. The word "transfer" includes the sale and every other different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as by payment, pledge, mortgage, gift, or security. *Id.* § 1, cl. 25. Therefore the title to the bankrupt's property, incumbered by the mortgages and lease, was transferred by operation of law to, and vested in, the trustee, an officer of this court. The decree operates in rem, and from the moment of the adjudication of bankruptcy the bankrupt's estate is in custodia legis, and under the jurisdiction of this court. It is fundamental that no court or individual can interfere with such custody and possession. The assertion of any right against, or to participate in, the res so in custodia legis, must be sought in the court in whose custody it is. An attempt to assert such right elsewhere would be regarded as a contempt. The adjudication proceeds in rem, and all persons interested in the res are regarded as parties to the bankruptcy proceedings. These parties include, not only the bankrupt and trustee, but also all the creditors of the bankrupt. The present act, in addition to having provisions analogous to those found in the act of 1841, also discloses (section 57e) that claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities and priorities. The last clause clearly implies an authority in the bankruptcy court to ascertain and determine whether or not the security or priority exists; as well as to determine the value of it, and the amount of the debt so secured. Section 56b contains a similar provision. Section 63 makes debts, whether due and payable or not, provable in bankruptcy. Section 57h provides that the value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which the securities are held by the creditors, or by such creditors and the trustee by agreement, arbitration, compromise, or litigation as the court may direct; and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

The last section clearly shows that the secured creditor is under the jurisdiction of the bankruptcy court, and that it may restrain him from enforcing his claim in any other court, or it may authorize such secured creditor to litigate a claim secured by lien in a state court. The jurisdiction of the bankruptcy court over such claims and claimants, in my opinion, is clearly conferred by the present act. We do not understand respondents' counsel to contest such jurisdiction if the secured creditor seeks to prove against the general assets. Their contention is that such secured creditor may, if he elects to look to his security alone for the satisfaction of his debt, decline to prove his debt; and by so doing he is not drawn within the jurisdiction of the bankruptcy court; and that, so electing, he is to be regarded as an adverse claimant, and cannot be proceeded against in the bankruptcy court, but must be proceeded against in a court of the state, unless, by reason of diversity of citizenship and the amount in controversy, he may be sued in the circuit court of the United States. But, in my judgment, such secured creditor is not an adverse claimant. Under Act 1841, § 6, it was contended that a secured creditor who had not come into the bankruptcy proceedings and proved his claim was to be regarded as an adverse claimant, over whom the bankruptcy court possessed no jurisdiction. This contention did not prevail. The supreme court, in *Ex parte Christy*, 3 How. 292, 315, said:

"Another ground of objection insisted on in argument is that the language of the sixth section, when it refers to any creditor or creditors who shall claim any debt or demand under the bankruptcy, is exclusively limited to such creditors as come in and prove their debts under the bankrupt law, and does not apply to creditors who claim adversely thereto. * * * But we do not so interpret the language. When creditors are spoken of who claim a debt or demand under the bankruptcy, we understand the meaning to be that they are creditors of the bankrupt, and that their debts constitute present subsisting claims upon the bankrupt's estate, unextinguished in fact or in law, and capable of being asserted under the bankruptcy in any manner or form which the creditors might elect, whether they have a security by way of pledge or mortgage therefor or not. If they have a pledge or mortgage therefor, they may apply to the court to have the same sold, and the proceeds thereof applied towards the payment of their debts pro tanto, and to prove for the residue; or, on the other hand, the assignee may contest their claims in the court, or seek to ascertain the true amount thereof, and have the residue of the property, after satisfying their claims, applied for the benefit of the other creditors. Still the debts or demands are, in either view, debts or demands under the bankruptcy, and they are required by the bankrupt act to be included by the bankrupt in the list of his debts due to his creditors when he applies for the benefit of the act; so that there is nothing in the language or intent of the sixth section to justify the conclusion which the argument seeks to arrive at."

From the foregoing considerations it would seem to be clear that the district court, when sitting in bankruptcy, has lawful jurisdiction over liens and mortgages upon the property of the bankrupt, so that it may inquire into their validity and extent, and grant the same relief which the courts of the state might or ought to grant, and that such court may do this without the consent of the secured creditor.

Nor do I think a fair construction of section 23b of the present act can be regarded as ousting the court sitting in bankruptcy of such jurisdiction. The grant of jurisdiction by the second section of the act, omitting the exception in clause 7, is ample, and perhaps would

be exclusive in collecting in and reducing to money and distributing the estate of the bankrupt, of whatever nature. Section 2, cl. 6, 7, 15, including the last paragraph of the section. Section 23b reads:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

This section, doubtless, is intended to be the exception ingrafted on section 2, cl. 7, which reads:

"(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

Omitting the exception, it is clear that by section 2 the district court sitting in bankruptcy would be invested with original and exclusive jurisdiction unless it gave leave to parties to sue in the courts of the state over the collection of all debts and demands due the bankrupt, as well as the entire administration of the bankrupt's estate, and the determination of all controversies relating thereto. It is, however, earnestly contended that clause b of section 23, with which we are alone concerned, takes from the bankruptcy court, and remits to the courts of the state, jurisdiction over all suits for the collection of debts and demands due the bankrupt, as well as of all suits to set aside fraudulent transfers of every sort, and to recover the property of bankrupts in the wrongful possession of third parties; in short, that the bankruptcy court has no jurisdiction to "cause the estates of bankrupts to be collected" and reduced to its possession. If the bankruptcy court possesses no jurisdiction over these matters, it is shorn of power to accomplish the purpose of its creation, and it is impotent, indeed, if it must rely upon the courts of the state to perform the largest and most important part of the work of administering the bankruptcy act. Such, in effect, is the ruling in *Burnett v. Mercantile Co.*, 91 Fed. 365, where it is held that the district court has no jurisdiction to entertain a suit to set aside conveyances made by the bankrupt in fraud of his creditors. But this broad construction of clause b is inadmissible. It, of course, is to be construed in connection with every part of section 2, which contains the plenary grant of jurisdiction to the district court sitting in bankruptcy. It takes out of the plenary grant of jurisdiction that which otherwise would be within it. But such a construction of an exception as makes it plainly repugnant to the body of the act is not permissible. *Dollar Sav. Bank v. U. S.*, 19 Wall. 227. The general rule of law is that an exception only carves some special matter out of the body of the act, and those who set up such exception must establish it as being within the words as well as the reason thereof. *Ryan v. Carter*, 93 U. S. 78; *U. S. v. Dickson*, 15 Pet. 141. The language of clause b must be strictly construed to avoid repugnancy between it and the plenary grant of jurisdiction conferred by section 2. The application of these settled rules of construction leaves no doubt that the clause of section 23 under consideration does not divest courts of bankruptcy of jurisdiction over suits brought by the trustee to set aside fraudulent transfers of the bankrupt. The clause in question requires suits which the bank-

rupt might have brought or prosecuted to be brought in the courts in which the bankrupt must have brought them if bankruptcy had not supervened. It seems to me to be clear that, where the trustee brings a suit to enforce a right of action which never existed in the bankrupt, the district court has ample jurisdiction to maintain it. The trustee's right of action in such a case is not a derivative one, growing out of a prior right possessed by the bankrupt, but his right is original, created by law, and in the enforcement of it he represents the creditors, and his suit is, in effect, the exact equivalent of a creditors' bill to reach property fraudulently transferred. Such a suit could never have been brought or prosecuted by the bankrupt against himself and his fraudulent transferees. No state court could entertain jurisdiction over such a suit when attempted to be brought or prosecuted by the bankrupt, and no such construction of clause b is admissible. When suits which the bankrupt could have brought or prosecuted in the courts of the state are spoken of, evidently real suits upon existing causes of action belonging to the bankrupt are meant, and not suits for the pretended enforcement of causes of action which never existed in favor of the bankrupt. Whether district courts have jurisdiction over suits to recover debts and demands due or owing to the bankrupt at the time of the adjudication of bankruptcy it is not necessary to consider or determine. On this question, however, see *In re Sievers*, 91 Fed. 366.

It is insisted that the conclusion here reached is in conflict with the opinions expressed by Senator Lindsay and Representative Henderson, who respectively had the bill in charge in the senate and the house. Counsel have set out in their brief copious extracts from the speeches of these gentlemen, which it is claimed show that the congress intended all adversary suits to be brought in the courts of the state. A careful reading of what was said does not, in my opinion, justify any such conclusion. Their views seem to have been that debts and demands due or owing to the bankrupt on which he could have brought suit must be prosecuted and collected by the trustee in the courts of the state. But we need not further consider the opinions of these gentlemen, for the reason that the opinions of individual legislators as to the object and effect of a statute are of little or no weight on the question of its construction. 23 Am. & Eng. Enc. Law, p. 337, note 5, and cases there cited.

It follows that the demurrer must be overruled, to which the defendant excepts. The defendant is ruled to answer within 10 days. So ordered.

UNITED STATES V. FIFTY BOXES AND PACKAGES OF LACE.

SAME V. EIGHTY-NINE BOXES AND PACKAGES OF LACE.

(District Court, S. D. New York. March 15, 1899.)

1. DEPOSITIONS—MANNER OF TAKING IN FEDERAL COURTS—STATE PRACTICE NOT OBLIGATORY.

Rev. St. § 721, making the laws of the several states rules of decision in trials at common law, does not require the federal courts to conform to state laws as to the mere manner of executing commissions to take testimony, which may be regulated by the court, either by general rules, or by special directions accompanying the commission.¹

2. SAME.

Rev. St. § 914, conforming the federal to the state practice "in like causes," does not require a federal court to follow a state statute as to the manner of taking depositions in a proceeding in rem by the United States for the forfeiture of merchandise under the customs revenue laws, (1) because there are no "like causes" in the state courts; and (2) because the provision does not apply to the evidence of witnesses, either as to its character or competency, or the mode of taking it.

3. SAME.

The phrase, "according to common usage," in Rev. St. § 866, authorizing courts of the United States to "grant a dedimus potestatem to take depositions according to common usage," means according to the practice existing in 1874, when the section was enacted, and does not import that the federal courts must adopt all subsequent new regulations that may be enacted by state legislatures or adopted by the state practice, though such courts are permitted by Act March 9, 1892 (2 Supp. Rev. St. p. 4), to follow the mode prescribed by the state laws, "in addition" to the former method.

4. SAME—INFORMALITY OF CERTIFICATE.

The fact that a commissioner to take depositions in a foreign country fails to certify, as directed in the commission, that "the examination was subscribed by the sworn interpreter," is immaterial, and not ground for suppressing the deposition, where the certificate shows that the interpreter was sworn, and the deposition is in fact subscribed by him.

5. SAME—FAILURE TO ATTACH EXHIBITS.

Where exhibits are not identified and attached to a deposition as required by the instructions, it is proper to order the deposition returned for that purpose; and the right of the adverse party to further examine as to the identity of such exhibits is waived, if no request therefor is made.

6. SAME—MANNER OF TRANSMISSION.

It is immaterial that foreign depositions, directed to be addressed to the clerk and returned by mail, were forwarded through the embassy bag by mail to Washington, and thence to the clerk, to whom they were properly addressed, instead of being forwarded direct.

On Motion to Suppress Depositions.

Henry L. Burnett, U. S. Dist. Atty., and Mr. Baldwin, Asst. U. S. Dist. Atty.

A. J. Dittenhoeffer, for defendants.

BROWN, District Judge. In the above cases, which are informations for forfeitures of laces and other goods under the customs revenue laws of the United States, two commissions were issued under a dedimus potestatem pursuant to the provisions of section

¹ As to conforming federal to state practice, see note to O'Connell v. Reed, 5 C. C. A. 594.

866 of the Revised Statutes to take the testimony of foreign witnesses in behalf of the government, one at London and one at Paris. Upon the execution and return of the commissions, a motion is made on the part of the defendants to suppress them on the general ground that they have not been executed in all particulars in precise conformity with provisions of sections 887-912 of the New York Code of Civil Procedure, relating to depositions taken without the state, which it is contended by the defendants are binding upon the federal courts.

I have carefully examined the objections raised, and the briefs submitted by counsel. Unable to write at length upon the interesting questions discussed, I state my conclusions as follows:

1. Section 721 of the United States Revised Statutes, making the laws of the several states "rules of decision in trials at common law," while governing upon such trials as respects the competency of witnesses and the admissibility of evidence offered on the trial, has no reference to such objections as are here raised in regard to the mere manner of executing commissions, which may be regulated by the court as justice may require, either through general rules, or by special directions accompanying the commission.

2. Section 914 of the United States Revised Statutes, providing that "the practice, pleading and forms and modes of proceeding in civil causes, other than equity or admiralty causes, shall conform as near as may be to the * * * forms and modes of proceeding existing at the time in like causes in the state courts of record," is not applicable in the present case for two reasons: (a) This is an information in rem for a forfeiture under the customs revenue laws of the United States, and there are no "like causes" in state courts. See Coffey v. U. S., 117 U. S. 233, 6 Sup. Ct. 717, expressly adjudging this point. (b) This section has not been construed in this circuit to "apply to the evidence of witnesses, either as to its character or competency, or the mode of taking it." Per Blatchford, District Judge, in Beardsley v. Littell, 14 Blatchf. 105, Fed. Cas. No. 1,185. And Judge Choate so ruled in U. S. v. Pings, 4 Fed. 714, where he says that these matters "being expressly provided for by act of congress, the state practice regulating the same matter is not adopted by section 914 of the Revised Statutes." See Flint v. Crawford Co., 5 Dill. 481, Fed. Cas. No. 4,871; Easton v. Hodges, 7 Biss. 324, Fed. Cas. No. 4,258; Sage v. Tauszky, Fed. Cas. No. 12,214. And see Bate Refrigerating Co. v. Sulzberger, 15 Sup. Ct. 515, 516.

3. The phrase, "according to common usage," in section 866, authorizing the court to "grant a dedimus potestatem to take depositions according to common usage," means according to the existing practice whether at law or in equity (Bischoffsheim v. Baltzer, 20 Blatchf. 232, 10 Fed. 1); that is, by a commission upon interrogatories and cross interrogatories, as was the common usage both at the time when section 866 was passed in 1874, and at the time of the passage of the judiciary act of 1789, in which substantially the same provision was enacted. The usage referred to in section 866 is the common usage at the time of the revision in 1874; and

in districts where there is no established practice in the federal courts, it is no doubt competent and proper to refer to the usage in other districts, or to laws or usages of the state as evidence of the common usage, as was held might be done in the case of *Bud-dicum v. Kirk*, 3 Cranch, 293, in 1801, in respect to notice, and later by Judge Deady, in Oregon, in the case of *Jones v. Railroad Co.*, 3 Sawy. 523, Fed. Cas. No. 7,486. There is nothing in this general phrase, "according to common usage," which imports that the federal courts in any of the states must adopt all subsequent new regulations that may be from time to time enacted by the state legislatures, or adopted by the state practice. This notion was expressly repudiated by Mr. Justice Brewer in *Turner v. Shackman*, 27 Fed. 184, and by Mr. Justice Miller in *Ex parte Fisk*, 113 U. S. 724, 5 Sup. Ct. 724, where the latter refers to such enactments as "a very special usage dependent wholly upon the New York statute." That no such rule was contemplated by congress in the act of 1789, or prior to the revision, is moreover evident from the act of May 9, 1872 (17 Stat. 89), which, after making certain provisions in regard to depositions taken *de bene esse* for use in the federal courts, adds:

"But this act shall not be construed to affect the power of any such court to cause testimony to be taken under commission according to the course of common law to be used therein."

At the time of the revision and the enactment of section 866, the "common usage" within this district had been long and well established, not merely by the practice of the federal courts, but by the rules of the circuit and district courts at common law for upwards of 45 years; the first printed rules on the subject (rules 33 to 36) being established in 1828 by Mr. Justice Thompson and Judge Betts, and at various times since amended and enlarged. See circuit rules 41 to 50 of 1838; district rule 97 (old 240). The provisions of the New York Code of Civil Procedure now existing, which the defendants claim are binding upon this court, so far as they differ from the practice of the federal courts in this circuit, are mainly the result of enactments of the state legislature since section 866 was passed; and some of these changes are quite recent and peculiar. The most important is the one providing that the interrogatories, cross interrogatories, and the answers in case of a foreign witness who does not understand English, may be taken in the language of the witness, and interpreted upon the trial (Code Civ. Proc. N. Y. § 912); but this, as I understand, is wholly in the discretion of the court. In this case, as no application was made to this court upon that subject before the commission was issued, no objection can be raised upon that score now.

The above view is confirmed by the recent act of March 9, 1892 (2 Supp. Rev. St. p. 4), which provides,

"That in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held."

This apparently applies to all depositions authorized to be taken under federal laws (*Cash-Register Co. v. Leland*, 77 Fed. 242), and it is a clear recognition of the existing "mode" (i. e. a lawful mode) of taking depositions both at law and in equity in a manner different from that of the state practice, and at the same time it authorizes the latter method, thus giving a legislative sanction to the following of the state practice in that regard, if desired, "in addition" to the former method. Several decisions had previously declared the same option to exist. *Flint v. Crawford Co.*, 5 Dill. 481, Fed. Cas. No. 4,871; *McLennan v. Railroad Co.*, 22 Fed. 198.

4. The commissions issued in these cases were issued in accordance with the long-existing common usage of this district. Instructions consisting of two printed pages, the same that have been used in this court for more than 20 years past, were attached. Except in one particular these instructions have been complied with. The omission is in the certificate to the French commission, which does not certify, as directed, that "the examination was subscribed by the sworn interpreter." But the commissioner does certify that the interpreter, Paul F. Paquet, "was sworn"; and he was presumably sworn in the manner directed. And although the commissioner does not certify that the interpreter subscribed the deposition, yet every page of the examination is in fact subscribed by "Paul F. Paquet, Interpreter," and at the close the deposition is in like manner subscribed by him and by the witness. There seems to be no reasonable doubt whatever, as to the fact of the subscription as required, and as the informality of the certificate in this respect cannot prejudice the defendants, it should, therefore, be held to be immaterial. *Railroad Co. v. Stoner*, 2 C. C. A. 437, 51 Fed. 656; *Rust v. Eckler*, 41 N. Y. 488; *Gormley v. Bunyan*, 138 U. S. 632, 11 Sup. Ct. 453; *Bibb v. Allen*, 149 U. S. 488, 13 Sup. Ct. 950.

5. The return of the commissions in order to have exhibits not previously attached identified and attached as required by the instructions, was a proper order; the defendants would have been allowed to interrogate the witness further as respects the identity of the exhibits had they desired to do so; but no such request being made, this right was waived.

6. The commissions on the return were properly addressed to the clerk of the court, as directed; and as directed they were sent by mail. It is immaterial that they were forwarded through the embassy bag by mail to Washington, and thence to the clerk, instead of directly to New York.

The motion to suppress the commissions should, therefore, be denied.

CENTAUR CO. V. MARSHALL et al.

(Circuit Court, W. D. Missouri, W. D. February 6, 1899.)

1. TRADE-MARKS—PATENTED ARTICLES—EXPIRATION OF PATENT.

When a patented article becomes known by a particular name, though an arbitrary one invented by the patentee, such as "Castoria," such name becomes public property on the expiration of the patent; and no trademark right exists therein, or can be acquired by subsequent use. *Centaur Co. v. Heinsfurter*, 28 C. C. A. 581, 84 Fed. 955, followed.

2. SAME—PRELIMINARY INJUNCTION—INEQUITABLE CONDUCT.

The owner of a patent for a medicine enjoyed the protection of the patent during its term, and asserted in litigation that it claimed under the patent. After expiration of the patent, in order to claim a trade-mark in the name by which the patented medicine was known, it asserted for the first time, in a bill for injunction, that in the preparation of the medicine it varied from the formula of the patent. *Held*, that this conduct was not such as to command itself to a court of equity, on a motion for preliminary injunction against alleged unfair competition.

3. SAME—UNFAIR COMPETITION—IMITATION OF LABELS.

When the differences between the labels are so marked that it is hardly conceivable that even the casual observer who had been in the habit of purchasing complainant's goods, or who had acquired any knowledge of or preference for it, would mistake the one for the other, an injunction will be denied, especially when there is no proof that any purchaser was actually so misled.¹

4. SAME.

When complainant has no trade-mark right in the name under which an article is sold, and there is no misleading imitation of his labels or other indicia, he has no standing to complain that defendant is palming off a spurious article upon the public, or is using "fake" testimonials in his advertising.

5. SAME.

Plaintiff long sold medicine known as "Castoria," but without having any trade-mark right in that name. Afterwards defendant began selling a medicine under the same name, with labels so different as to repel the charge of fraudulent or misleading imitation, but at the bottom thereof he placed conspicuously the words "New Label." *Held*, that he should be enjoined from so doing, as this might lead customary purchasers of complainant's article to think that complainant had adopted a new label.

Karnes, Holmes & Krauthoff and Danl. B. Holmes, for complainant.

Henry Wollman and Benj. F. Wollman, for defendants.

PHILIPS, District Judge. This case has been submitted on application for a temporary injunction. The bill was drawn with a double aspect: First, to restrain the defendants from using the name "Castoria" in their business of manufacturing and putting on the market the medicine or drug known by such name, on the ground that the complainant has acquired a trade-mark right to said name; and, second, that by reason of their imitation of the wrapper, label, and other indicia of complainant's manner of preparing the bottles containing the medicine for market, the defendants are engaged in unfair competition with the complainant's business.

It has been expressly ruled by the court of appeals of this circuit (opinion by Mr. Justice Brewer), in the case of *This Complainant v. Heinsfurter*, 28 C. C. A. 581, 84 Fed. 955, that, the patent under

¹ As to unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

which the medicine known by the name of "Castoria" was manufactured and sold having expired in 1885, the name which was descriptive of the article became public property, and that no trade-mark right exists therein, or could be acquired by subsequent use. It was further held that the right to manufacture Castoria, and to use the name in selling it, are also public property. This proposition was definitely settled by the supreme court in Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002. Mr. Justice White, who delivered the opinion of the court, said:

"It is self-evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the same, formerly covered by the patent, becomes public property. It is upon this condition that the patent is granted. It follows, as a matter of course, that on the termination of the patent there passes to the public the right to make the machine in the form in which it was constructed during the patent. * * * It equally follows, from the cessation of the monopoly and the falling of the patented device into the domain of things public, that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly, in consequence of the designation having been acquiesced in by the owner, either tacitly, by accepting the benefits of the monopoly, or expressly, by having so connected the name with the machine as to lend countenance to the resulting dedication. To say otherwise would be to hold that, although the public had acquired the device covered by the patent, yet the owner of the patent, or the manufacturer of the patented thing, had retained the designated name, which was essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly. In other words, that the patentee or manufacturer could take the benefit and advantage of the patent, upon the condition that at its termination the monopoly should cease, and yet, when the end was reached, disregard the public dedication, and practically perpetuate indefinitely an exclusive right. The public having the right on the expiration of the patent to make the patented article, and to use its generic name to restrict this use, either by preventing its being placed upon the articles when manufactured, or by using it in advertisements or circulars, would be to admit the right, and at the same time destroy it. It follows, then, that the right to use the name in every form passes to the public with the dedication resulting from the expiration of the patent."

With the evident purpose to avoid, if possible, the effect of this ruling, the bill of complaint ingeniously asserts that Dr. Pitcher, the patentee, and the complainant holding under him through assignments, did not strictly follow the formula of the prescription in the patent, as to one ingredient, and therefore the complainant has acquired, by long usage, a trade-mark in the word "Castoria," and that all other persons ought to be denied its use under any and all circumstances and conditions. This is a remarkable position for this complainant now to assume in a court of equity. During the life of the patent, it and its predecessors in right have enjoyed the protection of the patent, warning off all intruders, up to the adjudication against the complainant in the Heinsfurter Case, decided in January, 1898. In that case the complainant alleged that its right to such exclusive use was covered by the Pitcher patent, "numbered 77,758, granted to him for a composition to be employed as a cathartic, or substitution for castor oil," etc. When the patent was obtained the same formula was upon the article as now. And, before the trade-mark act was declared unconstitutional, the predecessor of the complainant, in the right by assignment to said patented article, in 1883, made application to have the trade-mark of the word "Castoria" registered; and

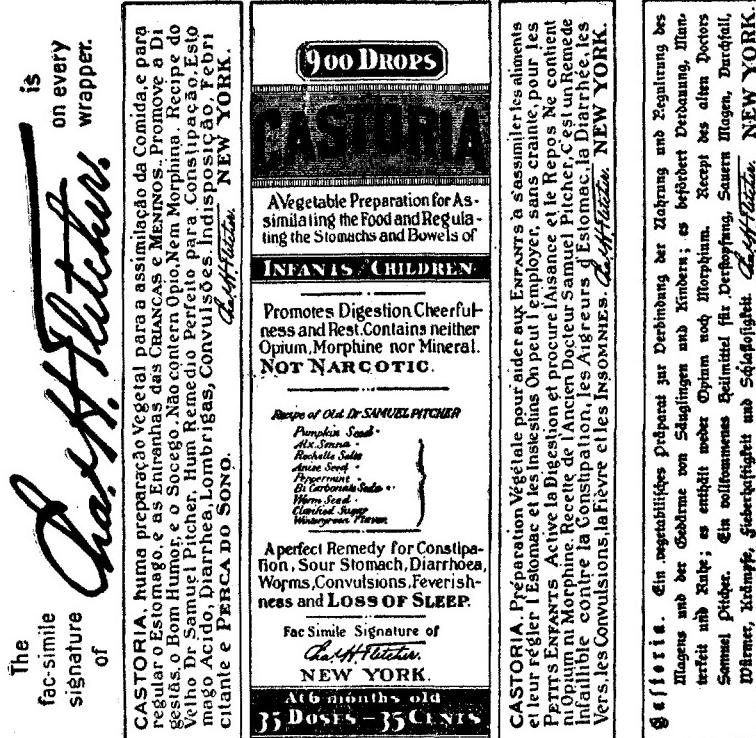
in that statement it was represented that the applicant had used the same in business since 1878, when she purchased the preparation or combination to which the same is applicable, "by deed of assignment of Demas B. Dewey, then owner of the same by assignment from Samuel Pitcher, who used the same before May 12, 1868, and to whom were issued letters patent No. 77,758, dated May 12, 1868, covering the composition to which I apply this trade-mark." In all of the advertisements of this article by the complainant, it refers to it as "Castoria—the kind you always bought." For the complainant now to change front, and announce to the court that it has not in fact followed the patented prescription, is little less than to plead its own deception upon the public, and to ask a court of equity to protect it so as to prevent any other person from either following the original formula, or from using the name "Castoria," where the party has substituted or added some one ingredient to the formula. Mr. Justice Field, in Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, discussing a kindred question, quoted the language of the lord chancellor in Leather Cloth Co. v. American Leather Cloth Co., 4 De Gex, J. & S. 137, and 11 H. L. Cas. 523:

"When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should, in his trade-mark, or in the business connected with it, be himself not guilty of any false or misleading representations; for, if the plaintiff makes any material false statements in connection with the property he seeks to protect, he loses—and that justly—his right to claim the assistance of a court of equity. * * * Where a symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it, or, in other words, the right to the exclusive use of it cannot be maintained."

Judge Taft, in Krauss v. Jos. R. Peebles' Sons Co., 58 Fed. 585, applied the same doctrine.

On the hearing of this application for a temporary injunction, it was stated by counsel for complainant that he did not expect or ask the court, as a basis for granting a temporary injunction, to determine whether or not, by reason of the matters alleged in the bill, the complainant was entitled, notwithstanding the ruling in the Heinsfurter Case, to assert the existence of the trade-mark right in the name "Castoria"; and therefore the court only presents this matter as it bears upon and affects the other ground of relief stated in the bill. If, as stated in the bill of complaint, and the affidavit of Mr. Fletcher presented in support thereof on this hearing, the complainant and its predecessors did depart in some material particular in the composition of Castoria from the original formula or prescription in the specifications of the patent, it does not appear that it ever took any pains to advise the public of such fact; and having during the life of the patent enjoyed its protection, and asserted in its litigation with Heinsfurter up to January, 1898, that it was claiming under the patent, its conduct in changing front, and now asserting a right to be protected for an acquired trade-mark in the name "Castoria," for the reason that it has not strictly followed the specifications of the patent, does not commend itself to a court of equity.

And it is difficult to separate this claim, presented both in the bill of complaint and the affidavit of Mr. Fletcher, presented to this court on the hearing, from the consideration of the remaining question, as to whether or not the defendants have been guilty of unfair competition. The complainant, notwithstanding it may not have asserted the trade-mark right, may have acquired an exclusive right to the manner of dressing up its preparation for sale, in the matter of labels, wrappers, and other indicia, so as to entitle it to the protection of the courts against imitative devices by other manufacturers, calculated to beguile the public into purchasing such other manufactures under the impression that they are those manufactured and sold by the complainant. The wrapper (with its wording and devices) of the complainant is here presented:



Contents, 900 Drops CASTORIA. Give to a Child 1 to 6 months old, 10 to 25 drops, 6 to 12 mos., 30 to 60 drops, 1 to 5 yrs., 1 to 2 tablets, adults, 5 to 15 yrs., 3 to 3 teaspoonsfuls; Adults, 1 to 2 tablespoonsfuls. Repeat in 2 hours and increase quantity when necessary. Emulsion very harmless. Shake before using.

Inhalts 900 Tropfen CASTORIA. Gabe einer Kinder von 1 bis 6 Monaten 10 bis 25 tropfen, 6 bis 12 Monate 30 bis 60 tropfen; 1 bis 5 Jahre, 1 bis 2 Tablettchen, Erwachsenen 1 bis 2 Gelschalenfull. Erwachsenen, 1 bis 2 Gelschalenfull. Gabe mehr als Kinder und verfärbe die Dose, wenn nötig. Bevorsichtigen und hässlich. Schüttle vor dem Gebrauch.

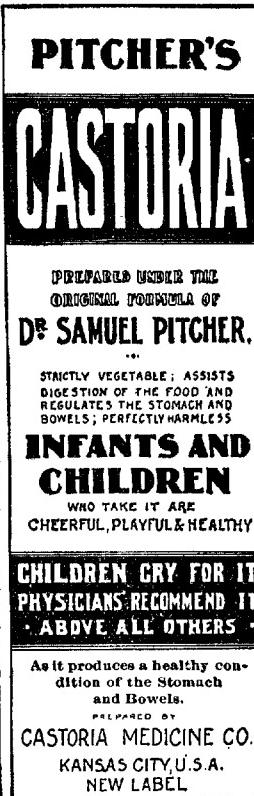
The one now in use by the defendants is here presented:

FULL DIRECTIONS ON LABEL.

Geo H Marshall.

Our genuine
Castoria bears
Fac-Simile
signature on
every wrapper

Pitcher's Castoria. — Siebart mit dem original Recept des Dr. Samuel Pitcher.
Eine Phlömen-Speise, welche die Verdauung unterstützen, bei Magen stark, den Säften
ganz regulirt, ohne irgend welche Nachfolgen. Kinder welche es gebrauchen sind
fröhlich und gesund. Kinder weinen für daselbe beruhigt. Siehe die Unterschrift von
anderen Kinder-Mitteln. Seine Freunde ebt, ohne die Unterschrift von
KANSAS CITY.



Price, 35 Cents

PITCHER'S CASTORIA.
THE CORRECT AND ORIGINAL FORMULA OF OLD DR. SAMUEL PITCHER.
.PUMPKIN SEED, WATERMELON SEED, ALEX SENNA, ROCHELLE SALTS,
PEPPERMINT, WINTERGREEN, CLARIFIED SUGAR,
OUR GENUINE CASTORIA BEARS FAC-SIMILE
SIGNATURE ON EVERY WRAPPER.

PITCHER'S CASTORIA.
For 40 years the Standard Remedy for Infants and Children.
THIS is the Genuine and Original Dr. Pitcher's Castoria compounded from the purest and
most select ingredients. Buy no other. Every bottle guaranteed.

It is true that prior to the institution of this suit the defendants used a wrapper, and at the time of the filing of the bill they were using a second wrapper, more objectionable than the one now in use. But as the defendants have satisfied the court that the first two wrappers have been abandoned by them, and will not be reused, an injunction on that ground should not be granted. The question therefore is, does the last one adopted come within the lines of forbidden imitation? It is quite obvious, even to an unscrutinizing eye, that there are radical differences on the face of these competing wrappers. The following is a fair summary of the more distinctive points of difference in the two wrappers: At the top of complainant's wrapper are the words "900 Drops," with white letters and black background, while at the top of defendants' wrapper are the words "Pitcher's Castoria,"—the word "Pitcher's" in black letters on a white background. The word "Castoria" on complainant's wrapper is in a crescent shape, with black letters and dark-colored penciled background; the letters varying in size on the complainant's wrapper from three-eighths to one-half inch. The word "Castoria" on the de-

fendants' wrapper is in white letters, seven-eighths inch in length, with intense black background; the letters being of different shape from that of complainant, and on straight lines. On complainant's wrapper appear the words "Infants and Children" in white letters on black background; and, while the words "Infants and Children" appear on the defendants' wrapper, they are in larger black letters, on white ground. The formula of the composition is given on the face of complainant's wrapper, while the defendants' is on the side, with some different ingredients, and printed in much larger and more conspicuous letters. On the face of complainant's wrapper is the statement that the package contains neither morphine nor mineral, with the words, in large letters, "Not Narcotic." These words do not occur on the defendants' wrapper. On the reverse side of complainant's wrapper occurs the fac simile signature of "Chas. H. Fletcher," stated to be "on every wrapper." And on the face and elsewhere occurs the fac simile signature of "Chas. H. Fletcher, New York." The defendants' wrapper states specifically on its face that it is "Prepared by the Castoria Medicine Co., Kansas City, U. S. A.;" and on the reverse side is given, as the evidence of "our genuine Castoria" the fac simile signature "on every label" of "Geo. W. Marshall." At the bottom of complainant's wrapper, with a black background three-eighths inch wide, occur in white letters the words, "At 6 months old 35 Doses—35 Cents." These words do not appear on the defendants' wrapper, but at the bottom of the wrapper occur the words, "Price, 35 Cents." On the face of the defendants' wrapper occur the words, "Who take it are cheerful, playful & healthy," not found on complainant's wrapper. On the two edges of complainant's wrapper are printed, in Spanish and French, legends or "catches," each one signed, "Chas. H. Fletcher, New York," while on only one edge of defendants' wrapper is a catch or legend, in German, with the words at the left-hand corner, "Kansas City," with the name of "Geo. W. Marshall" on the right-hand corner. On the other edge of defendants' wrapper is given the formula of "Pitcher's Castoria," signed, "Geo. W. Marshall," with the words "Kansas City" in the left-hand corner. On the back of complainant's wrapper is German print signed by "Chas. H. Fletcher, New York," whereas the language on the same side of defendants' package is in English, signed by "Geo. W. Marshall," of an entirely different composition, in which it is stated that: "This is the Genuine and Original Dr. Pitcher's Castoria compounded from the purest and most select ingredients. Buy no other." Complainant's wrapper is of yellow tint. That of defendants is white. The defendants' package is a little longer and wider than complainant's. The bottles differ somewhat in shape,—sufficiently to attract the attention of a casual observer. The neck of complainant's bottle is narrower at the top than the base, whereas the neck of defendants' bottle is the same width throughout, and has a heavy, round ring, while complainant's is smooth. And while it is true that the defendants have put upon the sides of their bottle practically the same directions, and a German legend, in respect of the wording, yet they are differently arranged; and what most obviously distinguishes these from com-

plainant's is the fact that on both sides of complainant's bottle the fac simile signature of "Chas. H. Fletcher," in glaring red letters, is stamped slantingly, while nothing of the kind appears on the flat sides of defendants' bottle. This difference is so pronounced that it would at once attract the attention of any purchaser who had ever used complainant's goods, the moment he removed defendants' wrapper. Blown into the edges of complainant's bottle are on one side the word "Castoria," and on the other "Dr. S. Pitcher's," while on the corresponding edges of the defendants are the words "Dr. Pitcher's Castoria," and "Castoria Medicine Company." These differences, in the main, are so marked that, in the absence of some other confusing indicia or device, it is hardly conceivable that even the casual observer who had been in the habit of purchasing complainant's goods, or who had acquired any knowledge of, or preference for, its Castoria, would mistake the one for the other. Putting the question in another form, reversing the position of the parties: Suppose that the defendants were seeking to enjoin the Centaur Company on the ground of undue competition in imitating defendants' wrappers, label, and indicia of manufacture; what standing would they have in court, on the comparison made herein? Superadded to the foregoing, it appears that in almost every conceivable way the complainant has taken pains to advise the public of its proprietorship and indicia of the Castoria made and sold by it. Conspicuous on the wrapper and label and every print in connection with its bottles is given the fac simile of the signature of "Chas. H. Fletcher," as the token of the genuine Castoria. And in the most extensive advertisements and placards the fact is made prominent everywhere that it is Fletcher's Castoria, manufactured and sold by the Centaur Company, to be looked after by the purchaser. As stated on the hearing, and shown by some of the exhibits, not controverted by the complainant, in the leading newspapers throughout the Union, in glaring display, the public are advised that Fletcher's Castoria is the only genuine article to be looked out for by purchasers, and the public are warned against all other manufactures. So it would appear that, if complainant has in fact established any trade-mark, it would be the name of "Chas. H. Fletcher," connected with "Castoria." So far from defendants in any way or anywhere imitating this name, they have, with singular conspicuity, on the wrapper and elsewhere, directed attention to the fact that their genuine Castoria bears the fac simile signature of "Geo. W. Marshall," and that this medicine is made by "the Castoria Medicine Company, Kansas City, U. S. A."

The bill does not allege, nor does it appear from the affidavits filed in support, that any purchaser of defendants' Castoria has ever been deceived into the belief that he was purchasing that of the complainant, or that the defendants have ever represented to any person that their goods were those of the complainant, or that they were laying any other claim to their product than that they were putting upon the market the original Pitcher's Castoria. No objection can be made to the latter representation made by the defendants by any one not entitled to the exclusive use of that formula, which the complainant does not have. In other words, unless the defendants, in some form

or manner, by their wrapper, label, wording, devices, or conduct, in presenting their goods to the public, so present the same as to likely deceive the purchaser into the belief that he is getting Castoria made and sold by the complainant, it is no business of its what the defendants do, or how they do it. It is claimed, for instance, by the complainant, that defendants employ some ingredients, such as water-melon seed, in their preparation, not found in the formula of Dr. Pitcher; and therefore the defendants are palming off on the community a spurious article. The complainant is not the guardian of the public against impostors or imposition. Whether the substitution for, or an addition to, the ingredients of Dr. Pitcher's prescription be an improvement, or deleterious, does not concern this complainant, unless it can make it appear that what the defendants are making and offering to the public is in some forbidden way represented to be the article manufactured and sold by the complainant. This is peculiarly so when the bill of complaint, as does the affidavit of Charles H. Fletcher in support thereof, discloses the fact that it is not fully pursuing the formula patented to Dr. Pitcher, and does not claim that it ever took any pains to advise the public of any departure therefrom, but, on the contrary, as already shown, has occupied for 30 years the attitude of pursuing Dr. Pitcher's formula, with a prescriptive right to its use.

Complaint is made in argument, based upon an affidavit, that the defendants, in one of their circulars inclosed within their wrappers, gave what purports to be an extract from Hall's Journal of Health commendatory of Castoria, which it claims was not furnished to the defendants, but to the complainant and its predecessors, with the exception that the defendants have interpolated in their circular the words "watermelon seed," as a part of the composition, so as to make it conform to the formula given on their label. It would be a sufficient answer to this criticism to say that no issue is presented respecting this in the matters complained of in the bill. Aside from this, however, it is expressly stated on the face of this circular that: "To guard against imitations, see that our fac simile signature by the Castoria Medicine Company is on every wrapper. Castoria Medicine Company." And on the back of this circular appears what are claimed to be commendatory letters from patrons, addressed to the Castoria Medicine Company, Kansas City, Mo. So there is nothing about it to indicate that the goods offered by the defendant company were represented to be of the make of the Centaur Company. Unless the courts, in view of a recognized habit of most of the concerns engaged in exploiting like drugs to present "fake" testimonials, ought to apply the maxim, "Consensus facit legem, communis error facit jus," we might justly reprehend the act of the defendants for circulating fictitious testimonials; yet the courts have not undertaken to enjoin the practice at the instance of some competing tradesman, except when and where it is made to appear that what the defendant is doing is such an imitation of the complainant's earmarks as is reasonably calculated to impose upon purchasers, in mistaking the goods of the one for those of the other. To avoid even the appearance of offense in this particular, defendants' counsel

offer to discontinue the use of this portion of the circular, and, if they will file in this case their written statement to this effect, it will be accepted by the court; and it should be satisfactory to the complainant, if its purpose in this litigation be merely to prevent unfair competition in business, and not to wholly occupy the field in exploiting the medicine known as "Castoria."

Objection is made in argument, though not asserted in the bill of complaint, to the fact that defendants have printed on the face of their wrapper the words: "Children cry for it; physicians recommend it," etc. These words do not appear on complainant's wrapper, or elsewhere about its bottles; but its contention is that this phrase has become catchwords appropriated by it in advertising. It is not claimed that complainant has acquired any trade-mark in these words, or that they are descriptive of its manufacture. Therefore the only possible ground upon which the interference of the court can be invoked against the use of the expression by the defendants on their wrapper must be that it is calculated to impress purchasers of defendants' Castoria with the belief that they are buying that of complainant's manufacture. The case of *Reddaway v. Hemp-Spinning Co.* [1892] 2 Q. B. 639, cited by counsel, does not support the contention that such words, employed in the manner stated here, should be regarded as descriptive of complainant's manufacture. In that case the plaintiff sold belting for machinery, which they called "Reddaway Camel-Hair Belting." The defendant later sold the "Bentham Camel-Hair Belting." It was held by the court that the catchwords are "Camel-Hair Belting," and therefore the plaintiff was entitled to have their use restrained, because of the liability to pass off defendant's goods as those of the plaintiff. If the complainant here has any such catchword it is rather that of "Fletcher's Castoria." The statement that "children cry for it, and physicians recommend it," is rather the expression of a fact in commendation of the virtue of Castoria as a medicine for children, than descriptive or indicative of that manufactured by the complainant. If children do cry for, or physicians do recommend, defendants' Castoria, there is no law known to this court that would prevent them from advertising the fact to enhance sales, and no law that gives to the complainant the exclusive use of such term of expression.

The defendants employ upon the face of their wrapper, at the bottom thereof, the words "New Label," which impeach, in my judgment, their good faith. For what purpose are these words thus printed? No satisfactory explanation is furnished in the affidavit presented by Mr. Marshall. It cannot be said, even plausibly, that these words refer to the fact that, as defendants had used two other wrappers prior to this, they merely sought to let it be known to purchasers that the Castoria under the new cover is the same heretofore put upon the market by them under the older covers; for the palpable reason that these words, in the same position, appear on both of the antecedent wrappers. A purchaser who had been in the habit of buying Fletcher's Castoria, on seeing these words so conspicuously on the defendants' wrapper, might be deceived thereby into the conclusion that while this wrapper, in its general appear-

ance, is quite different from that usually employed by the Centaur Company, perhaps the old company had dressed up its goods in a new cover. The use of the words "New Label" by the defendants will be enjoined.

KELLY et al. v. SPRINGFIELD RY. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 551.

1. PATENTS—INVENTION—ELECTRIC RAILWAYS.

After dynamic-electric machines and electric motors were invented, sufficiently powerful and economical to operate a street railway, there was no invention in combining them with a track and cars by a plan or system previously well known, and which had been unsuccessful solely because the electric machines then in use were defective.

2. SAME.

The only combination shown in the specifications of a patent for an electric railway was one in which the electricity is carried by one insulated rail and the wheels on it to the motor, and back by the wheels and the other rail. There was a suggestion that independent conductors might be used, but no suggestion as to how contact therewith was to be maintained by the moving car; and at that time there was no practical device for maintaining contact with an overhead wire. *Held*, that the patent could not be pieced out, by reference to the art, so as to include in the combination an overhead wire and contact device.

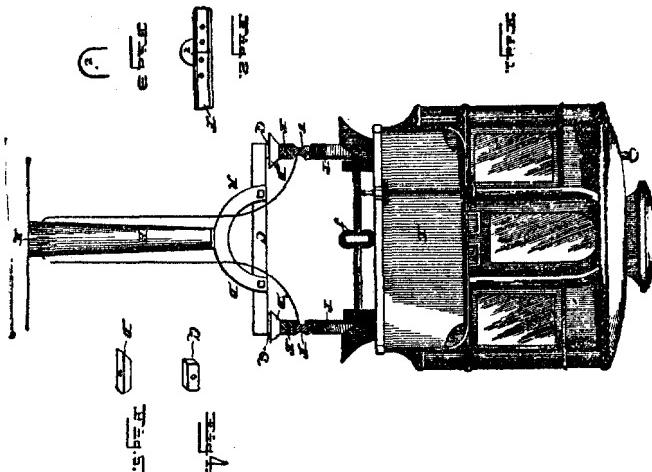
3. SAME.

The Green patents, Nos. 465,407 and 465,432, for an electric railway and means of operating the same, if valid at all in view of the previous state of the art, are confined to a combination in which the electricity is carried to the motor by one insulated rail and the car wheels, and back through the other wheels and rail or the ground, and is not infringed by the overhead wire and trolley-contact system.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This is a bill in equity to enjoin the infringement of two patents issued to George F. Green, assignor to Oliver S. Kelly, the complainant herein. The patents are numbered 465,407 and 465,432. The application for the first patent was filed September 15, 1879, and the second patent May 15, 1886. The first patent was issued December 15, 1891, to George F. Green, assignor to Oliver S. Kelly. The drawings and specifications of the patent are shown below.

"Figure 1 is a transverse section of the track and an end elevation of the car. Figs. 2, 3, 4, and 5 are details of the track. The object of my invention is to propel cars rapidly and easily without the annoyance and difficulty of transmitting the source of energy whereby the cars are propelled. I therefore locate my source of electrical energy or means of electric supply at the end of the track, or at any convenient points along the track, and let the engine only travel with the cars. Independent conductors may be used, but I prefer to employ the track rails for conductors, the cars feeding their engine from the track as they travel along. The required electricity may be produced by any of the known methods. The track or rail, being charged from the station battery or any other means of electric supply well known in the art, conducts the electric current to the wheels on the cars, and thereby to the engine on the cars. One rail of the track being connected with the positive pole, the other rail may be connected with the negative pole, and the current flows from the battery or other means of electric supply on one side of the



track up into the car through the engine and back on the other side of the track to the battery, making a complete metallic circuit. H is a post or proper support for the railway track, and C is one of the cross-ties whereon the string-rails, E, are mounted. A, B are proper braces for the structure. F, F are the metallic rails mounted on the stringpieces, E and D, and G, G, are insulators to prevent the escape of the electric charge. K is a stationary source of electric energy or means of electric supply in electrical connection with the rails, F, F, or other insulated stationary conductors. L is a car, the wheels, P, whereof are adapted to travel on rails, F, and J is an electric motor mounted upon the car, and supplied with electricity by a metallic connection with the track conductor. Through this motor, which is of any of the common forms in practical use, and well known in the art.—such, for instance, as that described in my patent No. 184,469, dated November 21, 1876,—the electric current flows continuously, and the coils of said motor are constantly excited (except at that instant of time when the current through said coils is being reversed) so long as the poles of said motor are in circuit with the electric generators, whereby a positive and continuous propelling force is transmitted to the driving wheels of the car. When the common form of uniting the ends of the track rails is found insufficient to make good metallic connection from one rail to the other, I use a U-shaped loop, i, of metal, as seen in Figs. 2 and 3, and secure its ends to the rail by solder or otherwise. The projecting U-shaped surface on the block, D, prevents the insulator, G, from becoming wet, because an electric current will run across a wet surface, and escape. The upper side and under side of the block, D, can be covered with a varnish, rubber, or other nonconducting substance. L is an ordinary railway car, but this will be understood to be merely typical. The engine, J,—an ordinary electric motor which furnishes the motive power,—is attached to the car in some proper manner. The electrical current from the stationary source of energy or means of electric supply charges and traverses one of the rails, F, and passes thence to the engine or motor by means of the car wheels, P. After passing the engine or motor, the current is circuited back to the battery by way of the opposite wheel and rail.

"Having, therefore, described my invention, what I claim as new, and desire to protect by letters patent, is:

"(1) The combination, substantially as set forth, of a railway track, one or more stationary means of electric supply, electrical conductors extending from said means of electric supply along the lines of said track, and consisting wholly or in part of the rails thereof, vehicles moving along said track, electro-dynamic motors whose coils are constantly excited so long as the poles

of said motors are in circuit with the means of electric supply, fixed upon said vehicles for imparting motion thereto, and wheels supporting said vehicles upon the track, and also serving to maintain continuous electrical connection between said means of electric supply and motors, substantially as described.

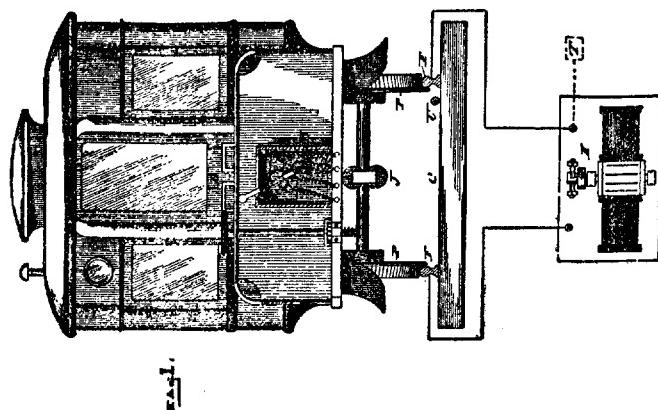
"(2) The combination, substantially as set forth, of a railway track, one or more stationary electric batteries, electrical conductors extending from said batteries along the lines of said track, and consisting wholly or in part of the rails thereof, vehicles moving along said track, electro-dynamic motors whose coils are constantly excited so long as the poles of said motors are in circuit with the electric batteries fixed upon said vehicles for imparting motion thereto, and wheels supporting said vehicles upon the track, and also serving to maintain continuous electrical connection between said batteries and motors, substantially as described.

"(3) The combination, substantially as set forth, of a railway track, one or more stationary means of electric supply, electrical conductors extending from said means of electric supply along the lines of said track, and consisting wholly or in part of the rails thereof, vehicles movable along said track, electro-dynamic motors fixed upon said vehicles for imparting motion thereto, and wheels supporting said vehicles upon the track, and also serving to maintain continuous electrical connection between said means of electric supply and said motors, substantially as described.

"(4) The combination of a railway track, one or more stationary means of electric supply, electrical conductors extending from said means of electric supply along the lines of said track, and consisting wholly or in part of the rails thereof, vehicles moving along said track, rotating electro-dynamic motors fixed upon said vehicles for imparting motion thereto, and wheels supporting said vehicles upon the track, and also serving to maintain continuous electrical connection between said means of electric supply and said rotating motors, substantially as described."

Patent No. 465,432 is for substantially the same combination as that shown and claimed in the foregoing, and was only applied for by Green in order to substitute in the combination for the battery a dynamo-electric generator, a change which the patent office refused to permit in the original patent. The second patent did disclose and claim as an additional element of the combination a current controller, placed upon the car, to enable the motorman to shut off and reverse the current. Only one feature of the second patent needs notice. The specifications contain the following: "In case only one rail is insulated, the return current may be taken back by ground as indicated by dotted lines at T, Figure 1, or by means of an independent conductor, as indicated at U, Figure 1."

The figure 1 referred to is below:



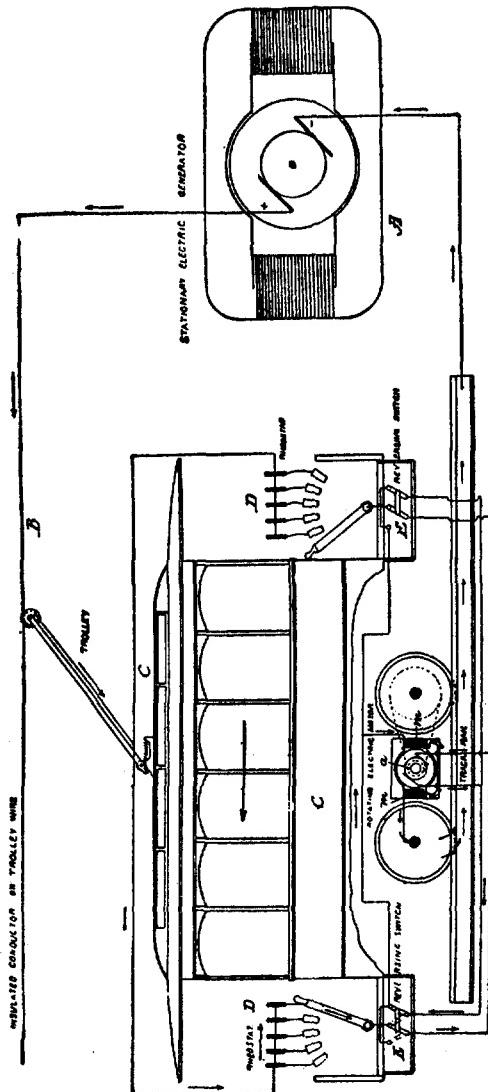
The original application for the first patent, No. 465,407, was filed August 19, 1879. In that application Green said: "This invention relates to the forms of track generally used, but, instead of carrying the engines and their means of supply along on the track, I leave my supply at the end of the track, or at different points on the track, and let the engines travel with the cars; the cars feeding their engines from the track, as they travel along, I charge my track or track rail with electricity produced by any of the known methods of producing electricity, but, instead of carrying the battery or means of supply along on the cars, I leave the battery at convenient stations on the track, and use the track or rail to conduct the [current] circuit to the engines, the wheels on the cars being used to connect the engines on the cars with the track; and, when some independent conductor is not used, I make the rail or track on one side of the car negative, and the rail or track on the other side positive, letting the current flow from the battery on one side of the track up into the car through the engines back on the other side of the track to the battery." And the only claim of importance in this application was the first, which was as follows: "First. The track being used as a cable to connect the engines on the cars with the electric supply at the end of the track or at different stations along the track, as set forth in the foregoing specifications."

The application remained in the patent office for eleven years. This was due to certain interference proceedings and through delays for which the patentee does not seem to have been responsible. Early in the history of the application, Green, the patentee, sold the invention to Kelly, the complainant. The record shows that in 1856 Green devised a model of an electric railway with a stationary source of electrical supply, a motor upon a car, and a circuit between the two, maintained through the insulated rails and the wheels of the car insulated from each other. Nothing was done by Green thereafter until 1870. In 1875 he completed a larger model of a railway with a motor. He applied for a patent upon the motor in 1876. In 1875 he exhibited this model of a railway, which was about 200 feet in length. The electricity was supplied from voltaic batteries, and the current was conducted from the battery by one insulated rail through the wheels to the motor on the rear, and was returned to the battery by the wheels and the other insulated rail. His shop in which this model was exhibited was visited by a great number of people. Green testifies that the reason why he did not then apply for a patent was that he was not financially able to do so; that he was engaged in an effort to secure capital with which to construct his railway and to procure patents. In 1879 he did interest some one with him, and applied for the first of the patents here in suit. The patent office rejected the claims under the first patent, and an appeal was taken from the decision of the commissioner of patents to the supreme court of the District of Columbia, which allowed four of the five claims which had been rejected. The opinion of the court is to be found sub nomine *In re Green*, 20 D. C. 237. Green's 1879 railway was 50 or 60 feet long, and the car was large enough to hold 5 or 6 people. The circuit in that was made up by insulated rails and the wheels. Green never made a model of the railway having an overhead wire as a conductor, and never operated such a railway. He testifies that in 1871 he made a sketch showing a street car with an overhead wire and a contact device consisting of two rollers supported above the car. This sketch was seen by several witnesses within the next two or three years after it was made, and these witnesses take the stand and testify to their having seen the sketch. But no model was ever made in accordance with the sketch, nor is it claimed that Green ever constructed a railway on such a plan.

In reference to the electric railway used by the defendants the following stipulation was entered into: "It is hereby stipulated, for the purposes of this case, by counsel for the respective parties, as follows: First. That the defendants have operated for regular commercial purposes an electric street railway in the city of Springfield, in the Southern district of Ohio, subsequent to the grant of letters patent of the United States, Nos. 465,432 and 465,407, mentioned in the bill of complaint herein, and prior to the filing of the said bill of complaint. The defendants have continued to operate, and are still operating, the said electric railway. Second. That the said electric railway, operated as

aforesaid by the defendants, is constructed in accordance with the diagram put in evidence, and marked 'Complainants' Exhibit Diagram of Defendants' Electric Railway,' wherein A indicates a stationary source of electric supply, consisting of a dynamo-electric machine of the ordinary Westinghouse type. The positive pole of the dynamo is connected electrically with an insulated trolley wire, B, extending along the line of the road, and insulated and suspended over the street in the customary manner. The cars, one of which is shown

**COMPLAINANTS' EXHIBIT.
DIAGRAM OF DEFENDANT'S ELECTRIC RAILWAY.**



in the diagram at C, are equipped with a trolley of the ordinary so-called 'Nuttall' type, making a traveling underneath contact with the trolley wire, B. From the trolley the electrical circuit passes through a rheostat, D, a reversing switch, E, the armature, a, field magnets, m, of the electro-dynamo motor, M, and thence through the wheels of the car to the track rails, which are connected electrically with the negative pole of the dynamo, A. The motor is of the ordinary Westinghouse type, series wound, and comprising field magnets and a rotating armature, which drives the car by gearing between the armature and axle. The circuit is indicated on the diagram by arrows, and may be traced from part to part in detail as follows: From the positive pole of the dynamo to the trolley wire, the trolley, the rheostat, one member of the reversing switch, the armature of the motor, the second member of the reversing switch, the field-magnet coils, and thence through truck frame and wheels of the car to the rails and the negative pole of the dynamo. By throwing the reversing switch into the dotted-line position, the direction of the current in the armature of the motor is reversed relatively to that in the field magnets, so that by operating the reversing switch the rotation of the armature and the movement of the car may be reversed at will."

The circuit court, after a hearing on the merits, found that the defendant railway did not infringe the patents in suit, and dismissed the bill. 81 Fed. 617. From this decree the defendants appeal.

Julian C. Dowell, for appellants.

Thomas B. Kerr and James H. Hoyt, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). The combination here patented consists of the following elements: First, a railway track; second, stationary means of electric supply; third, electrical conductors extending from said means of electric supply along the lines of the track, and consisting wholly or in part of the rails thereof; fourth, vehicles moving along said track; fifth, electrodynamic motors, whose coils are constantly excited so long as the poles of said motors are in circuit with the means of electric supply fixed upon said vehicles for imparting motion thereto; and, sixth, wheels supporting said vehicles upon the track, and also serving to maintain continuous electrical connection between said means of electric supply and motors, substantially as set forth. As early as 1840, a patent was issued to one Pinkus, in England, for the application of electricity to locomotion of vehicles, including railway cars. In the specifications he provided a stationary source of supply of electricity, a motor upon the car, to be actuated by the electric current, and two parallel electrical conductors extending along the track between the rails to maintain the electrical circuit between the stationary source of supply and the motor. The connection between the car and the conductors was maintained by two so-called electro-magnetic slides, which, being attached to the car, were intended to trail or slide along on the conductors, maintaining constant contact and an unbroken circuit. Five years later—in 1845—an article was published in the Mechanic's Magazine, in which it was suggested that a plan for an electric railway was feasible in which there should be a stationary source of supply, and a motor upon the car, and that the electrical circuit between the source of supply and the motor on the car might be maintained by using the rails of the

track and the wheels as conductors. In 1847, a Dr. Colton, a popular lecturer on scientific subjects, in order to show the possible applications of electricity as a force, devised, in conjunction with one Lilly, a machinist, a model of an electric railway. He built a circular track six feet in diameter, insulated the rails, placed thereon a car upon which was a motor consisting of two electro-magnets with an armature over each, by the reciprocating operation of which, motion was given to a crank that turned cogwheels geared with the wheels of the car. The current was carried by a wire from the positive pole of the battery to one of the rails of the track, through the wheels traversing that track to the motor, and thence through the wheels on the other rail to that rail, and thence by wire to the battery again. This model, in operation, was exhibited, and its principle explained, by Dr. Colton, in all the large cities of the country, to 50,000 people, and descriptions of it appeared in all the daily papers of that day and in the Scientific American and other scientific publications. In 1853 an English patent was issued to Dugmore and Millward for electric signaling from one train to another, in which is suggested as a practical alternative mode of carrying the current from one train to the other the use of the rails of the track and the wheels of the locomotive on each train to maintain the electrical circuit. In 1855, in a patent issued to one Guyard for a method of signaling between trains, as an alternative method, is suggested a circuit consisting of an overhead wire, a contact device on the cars, and a return by way of the wheels and the rails and the earth. In the Wesson's United States patent, issued in 1857, for communicating signals from a station to a moving train, the suggestion is made that the electricity could be carried to the train by means of the insulated tracks. In an English patent to Clark, of 1864, for electric generators and motors, rails and wheels were used to carry the current from a stationary source of supply to the motor on a railway car and back again. There are other suggestions of the same kind between 1864 and 1879, when Green applied for the first patent in suit.

Counsel for complainant object vigorously to all these references to the prior art as grounds for denying novelty to Green, for the reason that none of the devices were operative, or commercially available for the construction of a street railway. This is probably true. Prior to 1872, the expense attending the production of electricity sufficient to run a street railway by any of the then known methods was so enormous as to make an electric railway an impossibility. It was not until 1867 or 1868 that a practical machine for turning electricity into propelling force was devised which was powerful enough to move the modern street car. Given a practical stationary source of electrical supply, and given a practical motor, the prior art was full of practical suggestions of the method Green afterwards adopted by which the current might be carried from one to the other without interrupting the progress of the traveling car. Green does not narrow his combination to the use of any particular method of producing electricity, but includes therein any well-known method. He does narrow somewhat his motor to one whose coils

are constantly excited so long as the poles of the motor are in circuit with the means of electric supply. This was, however, the common and best class of motor in use then, and is still. Green does not and cannot claim in this patent any novelty for either his source of supply or his motor. The gist of his invention, if he made any, is in the system or plan by which he brought into correlation a practical stationary source of electricity and a practical electrical motor for changing the current into propelling force. After dynamic-electric machines and electric motors were invented which would do the work required, then Green united them by a plan or system which had previously been unsuccessful solely because the electric machines then known were defective. Did it involve an exercise of the inventive faculty to substitute good machines in the combination for defective ones when the functions to be performed had been clearly outlined in the prior art? Was there anything new discovered in the quality of the electric fluid to be conveyed which made the problem of conveying it from a practical electricity-making machine to the practical force-producing machine on the moving car any different from the problem when the machines were defective and feeble, but the possibility of their perfection was conceived of, and confidently predicted? We have found nothing in the record, or in the arguments or briefs of counsel, or in a careful consideration of the patents themselves, that will justify an affirmative answer to these questions. The additional element of a current controller in the combination of the second Green patent, and the suggestion therein that a dynamo might be used as a source of supply, do not save that patent from the fatal defect of a lack of invention. As far back as 1840, the Pinkus patent included in the combination there proposed a motor which had a current controller. The advantage of means for reversing the current and the motion of the car would seem to have been so obvious that it could not have involved an exercise of the inventive faculty to add it here when such means had been shown in the prior art.

There is satisfactory evidence that Green made a working model of his electric railway in 1875, and that he exhibited it to many thousand people at his shop. Green says that he conceived his invention in 1856, when he constructed and operated a small circular-electric railway very like that of Lilly and Colton. Defendants attack complainant's patent, which was not applied for until 1879, on the ground that his railway of 1875 was in public use more than two years before his application. Without passing on this issue, it suffices to say that Green's earlier conceptions of his plan do not aid his case, for the Pinkus, the Lilly and Colton, and the Dugmore and Millward suggestions of a system including a stationary source of supply combined with a motor on the car and an electrical circuit of the rails and wheels were made prior, even, to the first conception by Green of his system in 1856. It cannot be too emphatically stated that Green's claims in these patents are for combinations of parts, and not for the parts themselves. He had secured a patent for a motor prior to making his application for the first of the patents now in suit, but the invention involved in devising that ma-

chine is of no moment in considering the question of invention in the combination, for it is not claimed that the peculiarities of that motor presented any new problem of carrying the current to the poles of the motor from a stationary source of supply. We think, therefore, that Green's patents are void for want of patentable invention.

But, even if Green's patents could be sustained, it could only be on the ground that the combinations patented are to be distinguished from those shown or obviously suggested in the prior art by the fact that with the new machines for making electricity, and new machines for converting it into propulsive force, the combination was operative, and could be actually used to run a street railway. The scope accorded to the claims must, therefore, be limited strictly to the combination disclosed in his patent, which could be made practically operative by following the directions of the specifications. The only combination thus shown in the specifications is one in which the electric fluid is carried by one insulated rail and the wheels on it to the motor, and back by the wheels on the other rail, and that rail either insulated or grounded so as to permit either a complete metallic circuit or an earth return. There is a suggestion in both patents that independent conductors may be used, but there is no suggestion as to how the contact between those conductors and the moving car is to be maintained, unless the specifications are to be construed as meaning that conductors are to be used so connected with the rails that the wheels may still be used as contact devices. The defendant does not insulate either rail, and uses an overhead wire with an under-running trolley contact. It is contended by counsel for the complainant that it is permissible to imply in his specifications the use of any contact device then known in the art for keeping continuous connection between the independent conductor and the moving car. What contact devices were then known in the art? We are referred to the one shown in the Pinkus patent, called by the patentee an "electro-magnetic slide." But it is quite clear that such a slide could not be used with an overhead wire used in defendants' railway without changes involving much more than mechanical skill. And it is quite probable that the Pinkus device, even as used, would not be of any practical value. The fact is that in 1879 there was no contact device known in the art, capable of use with an independent conductor, especially an overhead wire, which had been proven to be practically operative. Green had never used one on his railway models, and, although he shows a sketch, made, as he says, and as attesting witnesses say, in 1871, in which an overhead wire and a contact device of double rollers are shown, he never made such a conductor, or such a contact device, or demonstrated their operativeness; and when he applied for a patent he failed to disclose either overhead wire or contact rollers. The history of the art of electric railways is made up in three great steps: First, the invention of a machine or motor for converting the electric fluid into propulsive force without material loss; second, the invention by Gramme of an electric generator which would produce the electric fluid in great quantity and high intensity at such a price as to make the operation of heavy

street cars commercially possible and profitable; and, third, the invention of a practical contact device for keeping constant the connection between the overhead wire used for carrying the positive electricity and the moving car. This last device was invented by Van De Poele in 1886 or 1887, and is called the "under-running trolley." Other contact devices were invented and known before Van De Poele's, but, although cars could be moved by them, they did not prove to be efficient, or really practical. When Green applied for his patent, in 1879, so far as this record shows, there was no operative and practical contact device known to the art for connecting moving cars electrically with an overhead wire. It therefore follows that the indefinite suggestion of independent conductors in Green's patents cannot be enlarged or pieced out by reference to the art to make an operative combination of that which we find in defendants' railway, to wit, a stationary source of electrical supply, a circuit consisting of an outgoing current to the car by an overhead wire and a suitable contact device, and a return circuit by the wheels and the rails or the earth. A careful reading of the history of Green's patent in the 12 years his application was pending in the patent office, leaves no doubt in our minds that the combination for which Green intended to procure a patent, and the only one he did intend to patent, and the only one he was entitled to have patented, if any, was a circuit in which the rails were to form the conductors, and the wheels were to be the collectors or contact devices. The really accidental reference to independent conductors contained in the original application of Green was made the unfounded basis as the art progressed, and as the fact that success was to lie with the overhead conductor became plain, for changes of language in the specifications and claims which give color to the argument that the combination intended and disclosed by Green when he filed his application really included independent conductors and other contact devices than the wheels. We concur, therefore, in the view of the judge of the circuit court that the defendants' railway does not infringe the patents of the complainant. The decree of the circuit court dismissing the bill is affirmed.

WALDO v. AMERICAN SODA FOUNTAIN CO.

(Circuit Court, D. New Jersey. March 16, 1899.)

PATENTS—LICENSE TO SELL AND MANUFACTURE—CONSTRUCTION.

The complainant, being the owner of letters patent of the United States No. 264,586, for an improvement in soda-water apparatus, executed a license to a firm, conferring upon it, among other things, the exclusive right to make, use and sell the patented invention as applied to new soda-water apparatus "of their own manufacture only," and providing that the license "shall be binding on the parties hereto, their heirs, successors, administrators or assigns, and shall be valid until the 19th day of September, 1899, or unless sooner terminated by the written consent of both parties hereto." Held, on consideration of all the provisions in the license, that in imposing the restriction "of their own manufacture only" the complainant intended that the right to make, use and sell the

patented invention as applied to new apparatus should only be confined to such person or persons as should hold the license from time to time during its term and manufacture such apparatus, and not exclusively to the firm, and that therefore the license was assignable.

(Syllabus by the Court.)

In Equity.

Denis A. Spellissy, for complainant.

Clarkson A. Collins, for defendant.

BRADFORD, District Judge. The bill in this case charges infringement of letters patent of the United States No. 264,586, for an improvement in soda-water apparatus issued to the complainant September 19, 1882, and prays for an injunction and an account. The patented invention is an acid-feeder used in connection with such apparatus. The defendant by way of plea justifies the acts complained of as infringements by virtue of a license executed by the complainant to the firm of John Matthews and subsequently, as alleged, assigned to the defendant. On or about March 16, 1886, the complainant and the firm of John Matthews, a co-partnership then composed of John H. Matthews and others, entered into an agreement under seal, as follows:

"This agreement, entered into this thirteenth day of March, 1886, between the firm of John Matthews, of New York, in the County and State of New York, party of the first part, and Francis S. Waldo, of the same place, party of the second part, witnesseth:

"Whereas, the said party of the second part is the owner of letters patent of the United States No. 264,586, issued Sept. 19th, 1882, for an acid-feeder for use on soda-water apparatus,

"And whereas, the said party of the first part is desirous of acquiring the exclusive right of manufacturing, using and selling said patented invention as applied to new machinery, and also the right to apply the same to old machinery,

"And whereas, the said party of the second part has granted unto one Martin V. B. Watson, of San Francisco, California, the exclusive right for the term of five years of manufacturing, using and selling said invention in the states of Nevada, California, Oregon and the Territories of Idaho, Washington, Arizona, Montana and Utah, which license will expire September 12th, 1889,

"Now, in consideration of the sum of one thousand dollars (\$1,000) in hand paid to said party of the second part by said party of the first part, the receipt of which is hereby acknowledged, and of the covenants and conditions hereinafter contained, to be well and truly kept by said party of the first part, the said party of the second part has granted and by these presents does grant unto said party of the first part the exclusive right, liberty and license for the whole term of said letters patent, of making, using and selling said patented invention as applied to new machinery of their own manufacture only for that part of the United States not covered by the license to M. V. B. Watson hereinabove set forth, and at the expiration of said license to Watson the exclusive right of making, using and selling the said patented invention throughout all the United States and territories thereof as applied to new machinery.

"It is agreed, that said party of the first part shall have the further right, which shall not be exclusive, of manufacturing and selling said patented invention to be applied to old machinery until the number sold, including those sold to be applied to new machinery, as hereinafter expressed, shall reach one thousand (1,000) and that when said number shall have been sold, the right of the party of the first part to sell said patented invention to be applied to old machinery shall cease and determine.

"It is agreed, that in the construction of this agreement the term 'new machinery' shall refer to machinery which shall have been used for less than six months, or not at all, before the improvement is applied thereto, and the term 'old machinery' to machinery which shall have been in use for more than six months before the improvement is applied thereto.

"It is agreed, that every article containing the patented invention, and sold by either of the parties hereto, shall be marked with the word 'patented' and with the number or date of the patents, and shall be accompanied by a user's license properly filled out and signed by the party selling, the form of said license being annexed hereto and marked 'Schedule A.'

"The parties hereto hereby agree not to sell below the prices in 'Schedule B' annexed, but said prices may be changed at any time by mutual agreement; said party of the second part agrees not to sell said patented invention for use on old machines to any manufacturer of soda-water apparatus, and to advertise the fact that the said party of the first part has the exclusive right of selling said patented invention for application to new machinery.

"Said party of the first part agrees to advertise and endorse said invention in their catalogue and advertisements and through their salesmen, and not to sell said invention directly or indirectly to other manufacturers of soda-water apparatus.

"Said party of the second part agrees to pay to said party of the first part a commission of twenty (20) per cent. on the selling price of the patented acid-feeder on all orders for the same turned over to him by said party of the first part, provided he accepts the order, said payments to be made at the time said party of the second part is paid for said acid-feeder.

"It is agreed that full and true accounts shall be kept by each party hereto of every license issued by said party, such account to contain an accurate description of the machine to which said license is applied, name and address of the purchaser and date and terms of sale. And such account is to be open to the inspection of the other party to this agreement at any reasonable time.

"The said party of the first part agrees to render to said party of the second part annually on the first day of August, or within twenty days thereafter, a sworn statement of all users' licenses granted by them during the preceding year.

"In further consideration of said sum of one thousand dollars the said party of the second part covenants and agrees that he has a full and unencumbered title to the patent hereby licensed, with the exception of the license to Watson hereinabove set forth.

"This agreement shall be binding on the parties hereto, their heirs, successors, administrators or assigns, and shall be valid until the 19th day of September, 1899, or unless sooner terminated by the written consent of both parties hereto.

"In testimony whereof, the said parties have hereunto set their hands and seals the day and year first above written.

Firm of John Matthews, [Seal.]
J. Matthews.

F. S. Waldo. [Seal.]

"Sealed and delivered in the presence of Joseph Connor.

"Interlining page 2, between lines 4 and 5, were there at the time of signing above. J. C."

"Schedule A.

"License No.

"In consideration of \$ paid or to be paid we hereby license Mr. of to use the invention known as the Waldo acid-feeder, covered by letters patent No. 264,586, issued Sept. 19th, 1882, on his one generator, of which the following is a full and accurate description.

"It is distinctly understood that this license applies to above-described generator only, and the use of the invention without proper license on any other generator will subject the user to a suit for infringement of above letters patent.

"[Signed]

F. S. Waldo, Inventor.

Firm of John Matthews, Licensee."

"Schedule B."

"Schedule of Prices.

"Price of feeder, including license to use to be until otherwise agreed, not less than \$50.

Firm of John Matthews,

J. M.

F. S. Waldo."

Afterwards, on or about June 25, 1891, the surviving members of the firm of John Matthews and the personal representatives of such deceased persons as had been entitled to any interest or share in the property and assets thereof executed an assignment purporting to transfer absolutely to the defendant, among other things, the above license, subject to a certain proviso not material to be considered here. The defendant claims that the license from the complainant to the firm was assignable and was validly assigned to the defendant, and that all its acts in the manufacture, use and sale of the patented acid-feeder were within the scope of the license. It further claims that if the license should be held not assignable, the defendant was nevertheless entitled to the benefit of it, not as assignee, but as successor to the business of the firm. The complainant, on the contrary, contends that the license was not assignable and that the defendant was not such a successor to the business of the firm as to entitle it to its protection. The license is artificially drawn and an ascertainment of its scope or assignability or non-assignability involves careful examination and consideration of it as a whole. The draft when first submitted to the complainant for execution did not contain in the paragraph next following the recitals the words "of their own manufacture only." The evidence shows that he refused to sign the contract unless those words should be incorporated therein, for the reason that, without them, he thought "it would be a general license; it was not intended to be a general license." There was consequently an interlineation of those words and thereupon the contract was executed. The insertion, under the circumstances, of the words "of their own manufacture only" materially affected the scope of the license as embodied in the draft as first submitted. In so far as they were in conflict or inconsistent with any of the provisions in the instrument, they controlled, modified or qualified such provisions. Before the interlineation, the above-mentioned paragraph purported in effect to grant to the firm the exclusive right until September 12, 1889, to make, use and sell the Waldo feeder as applied to new machinery in all parts of the United States except Nevada, California, Oregon, Idaho, Washington, Arizona, Montana and Utah, and after the last-named day and for the balance of the whole term of the letters patent the exclusive right to make, use and sell such feeder as applied to new machinery throughout the United States. Had the license been executed without the interlineation, the complainant would have wholly divested himself for the balance of the term of the letters patent of the right to make, use or sell his patented feeder as applied to new machinery which, under the contract, was soda water apparatus used for less than six months, or not at all, before the application thereto of such feeder. The insertion of the words "of their own manufacture only" materially narrowed the scope

of the rights which would have been conferred on the firm by the execution of the license in the terms of the original draft. The complainant by the license as executed granted to the firm, among other things, "the exclusive right, liberty and license for the whole term of said letters patent, of making, using and selling said patented invention as applied to new machinery of their own manufacture only for that part of the United States not covered by the license to M. V. B. Watson hereinabove set forth, and at the expiration of said license to Watson the exclusive right of making, using and selling the said patented invention throughout all the United States and territories thereof as applied to new machinery." There can be no question that until the expiration of Watson's license on September 12, 1889, the right conferred on the firm was restricted to the making, using and selling of the patented feeder solely in connection with new soda-water apparatus manufactured by the firm and until then the complainant retained the exclusive right to make, use and sell such feeder, except within the territorial limits mentioned in Watson's license, as applied to new apparatus other than that manufactured by the firm. I am further satisfied that after September 12, 1889, while the firm had the exclusive right for the balance of the term of the letters patent to make, use and sell throughout the United States the patented feeder in connection with new apparatus manufactured by the firm, the complainant retained the exclusive right for the balance of the term to make, use and sell throughout the United States such feeder as applied to new apparatus other than that manufactured by the firm. There is some inconsistency in the terms of the above provision. The latter portion of it purports to grant to the firm the exclusive right, at the expiration of Watson's license, to make, use, and sell throughout the United States the patented feeder as applied to new apparatus, without any restriction of that right to acid-feeders as applied to apparatus manufactured by the firm. This portion of the provision standing alone would negative the existence of any right on the part of the complainant after September 12, 1889, to make, use or sell the patented feeder in connection with new apparatus in any part of the United States. But it must be read in the light of what precedes it. The preceding part of the clause grants to the firm the exclusive right "for the whole term of said letters patent of making, using and selling said patented invention as applied to new machinery of their own manufacture only for that part of the United States not covered by the license to M. V. B. Watson." Here the exclusive right is expressly restricted for the term of the patent to making, using and selling in the United States, save in the excepted territory, the Waldo feeder in connection with new apparatus manufactured by the firm. It cannot be assumed that the complainant intended in and by the same sentence in which he expressly limited the exclusive right for the balance of the term to feeders as applied to new apparatus manufactured by the firm to remove that restriction during the term and permit the firm to make, use and sell the feeder to be used in connection with new apparatus by whomsoever manufactured. Nor can it be assumed that he intended that after September 12, 1889, the exclusive right of the firm

under the license should be more extensive in Nevada, California, Oregon, Idaho, Washington, Arizona, Montana and Utah than elsewhere in the United States. The complainant, having given an exclusive license to Watson for the above named states and territories for a limited period, granted to the firm an exclusive right in all other portions of the United States for the term of the patent, restricted to the application of the feeder to new apparatus of their own manufacture. Had it not been for that outstanding license it is reasonable to assume that the same exclusive but restricted right would simply and without circumlocution have been granted to the firm throughout the United States. It was evidently the intention of the complainant that the firm should on the expiration of Watson's license have for the residue of the term of the patent the same exclusive but restricted right in the territory theretofore occupied by Watson as well as in other portions of the United States. It is true that in a subsequent clause of the license the complainant agreed "to advertise the fact that the said party of the first part has the exclusive right of selling said patented invention for application to new machinery." This provision, taken literally, is in direct conflict with the paragraph above considered, where the interlineation was made as the condition on which the license was executed. The same effect must therefore be given to it as if it contained at the end thereof the words "of their own manufacture only." The conclusion I have reached on this branch of the case is that after September 12, 1889, the firm had under the license the exclusive right throughout the United States to make, use and sell the Waldo feeder as applied to new apparatus of their own manufacture, and the complainant retained the exclusive right throughout the United States, subject to certain stipulations in the license unnecessary to be considered here, to make, use and sell such feeder as applied to new apparatus not manufactured by the firm. The license further provided that the firm "shall have the further right, which shall not be exclusive, of manufacturing and selling said patented invention to be applied to old machinery, until the number sold, including those sold to be applied to new machinery, as hereinabove expressed, shall reach one thousand (1,000), and that when said number shall have been sold, the right of the party of the first part to sell said patented invention to be applied to old machinery shall cease and determine." No charge of infringement can be sustained with respect to this provision. The evidence does not show or tend to show that it has been violated.

I now come to the question whether the license was assignable to the defendant. As an express contract it, like other express contracts, must be construed according to the intention of the parties as disclosed by the language therein employed. It is well settled that "a mere license to a party, without having his assigns or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal power to the licensees, and is not transferable by him to another." *Nail Factory v. Corning*, 14 How. 193. It is strongly urged on the part of the complainant that the license was strictly personal and therefore not assignable. There is doubtless some color for this contention. The right of the firm

to make, use and sell the patented feeder in connection with new apparatus was confined to apparatus "of their own manufacture only." The printed form of a user's license set forth in Schedule A contains the names of "F. S. Waldo, Inventor" and "Firm of John Matthews, Licensee." So the stipulation as to the price of a Waldo feeder, including the right to use the same, set forth in Schedule B, bears the names of "Firm of John Matthews" and "F. S. Waldo." The license further provided that "it shall be valid" for the term of the patent "unless sooner terminated by the written consent of both parties hereto." There are also other stipulations in the license which, considered alone, seem to involve personal confidence as between the parties. But can this contention be sustained? The concluding paragraph of the agreement is as follows:

"This agreement shall be binding on the parties hereto, their heirs, successors, administrators or assigns, and shall be valid until the 19th day of September, 1899, or unless sooner terminated by the written consent of both parties hereto."

It is asserted on the part of the complainant that this clause did not render the license assignable, but only provided for its duration and operated to make "heirs, successors, administrators or assigns," responsible for previous violations of its stipulations while subsisting between the complainant and the firm. But such an interpretation is inadmissible. Heirs and administrators would, with respect to their decedents' estates, have been liable in such case without any express declaration on the subject. The use of the word "assigns" in this connection would, so far as it relates to assigns of the firm, be unintelligible unless predicated on the right of the firm to assign the license. The word "successors" may fairly be applied to the firm as varying in its constituent members from time to time. Further, the license was by its express terms to be valid until the expiration of the term of the patent unless sooner terminated, not by death or by assignment, but by the written consent of both parties. The provision as to the continuance of the license in juxtaposition with the declaration that it should bind "the parties hereto, their heirs, successors, administrators, or assigns," plainly indicates when taken alone an intention by both parties that it should at any time during the term of the patent be assignable unless sooner terminated by consent. I have not discovered on careful examination of the various provisions of the license anything sufficient to negative this apparent intention. While it is true that the words "of their own manufacture only" are used, and the words "Firm of John Matthews, Licensee" are appended to the form prescribed for the user's license, and the words "Firm of John Matthews" appear in the stipulation as to the price of the patented feeder, the main license, if assignable, would mutatis mutandis be equally operative as between the complainant and the assignee. In such case the above restriction would relate to apparatus of the manufacture of the assignee only, and the assignee's name would be substituted for that of the firm of John Matthews in the user's license and stipulation as to price. So, too, the written consent required for the termination of the license within the term of the patent would

be that of the complainant or his assigns and the assignee. In imposing the restriction "of their own manufacture only" the complainant must be held to have intended that the right to make, use and sell the patented feeder as applied to new apparatus should only be confined to such person or persons as should hold the license from time to time during its term and manufacture such apparatus, and not exclusively to the firm of John Matthews. This construction of the license does not involve such hardship to the complainant as to render it unreasonable. He granted the exclusive right to the firm to make, use and sell his acid-feeder as applied to new machinery of its own manufacture. He retained such exclusive right as to new apparatus not manufactured by the firm. The license was for the balance of the whole term of the patent, and the firm had paid to the complainant a gross sum of money for the right secured from him. There was no stipulation or restriction as to the number of persons who should be employed by the firm in the manufacture and sale of new apparatus to which the exclusive right of applying the patented invention related, or as to the amount of capital which should be employed in carrying on its business. The firm had the right to invest unlimited capital in its business, and to establish branches in all parts of the United States. Under these circumstances, and in view of the express provision that the license should bind assigns, the license, in my opinion, clearly was assignable and was validly assigned to the defendant June 25, 1891. It does not appear from the evidence that the defendant at any time made, used or sold the patented invention except as applied to and forming part of new soda-water apparatus manufactured by it, nor that it made, used or sold the same at any time prior to the execution of the above assignment. The conclusion reached renders unnecessary any discussion of the question whether, if the license had not been assignable, the defendant was such a successor of the firm or succeeded to the business of the firm in such manner as to entitle it to the benefit and protection of the license.

The bill must be dismissed with costs.

PENFIELD v. CHAMBERS BROS. CO.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 572.

1. PATENTS—CONSTRUCTION OF CLAIMS—INFRINGEMENT—MECHANICAL EQUIVALENTS.

The more meritorious an invention, the greater the step in the art, the less the suggestion of the improvement in the prior art, the more liberal are the courts in applying the doctrine of equivalents; and the narrower the line between the faculty exercised in inventing a device and mere mechanical skill, the stricter are the courts in rejecting the claim of equivalents in respect of alleged infringements.

2. SAME—INVENTION—COMBINATIONS—USE OF CAMS.

Where resultant motion is obtained by a stationary cam guiding a tool, it may often, but not necessarily, be an obvious change to reverse the

parts by making the cam movable and the tool stationary. The question whether it is obvious is to be determined by examination of the particular machine in which the change is made.

3. SAME—INFRINGEMENT.

An infringer cannot evade liability by deliberately diminishing the utility of the invention without materially changing its form, its chief function, or its manner of operation.

4. SAME—BRICK-MAKING MACHINES.

The Chambers patent, No. 297,671, for improvements in brick machines, held valid, and infringed as to claim 24, which covers a transfer roller in combination with and placed between the propulsion belt carrying the bar of clay, and the off-bearing belt, designed to remove the bricks after their severance from the bar by the cut-off device.

5. SAME.

The Chambers patent, No. 362,204, for improvements in brick machines, construed, and held not infringed as to claims 7, 9, 10; 11, and 12, which cover a rotatable reel device for cutting off the bricks from the moving bar of clay.

6. SAME.

The Chambers patent, No. 207,343, for improvements in brick machines, is void for want of invention as to claim 6, covering the expressing screw, having its mouth set in a particular relation to the first tempering knife.

7. SAME.

The Chambers patent, No. 297,675, for an improvement in brick machines, is void, for want of invention, as to claim 2, which covers the combination of the forcing screw and the tempering knives arranged on the shaft, the first two knives being located with relation to each other, and the screw in the particular manner shown.

8. SAME.

The Chambers patent, No. 275,467, for improvements in brick machines, is void, for want of invention, as to claim 1, which covers a former die having its top and bottom convex, and its sides straight or concave.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

The following is the opinion of the court below (Severens, District Judge):

In this case the claims in the complainant's patents which have been made the basis of the suit are very numerous, and have required and received prolonged attention. The court has been made impressed with the merit of the many inventions of Mr. Cyrus Chambers, Jr., relating to the subject involved,—that of the construction of brick-making machines,—and thinks it just to say that, in its view, he has probably done more than any other man to bring this class of machines to the wonderful degree of perfection it has attained. But it is also right to say that he had been preceded by many other inventors in the field, and that many others have been working on the same subject contemporaneously with him. The Chambers inventions are not strictly primary ones, but relate to improvements upon existing machines; and several of these inventions display great ingenuity, and are evidently the result of protracted observation and study. To the extent of such improvements, and on account of their manifest value, they deserve the full measure of protection which the law affords. The time at my command will not permit of a detailed statement of the reasons upon which the court has reached its conclusions in respect of these several claims, and of the questions involved in the mechanism of the defendants' machine, which is alleged to infringe them. If time and opportunity permit, I may hereafter explain more at length the grounds and reasons upon which some of the present conclusions are founded, but I cannot promise it.

The patents of the complainant relate almost entirely to combinations of the various elements of mechanism of which they are made up, and consist in the

main of two classes, viz. those which relate to the apparatus for cutting off bricks, and, incidentally thereto, the carrying them away from the point where they are cut off in such a way as to prevent their becoming marred by the apparatus for cutting them off, and the accumulation of the bricks after they are formed; and, secondly, those which are involved in that part of the machine which is employed in pugging or grinding clay and expressing it through the die upon the propulsion belt upon which it is carried along in a bar to the cut-off apparatus already mentioned. Although this is not in the natural order of the operation in the employment of the machine, it is the order in which the case was presented by counsel for the complainant in the argument, and is as convenient as any.

Claim 7 of Claimant's Patent No. 297,671.

The validity of this claim is disputed upon the ground that it was anticipated by a British patent to Ainslie in 1841; by the French patents of Buzelin, 1872, and of Combe d'Alma and Dupin, 1876; by the American patents to Adamson, No. 106,448, to Gard, No. 255,385, to Sword, No. 40,149, to Dixcee, No. 64,504, to Beaujeu, No. 122,214, to Wehlan, No. 252,636, to Penfield, No. 122,851, and to Tiffany, No. 156,188; and by the British patent to Wright & Green issued in 1857. Other patents are also referred to as containing the elements, or some of them, which are employed in the Chambers combination. While I am satisfied that the several elements involved in this claimed combination had been previously exhibited in brick-making machines, including among them the device of the spring-controlled cut-off wire, in a crude and less perfect way than that of Chambers, still I am satisfied that this combination and more complete adjustment of these elements in an operative way, as shown by the combination of this seventh claim, was not anticipated. It is argued by the defendants' counsel that the brick machines which employed this combination were not altogether successful, and that defects appeared which induced Chambers to undertake and perfect improvements upon it; but this contention cannot be sustained for the purpose of defeating this claim. To do this it would be necessary to show that this combination was not operative and useful, which does not appear to be the fact. It is not sufficient to say that the invention was susceptible of improvement, and that, when improved, it would be more useful. The instances are numerous everywhere of patents which make but a start in the line of things new and useful, but which are valid notwithstanding many successive improvements are afterwards built upon them. My opinion is that this claim is valid.

Claim 9 of the Same Patent.

This combination is essentially the same as that of claim 7, except that the spring which controls the cut-off wires is limited to U-shaped elastic bows; the arms of the bows supporting the wires being in this case the springs also. The defense of anticipation made to this is substantially the same as that made to claim 7, with the addition of a reference to a German patent to Adrión, which is not more germane to the subject than those already enumerated. My opinion is that this claim is also valid.

Claim 22 of the Same Patent.

This combination includes not only the cut-off apparatus mentioned in claims 7 and 9, but includes also an off-bearing belt with mechanism to give it faster motion in order to quickly remove the brick after it has been cut off from the bar of clay. The defendants insist that the combination was also anticipated by a previous patent to Chambers, No. 40,221, and the Wright & Green British patent of 1857, already referred to. In my opinion, this claim 22 was not anticipated by the patents referred to, or by anything shown in the record, and is valid.

Claim 24 of the Same Patent.

This relates to a combination consisting of a propulsion belt on which the bar of clay is moved over pulleys and rollers past the cut-off and off-bearing belt, and a transfer roller located between these two belts, the function of which was to tilt the brick after it had been cut off, a little downward, where

it would be caught by the off-bearing belt, and be rapidly removed, without being marred on its under surface by dragging on an immovable fixture. Anticipation is pleaded also as to this, and in the proof reference is made to the Wise patent of 1862, which was for a machine for elevating cakes of ice. There was no element in the Wise patent designed for any such purpose as that of the Chambers roller, and the combination is not the same. Besides, if it was, I think there would be much ground for the suggestion that the transfer of that device to such a purpose as that of brickmaking, with the changes in the apparatus made necessary for such a transfer, would be evidence of invention and support the patent within the doctrine of the case of C. & A Potts & Co. v. Creager, 77 Fed. 454. This claim is held valid.

Claim 9 of Patent No. 297,917.

This claim covers a combination consisting of the elements of claim 7 of the previous patent just considered, No. 297,671, together with certain other elements, viz. the clay-expressing mechanism, the propulsion belt, and the adjustable frictional devices for conveying auxiliary motion to the propulsion belt. The defendants contend that this claim was anticipated by the Ainslie patent; the Nichols patent, No. 45,514; the Barr patent, No. 173,332; the Davis patent, No. 258,027; the Meyers patent, No. 97,955; and the Wright & Green patent, above mentioned. I have considered them all, and, while some of them exhibit in some form one or more of the elements of complainant's claim 9, now being considered, I am quite unable to find that any of them involve this combination as a whole, and certainly not in any practicable and useful way. This claim is also held valid.

Claim 10 of the Patent Last Mentioned.

This claim covers substantially the same elements as claim 9 of the same patent, but includes also a lever and some minor appliances for adjusting the friction of one of the belts employed. The defendants pleaded anticipation as to this claim, founding their defense on the same patents as those relied upon to anticipate claim 9. There will be the same ruling with reference to this claim as to claim 9. It is sustained.

Claim 11 of the Same Patent.

This claim is, in general, the same as claim 10, except that the lever mentioned in the tenth claim, used for regulating the friction belt, is constituted of two independent arms, adjustable with relation to each other. There is nothing new in the defense of anticipation, which is also raised to this claim, and the claim is therefore sustained.

Claim 7 of Patent No. 362,204.

In this patent there is a very important modification of the previous devices in the carrier of the spring-controlled cut-off wires. Theretofore this carrier consisted of an endless belt, to which the holders of the wire were secured, which holders were, as generally constructed, elastic, and served not only as supporting standards for the wires, but also as springs to hold them taut, or to yield when the wires should meet obstructions in cutting off bricks, these supports being in the form of a letter U, joined at the base to the endless belt. The improvement brought in by Mr. Chambers in patent No. 362,204 consisted in part of substituting for the endless belt as a carrier for the cut-off apparatus—and which, of course, was supported by a pulley inside of each end of it—a wheel upon the periphery of which the cut-off wires were fixed, and other mechanism was supplied for the purpose of so directing the cut-off wires as they should be carried down through the clay by the revolution of the wheel as to cut clean and straight across, making properly formed ends of the bricks. This claim was in the following words:

"In a brick machine of the class recited, the combination of a rotatable wheel journaled above the continuously moving bar of clay, the series of transverse cut-off wires fixed to the periphery of said wheel so as to successively cross the path of the clay bar as the wheel rotates, together with mechanism, substantially as shown, whereby said wheel is caused to rotate in the same direc-

tion as that of the movement of clay bar, and in unison therewith, so as to sever the bar into brick lengths, substantially as and for the purpose set forth."

The use of this combination has largely superseded that of the old endless belt carrier, and is the one which is now generally, although not exclusively, used in the construction of the Chambers brick machines. Later on I shall have occasion to go somewhat into the details of this new cut-off device embodied in the claim now being considered. The defendants set up in defense that this claim was anticipated by the Adamson patent, No. 106,448, by the French patents of Buzelin and Combe d'Alma and Dupin, and by the British patent of Wright & Green. I think none of these amount to an anticipation of this claim, and have no doubt of its validity.

Claim 9 of the Same Patent.

This claim relates to the construction of the cut-off wheel with its radial arms bearing U-shaped elastic bows secured to the periphery of the wheel, on which bows the cut-off wires are secured. This cut-off wheel in claim 9, with the detailed mechanism set forth, in the specifications and claimed in this claim, takes the place of the former belt carrier, and the devices associated with it, constituting the cut-off apparatus in the older patent. The same patents are set up as anticipations of this claim which were set up against claim 7, just considered. I hold that the patents referred to do not anticipate this claim, and that it is valid.

Claim 10 of the Same Patent.

This claim consists of a combination of a regulating belt, a cam engaging with a tappet wheel, the transverse cut-off wires, and a positively driven friction belt for driving the tappet wheel. The defense of anticipation of this claim is not, in my opinion, sustained, and the claim is held valid.

Claim 11 of the Same Patent.

This claim is for another combination of the elements involved in the cut-off apparatus employed in the new arrangement of devices in this patent. With other mechanism already stated, it includes devices for locking the spring-regulating arm of the pivoted tightener in the required position. Upon consideration of the same grounds and reasons as have been stated in reference to the question of anticipation, this claim should be held valid.

Claim 12 of the Same Patent.

This claim is also held valid on similar grounds.

Claim 29 of Patent No. 275,467.

This claim, I think, is invalid. It consists of a combination of a pulley frame with a scraper secured thereto, whereby, when the pulley frame is adjusted, the relative position of the scraper to the pulley will remain unchanged. The substance of this device, having regard to the prior art, is this: Prior to this contrivance, there had been organizations of a pulley with a scraper adjusted thereto, as Mr. Chambers admits; but in those cases the pulley was made adjustable upon the frame on which its axle was suspended, and the scraper was adjusted also upon the same frame. It is obvious that any change in the adjustment of the pulley would necessitate a readjustment of the scraper. Mr. Chambers substituted for the old fixed frame upon which the pulley and its axle were located a movable or swinging frame, which obviated the necessity for any adjustment of the pulley upon the frame. Then, when he came to locate its scraper to clean the pulley, it was perfectly obvious, as I should think, that the scraper should be located upon the frame as before, and the result would be that when once located its relation to the pulley would be constant. It is difficult to see how, with any reason, the scraper should be located anywhere else. The fixed relation of the scraper and pulley is the result simply of employing a movable frame for the pulley itself. There is nothing peculiar in the devices for changing the relation of the scraper to the pulley; nor, if there were, would the peculiarity of that element in the combination be susceptible of being claimed under a claim for this combination.

Claim 25 of Patent No. 297,671.

This claim consists of a combination with a scraper of deflecting wings for directing the material scraped from the periphery of the pulley so that it will fall beyond the belts. The substance of this combination is old; that is, it is the application of an old device to a new use, and is found in previous well-known constructions; such, for instance, as the double moldboard snowplows carried in front of engines to remove the snow from the track to points outside of it.

Claim 17 of Patent No. 297,917.

This claim is for a combination with off-bearing belt rollers of cap pieces covering the journals of the rollers, which extend over the ends of the latter, and beyond their bearings. I find nothing in this which deserves to be called invention. The business in which these rollers were employed would naturally suggest the propriety of protecting the journals from dirt, or chips of clay, or the like, and the construction of these caps is nothing more than any skilled mechanic would see the utility of. I feel very confident that there would have been really nothing new in this provision. The claim is held invalid.

Claim 18 of the Same Patent.

This claim adds to the combination of claim 17 minor pieces which receive the end thrusts of the journals. I have a strong impression that this also is not new, and, if it is, I do not think it amounts to invention. It is also held to be invalid.

Claim 19 of the Same Patent.

This claim consists of a combination with the rollers of longitudinally adjustable bearing strips, the cap pieces, and the corner pieces constructed as shown. This adds to the combination of claim 18 the important element of the longitudinally adjustable bearing strips. If the several elements co-act, it is probably patentable. I am unable to say with certainty that they do; and my impression is that there is room for thinking that this claim is of an aggregation of the bearing strips with the other elements in the alleged combination. But the patent office held the claim valid, and the contrary is not so clear as to justify an opposite conclusion. The result is that I hold this claim valid.

The foregoing claims all relate to those parts of the brick-making machine which deal with the bar of clay after it has been expressed through the die. The other claims to be considered relate to the structure of the tempering case, its inlet shafts and knives, and the die through which the clay is expressed. The first to be considered is:

Claim 2 of Patent No. 297,675.

This is for a combination of a screw with knives arranged on the shaft in the spiral manner shown, the first two knives being located with relation to each other and the screw, in the manner described. In this combination the first knife of the spiral is placed in the continuation of the spiral flange of the screw some distance beyond the latter; the second knife is located to the left and in advance of the end of the screw flange, about half way between the latter and the knife, 1, leaving a considerable lateral space between the second knife and the flange of the screw. The advantage claimed is that by this relative arrangement of the two knives with the rear end of the screw, sufficient space is left between the first knife and the opposite side or flange of the screw for the clay advanced by said knife to enter between it and the screw, and ample space is left between the second knife and the mouth of the screw for the body or furrow of clay advanced by the first and second knives to enter easily the mouth of the screw without undue packing or jamming of the clay, which it was said was a difficulty which had been encountered in previous constructions of this sort. This appears to me to be a device indicating invention; and, as nothing is shown which can be held to anticipate it, this claim is held valid.

Claim 3 of Chambers Patent, No. 207,343.

This claim consists of so arranging the inlet pipe to the tempering case a that it shall deliver the clay into the side of the case in which the tempering

knives are on the ascending part of their revolution. The object of this is to continually agitate and loosen the clay, and prevent its becoming packed, and obstructing the operation. The defendants plead in anticipation of this the Schlickeysen patent, No. 189,270. With considerable doubt and hesitation, I hold that, as the Schlickeysen machine shows the inlet on the ascending side of the revolution of the knives, although that was accidental merely, and not contemplated, the Chambers patent is, as to this claim, anticipated, and is invalid. This because it was not invention to seize upon a device already known and used for the same purpose (that is, as an inlet) in this identical art.

Claim 4 of the Same Patent.

This claim relates to the shaft carrying tempering knives arranged in a spiral line opposite in direction to that of the thread of the expressing screw. This is another device devised for the purpose of preventing undue accumulation and impacting of the clay in its progress through the tempering case. It seems to me that the substance of this combination was anticipated by the British patents to Oates of 1851 and 1852. In these patents there was the same arrangement of knives upon the shaft, with reference to the expressing screw, as that in the present combination; and the result of operating the machinery constructed under the Oates patents must be substantially the same as that produced in this Chambers combination. It may be that the advantage of so arranging the knives with reference to the screw was not fully understood, but the construction, the mode of operation, and the result are the same; and I do not think it was competent for a subsequent inventor to seize upon a device exhibited in a former patent, which it can be seen possessed a peculiar advantage, and adopt that as his own invention. This claim is accordingly held not valid.

Claim 6 of the Same Patent.

This claim consists of an expressing screw having its mouth set back from, and opposite to, the first tempering knife. This arrangement seems to have been the result of "cutting and trying," and it appears to me to be a close question whether it can be regarded as in the nature of an invention, or of mechanical skill applied to conditions which indicate the need. But upon giving effect to the presumption arising from the issue of the patent, I conclude the claim should be held valid. There is no anticipation shown which should, in my opinion, defeat it.

Claim 8 of the Same Patent.

This claim relates to the former and lining of the die, which are, in this instance, made in one piece. These were formerly made in two pieces. It is stated by counsel that the purpose of this so-called improvement was to provide a way for obviating the difficulties which were found to exist in practice resulting from the uneven wear of the two parts, by making the former and die lining in one homogeneous piece, so that they would wear away uniformly, and oblige the user to renew both the former and the die lining at the same time. I do not think there is anything which can be called invention in this, and hold the claim invalid. I say nothing about the alleged anticipations, though some of them seem to leave little or no standing room for this combining of the two parts into one by Chambers.

Claim 1 of Patent No. 275,467.

This claim consists of a former die having its top and bottom convex, and its sides straight or concave. It appears that in the prior art the sides only of the former die were made convex. The advantage of the new construction, giving convexity to the top and bottom, is said to be that the clay flows and expands into the corners of the edge of the brick more readily than when formed in the old way. This is another instance where a question of doubt is presented; whether that which was discovered is to be regarded as in the nature of invention, or, on the other hand, of supplying by mere mechanical skill the remedy which the result of the operation of the machine suggested. The patent office has held that it falls within the first class, and, as I find nothing in the record which anticipates it, it will be held valid. That shown

which comes nearest to anticipation is the Tecumseh die, so called. But this die was only employed at the exit of the clay for the purpose of dressing up its surface. It did not perform the office of a former, and therefore had no part in producing the effect which results from expressing the clay through a former as in the Chambers construction.

We come now to the question whether the defendants have infringed any, and, if any, what, claims of the complainants which are held valid. In taking up this question of infringement, the court is required to bear in mind, as has already been suggested, the invention of Mr. Chambers consisted of improvements upon structures of the kind to which his inventions relate. In other words, they were not, in general, broad inventions, which brought into the field originally those general organizations which lie at the foundation on which improvements are built. His inventions are of a widely-varying degree of merit, and to each should be attributed a domain corresponding to its originality. His claims are for combinations, and the elements which he employs to make them up must all be found to exist substantially in the defendants' machine in order to sustain the charge of infringement. In making comparisons between the Chambers machine and the one used by the defendants for the purpose of determining the question of infringement, I have assumed that the models of the two machines which were exhibited in operation at the hearing correctly represent the two machines; the argument having been made with reference principally to those models.

Claim 7 of Patent No. 297,671.

In my opinion, the defendants' machine does not infringe this claim. One large, and, as I think, sufficient, reason is that the movable carrier of the springs and cut-off wires of the defendants' machine is a very different structure from that of the complainant's. The defendants' carrier consists of a wheel whose radial arms support the cut-off springs and wires, while the complainant's is an endless belt running over two pulleys so adjusted that the cut-off wires attached to the under-running portion of the belt should enter the clay, and cut off the brick. Within the rules applicable to the case of inventions of this class, I do not think the defendants' construction is the equivalent of the complainant's in respect to the carrier. There are other points of difference, which I do not stop to consider. Those existing at the time of the making of this invention did not permit Mr. Chambers to claim broadly and generally any combination of the kind employed by him, and he was restricted to a combination of such elements as he described.

Claim 9 of the Same Patent.

The question of the infringement of this claim stands upon the same grounds as those considered in reference to claim 7. The combination is of fewer elements than those of the former claim, but it includes "the endless belt or carrier." It is, therefore, unnecessary to repeat what was said in reference to that feature. There are some limitations in claim 9 which would present other questions upon the point of infringement which it is not necessary to consider.

Claim 22 of the Same Patent.

This, also, upon a proper construction of its terms with reference to the specifications, involves the same endless carrier. For the reasons already stated, I think the defendants' carrier is such a widely different structure that it ought not to be held an equivalent.

Claim 24 of the Same Patent.

I think this claim is infringed by the defendants' machine. It is true that there is a modification of the independent transfer roller, in that it is grooved so as to receive the cut-off wire after it has cut off the brick, and passes along with the wire while it radiates past the former end of the moving bar of clay. This may be an improvement upon the Chambers device. I do not determine whether it is such; but, if so, it is but an improvement which does not essentially change the form and composition of the machine. It is easy to see that the Chambers plan underlies that of the defendants in this particular, and,

while the defendants' improvement may be patentable, I do not think it displaces the claim of the complainant.

Claim 9 of Patent No. 297,917.

This combination also includes the endless belt, or carrier, supporting the cut-off wires as one of the elements. For the reasons already mentioned, I do not think the defendants' machine infringes this claim. There is a new feature introduced into this claim, consisting of adjustable frictional devices conveying auxiliary motion to the propulsion belt, which presents a fresh ground for considering whether the defendants' machine infringes; but I do not pursue that matter.

Claim 10 of the Same Patent.

For the same reasons as given in reference to claim 9, just considered, it is held that this claim is not infringed.

Claim 11 of the Same Patent.

I have held this claim in the Chambers patent to be valid. Its language is this:

"The combination of the propulsion belt, the cut-off mechanism, the pulleys, p₈ and p₉, the idler, I, R, the friction belt, and the weighted pivoted lever, L, L', composed of two independent arms adjustable with relation to each other, substantially as and for the purpose described."

The cut-off mechanism, though made an element, is not described in this claim, and it was necessary, in order to sustain its validity, that the specifications should be referred to in order to show of what that element consisted. On carrying the specifications into the claim as descriptive of the cut-off mechanism, it makes up a combination which, as already shown, the defendants do not infringe.

Claim 7 of Patent No. 362,204.

I think the defendants' machine infringes this claim. Beyond doubt, this is the most important of all the claims in the complainant's patents.

The defendants' counsel, in his able and ingenious argument, contends that by the limitations imposed on the complainant's patent by his own specifications, and especially by the prior art, the invention should be restricted to substantially the same details of mechanism. There is nothing in the limitations, expressly or by fair implication, imposed by himself, which limits him to a strict construction of this claim. Nor do I think that the prior art put him in such stringent limitations as counsel assumes. This invention, although an improvement, was one of great merit, and a large advance upon anything which had gone before. The doctrine of *Miller v. Manufacturing Co.*, 151 U. S. 205, 14 Sup. Ct. 310, is invoked to prove that where an invention relates to an improvement merely the inventor is restricted to the precise construction which he has detailed. But I take it that that doctrine is not absolute, and, when rightly construed and expounded, means this: that the rule applicable to the determination of equivalency depends upon the importance and the breadth of the original invention, and does not depend upon the question whether it was the first in the field relating to that subject, but upon the degree of advancement which the invention has made in newness of discovery and utility; for there may be as much merit in bringing on a large illumination from a feeble start as in the conception of the first beclouded idea which may have originated the course of study and discovery along that line. The rule is not a hard and fast one, but measures equivalents by looking to see what has been accomplished before, and finding whether the combination, read broadly, had been anticipated, or whether, having reference to what had already been shown, the claim must be limited to the precise construction in order to save it as being new; for the constant rule is to give to the inventor the benefit of all that he has invented. If he has improved only a little, he has only a correspondingly narrow standing ground. If he has improved much and widely, the arena of the field in which he is to be protected is enlarged to the limits of what his invention has made its own. A pertinent illustration of this is shown in the case of *McCormick Harvesting Mach. Co. v.*

Aultman, Miller & Co., 16 C. C. A. 259, 69 Fed. 371, where a very considerable and marked advance in invention in a machine already possessing faculties adapted in a measure for producing results somewhat similar was assigned a field corresponding to the extent of the new discovery. That invention was not "first in the line" of inventions relating to the subject, but it was held to be new, and found in a vital part of the machine, and extremely useful. In the present case I do not find anything in the crude and imperfect designs of the prior art to detract from this invention, or limit the inventor to the exact construction shown by his specifications. Looking at these two machines, and observing their mode of operation, one cannot fail to see that the scheme of the Chambers machine underlies that of the defendants. There are differences, it is true, and some of them may show that the defendants' has improvements, possibly such as would support a patent, but the general plan takes in the features of the Chambers combination. Counsel for the defendants contends that both were founded on the earlier art, and that each was entitled to the benefit of it as a starting point. But it appears to me that the more reasonable thing to say is that the Chambers machine rests upon the prior art, and that the Penfield is built upon that of Chambers. All the elements which exist in the one exist in the other. The functions of one are in some instances transferred to another, but the resultant conjoint operation is the same. And it may, in general, be said that the claim itself is a broad one, and does not tie the patentee down in respect of the details of the elements combined. It must be conceded that the conclusion which I reach in regard to the infringement of this claim rests upon the soundness of the original proposition which I have made in discussing this question,—that Chambers was entitled to a broad construction of his claim; that is to say, broad enough to render the particular form of his elements or exact mode of operation immaterial. On the other hand, if the prior art restricts his invention to the particular organization shown and the identical detail of operation, it would follow that the Penfield machine does not infringe this claim.

Claim 9 of the Same Patent.

This claim also, I think, is infringed by the defendants, for the reasons given in disposing of the same question in reference to claim 7.

Claims 10, 11, and 12 of the Same Patent.

With more doubt I hold that these claims are infringed. The doubt arises upon the fact that there is some room for saying that he has, by identification, particularly described one or more of the elements of these claims by reference letters, thus presenting the question whether such reference does in fact identify the particular element, or whether the reference is to be construed more largely, so as to cover any sort of an element of that kind which performs a like function in the operation of the combination. My impression is that the same rule of construction is to be applied as before, and that, for instance, the reference to the cam should be construed to mean anything in the form of a cam so constructed as to produce that effect in the operation of the machine which the device particularly shown does.

Claim 19 of Patent No. 297,917.

I do not think the infringement of this claim is made out of the proof. I put it in this way because the defendants do not use the longitudinal slot for making the adjustments. Apparently the receptacle for the screws is a hole, and while it is possible, as complainant's counsel suggests, that the holes might be made larger than the diameter of the screw, and thus give opportunity for some trifling adjustment, I do not think that on account of the mere possibility of thus fraudulently changing the character of the opening the machine, which does not indicate any purpose of such variation, should be held to infringe.

Claim 2 of Patent No. 297,675.

This claim is held to be infringed by the defendants. The only substantial difference between their own constructions and that of the Chambers combination consists in making the screw upon the end of the pugging shaft detach-

able, so that when the screw is in one position with reference to the shaft it is essentially the same structure as that of the complainant, while, if set the other way, it would be different. But, as it seems clear to me that when set in the right way to produce a useful result, it is substantially the same as that of Chambers, and that when set the other way it is comparatively useless, that difference of construction is only colorable. And so of the setting of the second knife on the opposite side of the shaft, which follows in the track of the first, and, so far as I can see, performs no useful function whatever. If it does, I think it must be regarded as only an improvement upon the Chambers invention.

Claim 6 of Patent No. 207,343.

The defendants have adopted the peculiar construction shown in this claim of the complainant's patent, and therefore infringe it.

Claim 1 of Patent No. 275,467.

There can be no doubt that the defendants infringe this claim also.
Let a decree be entered in conformity with these findings.

Statement by the Court.

This case involves the brickmaking art. There are several ways of making brick. We are here concerned with making brick by what are called "stiff-clay machines." An inventor of machines of this class is Cyrus Chambers, Jr., the president and chief stockholder in the complainant company, to which he has assigned all his patents. His patents Nos. 39,884 and 40,221 were issued to him in 1863. The process of making brick under these patents was as follows: The clay was dumped into a so-called "pugging mill," which was a partly cylindrical and partly conical or tapering receptacle, having a horizontal revolving shaft in its axial line. Upon the shaft were tempering knives to cut up the clay, and prevent laminations, and to press it forward into and between the threads or blades of the large end of a conical screw fixed upon the end of the shaft. By this means the clay was compressed, and forced into a so-called "former," with curved sides, which still further compressed the clay, and forced it into a rectangular die, from which it emerged in the form of a stiff clay column of the desired breadth and thickness of a brick. The column was delivered from the die onto an endless belt, later called a "propulsion belt" moving round two pulleys, one at each end, with friction rollers between. Beyond the propulsion belt, and extending in the same direction, was another belt of similar construction, upon which the bricks cut off from the clay column were carried to the point of delivery. This belt was, in later patents, called the "off-bearing belt." Between these two carrying belts, the ends of which were near to each other, was the cutting device. This device was a knife secured to a swinging cam, which was itself secured to a fly wheel. The fly wheel journaled in a shaft parallel to the carrying belt, revolved in a plane at right angles to the movement of the clay column, having its periphery at one point near the column. The knife, as the wheel revolved, was so fixed to the wheel as to cut through the clay column at each revolution of the wheel as the column was passing from the propulsion to the off-bearing belt. The shaft upon which the fly wheel was journaled was so geared and run as to make the shaft revolve a little faster than it took the column to move the length of a brick, but the fly wheel was fitted by a fric-

tion device but loosely to the shaft, and was made fast to another shaft, which was connected to and brought into unison with the movement of the propulsion belt and bar of clay thereon. In this way the fly wheel, though actuated by power independent of the propulsion belt, was restrained to revolve in unison with it, and made one revolution in exactly the time it took the clay column to move one brick length. The movement of the column was continuous. The cutting had to be done as the column moved, and yet the cut had to be straight, and at right angles to the direction in which the column moved, in order to make a square cut, and give the brick the required form of a parallelopipedon. This was accomplished by providing guides in which the knife was compelled to move, and an inclined plane, down which the frame of the guides was forced. By patents No. 45,974, issued in 1865, No. 104,705, issued in 1870, and No. 108,880, issued in 1870, Chambers made improvements in his brick machine, retaining, however, the same general form and the same cutting device. In 1878 he procured a patent for a brick machine (No. 207,343), in which, among other improvements upon his earlier machine, he included "a device for cutting the bar of clay into the desired lengths for bricks by means of a spiral blade and endless chain, with mechanism for regulating automatically the relation between the speed of the bar of clay and that of the cut-off device so that it shall be uniform under all conditions." He perfected this machine by devices for which he procured a patent (No. 275,467) in 1883. The spiral blade is driven by the same main driving shaft that drives the clay column. If the movements of the clay were uniform, the spiral blade and the clay column would thus move in exact unison, but such evenness of flow of the clay cannot be exactly sustained. When, therefore, the clay bar travels relatively faster than the blade, the bar presses against the blade, moving it forward, the oscillating movement being permitted by reason of the manner in which the shaft upon which the blade turns is supported. This, by means of a clutch device, increases the speed of the spiral blade. If the blade moves too fast, it will, by its reaction against the clay, screw itself back, loose the clutch, and reduce its speed. By letters patent No. 297,671, issued in 1884, Chambers disclosed another and improved mode of cutting the clay bar. This was an endless belt with elastic U-shaped bows fixed to its exterior surface and equidistant from each other, holding cut-off wires stretched from one end to the other of each U. The belt passed over a large and a small pulley, and was placed above the line of movement of the clay column. The belt was actuated through a cogwheel connection between the pulley about which the endless propulsion or clay-carrying belt moved, and the larger pulley of the cut-off belt; in other words, the clay column moved the cut-off mechanism, and this was the only source of power applied to the cut-off belt. The cut-off wires on the U-shaped bows were thus carried round on the endless belt at the same speed as the clay column, and, when they reached the lower side of the endless belt, in the same direction. The lower side of the endless belt was inclined downward from the smaller pulley to the larger in such a way that, as each wire and the

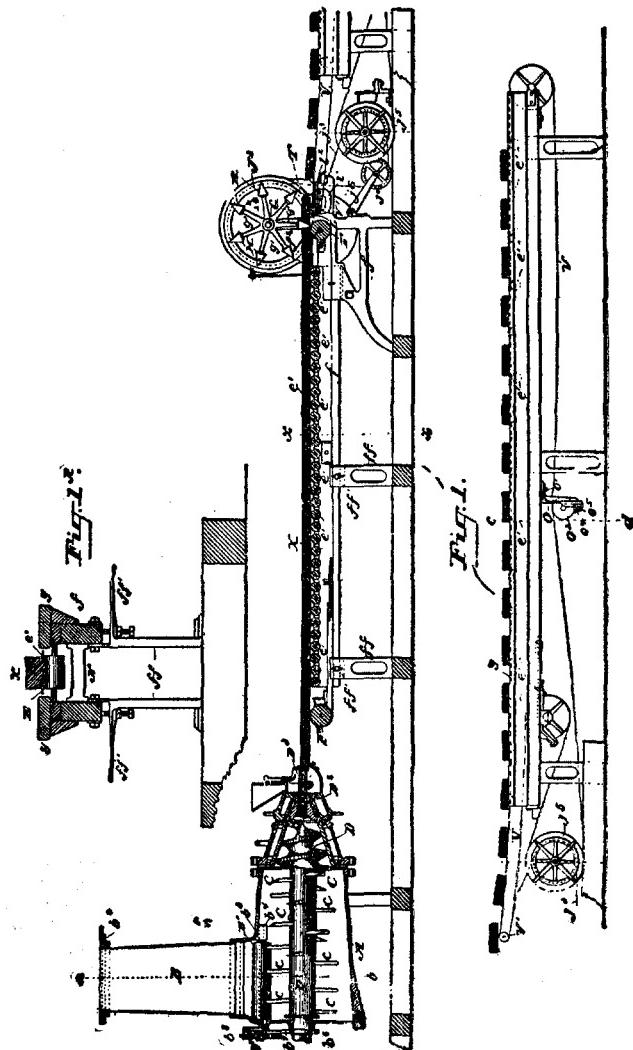
clay moved together towards the end of the propulsion or carrying belt, the wire was pressed more deeply into the clay column, and cut it through as the wire reached the end of the propulsion belt. This made a straight, square, vertical cut. In this patent he showed means for facilitating the delivery of the bricks, after they had been severed from the column, out of the way of the wire and the bricks behind by placing an idle roller in the space between the propulsion belt and the off-bearing belt. He ran the latter belt at a higher speed than the propulsion belt, and placed it at a lower level. The roller was on the level of the propulsion belt. Thus the brick, after it had passed half over the roller, would tilt forward onto the off-bearing belt, which, with its higher speed, would draw the brick quickly forward out of the way of the wire and the following brick. By patent No. 297,675, issued to him in 1884, Chambers disclosed an improvement in the arrangement of the tempering knives on the pugging shaft in their relation to the screw. By patent No. 297,917, issued in 1884, Chambers disclosed an improvement upon the endless belt cut-off to remedy a defect in his first device with such a cut-off, due to the fact that the clay was not always stiff enough to propel with uniformity both the belt upon which it was carried and the cut-off belt. He applied power from the main shaft by a friction belt to the forward pulley of the propulsion belt, and regulated the amount of auxiliary power thus supplied by passing his belting over an idle roller, which, journaled at the end of a lever with a weight upon its other end, exerted an adjustable pressure against the friction belt, and was the means of increasing or diminishing the auxiliary power thus furnished to the propulsion and cut-off belts.

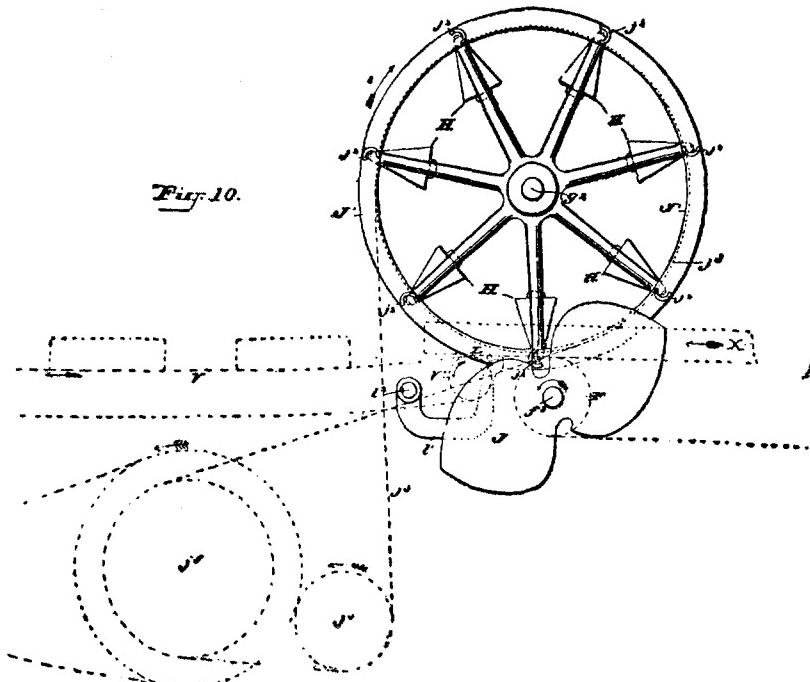
The next patent to Chambers was numbered 362,204, and upon the claims of this patent arises the most important controversy at the bar, namely, as to the cut-off device. In this patent Chambers changes his cut-off device again. He takes the U-shaped holders and his cutting wires, and fixes them at equal intervals on the periphery of a circular reel, which he journals on the frame of the machine immediately over the end of the propulsion belt, and he then uses mechanism to regulate the relative motion of the reel and the forward, or, as he calls it, the "measuring," pulley of the propulsion belt, so that the curve described by each cutting wire as it strikes into the clay with the revolution of the reel will make a vertical, straight cut across the face of the clay column at every brick length. The defendant uses a reel with cutting wires fixed in the same kind of elastic holders journaled over the propulsion belt, which accomplishes the same result; and the question is whether, in doing so, the defendant does it in substantially the same way as Chambers, and within the claims of the latter's patent. The patentee thus describes his last improvement in cut-off devices in the specifications of patent No. 362,204:

"The next and fourth improvement, which I remark is the most radical and important, relates to the devices for and pertaining to the severing of the bar of clay into brick lengths, and is specifically an improvement upon the cut-off devices shown in my aforesaid letters patent No. 297,671, dated April 29, 1884. As will appear by reference to that patent, the bar of clay was cut off

by means of wires secured to elastic bows mounted equidistantly upon an inclined, endless belt, which, being driven by the mechanism therein described, carried said wires successively in continuous rotation gradually through the bar of clay, and severed the same at right angles into bricks. I found, after some experience, that this endless belt cut-off device, although practically successful, was in certain respects imperfect in its operation, and was otherwise objectionable, whereupon I was led to devise the construction which I shall now proceed to describe. This consists of a wheel or hub, G, Figs. 1, 8, 9, and 10, having equidistant radial arms, g', to the expanded free ends of which are bolted elastic steel bows, H, whose form and function are identical with those of the bows shown and described in my patent No. 297,671; that is, their form is U-shaped, with tapering sides, and their function to hold with a yielding tension the cut-off wires, w. This 'cut-off' wheel, as I term it, is secured to a stud shaft, g², journaled in a box, g³, borne by a rigid standard, f², Figs. 1 and 9, that extends up from the frame, f, of the regulating belt. The position, laterally and vertically, of said cut-off wheel with relation to the advancing bar of clay, X (see Figs. 1, 10, and 12), is such that, as the wheel is rotated in the proper direction,—that of the arrow 1,—the wires, w, carried by the bows, H, will pass across the path of the clay bar, and also, at one point or stage of their movement, a short distance below the latter. As the motion of the bar of clay forced from the die in the end of the tempering case is forward in a straight line, while that of the cut-off is rotary across the path of the clay bar, and as, also, owing to the varying consistency of the clay, and other causes, the speed of the bar is not uniform, it is necessary, in the first place, to the production of perfectly rectangular bricks, that the rotary movement of the cut-off wheel shall be controlled or regulated so as to compel the cut-off wires, in traversing the bar of clay, to pass through the same at right angles; and, in the second place, it is requisite, in order to secure accurate results, that the rate of rotation of the cut-off wheel shall correspond with the speed of the bar of clay as the same shall vary. The means for securing these requirements are as follows, premising that the distance apart of the cut-off wires is greater than the length of the longest brick the particular machine is designed to make, or, to state it more precisely, greater than the length of a diagonal from the upper corner of one end of the track to the lower corner of the other end of the brick: The exact length of the brick to be made is measured by the pulley, F,—which I term the 'measuring pulley,'—at the forward end of the regulating belt frame, f, around which pulley, as previously stated, the said belt runs, and propels the pulley with a velocity in unison, so to say, with the advancing bar of clay resting upon the belt, the circumference of this pulley being the length of a brick, or a multiple of their length. In the present case it is equal to two brick lengths; hence this pulley makes half a revolution for each brick length. In calculating the proper diameter of said pulley, I allow for the thickness of the belt and the kind of belt. A four-ply rubber belt in bending over a pulley retains its normal length at the center,—that is to say, the half of the belt next the surface of the pulley upsets, while the outer half stretches,—so that half the thickness of the belt is to be added to the radius of the pulley, F, in calculating the circumference in order to secure exact length of bricks. In order to secure the first of the two requirements above recited,—that is, to insure a cut-off at right angles to the bar of clay,—I provide on the end of the shaft f³ of the measuring pulley, a double heart-shaped cam, J, and on the shaft g² of the cut-off wheel I place a wheel, J' (which, for a purpose to be hereinafter mentioned, is also a belt wheel), with tappets, j², corresponding in number and relation to the cut-off wires on the wheel, G. As the shaft f³ is turned by the bar of clay operating by its friction the regulating belt, the edge of the cam engages these tappets, whereby the course of the cut-off wheel is controlled, the cam, by its peculiar shape, governing the rate and course of movement of the cut-off, so that the wires can pass through the bar of clay only at right angles thereto, providing, of course, that it is desired to make rectangular or straight-edge bricks. If the ends of the bricks are to be of other configuration,—that is, 'ogees,' 'rounds,' or 'hollows,'—the shape of the cam must be varied accordingly. This cam, which runs within an oil-tight and dust-proof casing, T, is made quite heavy, so that it will serve both as a fly wheel to maintain uniform motion and as an anvil

to take up the blow of the somewhat irregular motion of the tappet wheel and its adjuncts, and thus relieve the bar of clay from unequal strains and the impact jars of the tappets. It will be understood that the cam does not drive the tappet wheel. It simply governs the necessary variability of its rotation. The tappet wheel is driven in the direction of the arrow, Figs. 1 and 10, so as to always hold the tappet sufficiently in contact with the edge of the cam by a friction belt, j^8 , which passes around said wheel and around a tightener-pulley, j^4 , and a grooved pulley, j^5 , which latter is positively driven through suitable belt and gear connections (not shown in the drawings) intervening between it and the main source of power. The rate of motion thus imparted to the tappet wheel tends to exceed relatively that of the bar of clay, so that the tappets always have a bearing against the cam; and as the friction of the bar of clay upon the regulating belt, E, moves the latter and its pulley, F, as also the cam, J, and as the cam restrains and governs the course of the





tappet, and consequently the cut-off wheel, the wires upon the latter must sever the bar of clay at right angles, whatever be the speed of the bar issuing from the die of the machine. As, owing to the difference in clays or the consistency of the clay, there frequently occurs a tendency of the friction belt to drive the tappet wheel with greater force than is really necessary (owing to the fact that the positively driven pulley, j^5 , rotates more rapidly relatively than the bar of clay advances), I provide the frictional belt device above alluded to, and also means for regulating the same. These are as follows, particular reference being had to Figs. 1, 9, 10, and 11:

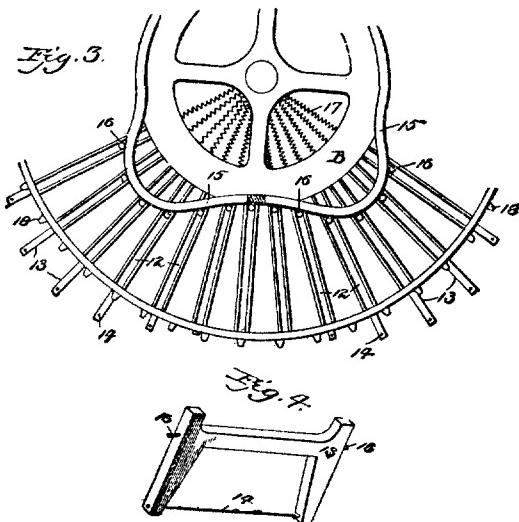
"As previously stated, the friction belt, j^3 , passes around the tappet-wheel pulley, J' , thence in contact with the tightener pulley, j^4 , and around the driving pulley, j^5 . The arm, j^6 , of the frame, in which the shaft of the tightener pulley is journaled, is attached to a shaft, j^7 , journaled transversely in the main frame. To a rearward projection of said arm is secured a spring lever, j^8 , terminating in a handle piece, j^9 , which bears against an upright segment, j^{10} , that is fastened to the foot of the frame. This piece has also attached thereto a spring finger, j^{11} , the end of which bears against the inside of the segment (see Fig. 8, sheet 4), and the latter is clamped between the piece j^9 , and the said finger by means of a clamp screw, j^{12} , and thus the spring arm, j^8 , is retained in the required position. The function of this spring arm is to allow for the small irregularities that may occur in the running of the belt,—such, for instance, as those caused by a piece of clay or stone getting under the belt. Other devices for retaining the spring arm in any desired position may be substituted for those described. The shaft of the tightener frame also carries a hand lever, j^{13} , which is intended to be used when it is necessary for the operator to temporarily increase or diminish the friction, which is done by raising or depressing said lever, and, consequently, the tightener pulley. The elasticity of the arm, j^8 , permits this to be done without freeing the same from the segment. I remark that the measuring pulley, with a circumference being a multiple of the bricks to be made, may be used in connection with other cut-off devices than those above described and referred to."

The defendant's machine is in almost every respect like the complainant's except in the operation of the cut-off wheel. The defendant uses a cut-off reel with bow-shaped elastic holders and wire cutters. It is geared by cogwheels with the forward pulley of the propulsion belt to run in unison therewith, and there is no double heart-shaped cam, nor are there tappets upon the reel intervening in the gearing connection between the reel and the pulley wheel, as in complainant's device. The defendant effects the variations of motion in the revolution of the cutting wires necessary to secure a straight vertical cut of the moving bar of clay in a somewhat different way. He does not fix his elastic holders and wires in the periphery of his reel, but he arranges each of them to slide in parallel radial slots cut in corresponding radial arms of the reel to and from the center or axis of the reel. He guides the in and out motion of these holders and cutting wires in the lower half of the revolution of the reel when the clay column is being cut by two fixed cams arranged opposite each other in the frame supporting the reel. Tappets on each elastic holder, as the reel brings it to the lower half of its revolution, are engaged against this cam, and so vary the distances of the wire from the center or axis of motion of the reel that the path of the wire through the clay is a plane at right angles to the plane of its motion, and it makes what is shortly called a "square cut." The device of defendant's is made under a patent (No. 478,436) issued to one Johnson in 1892, and for the sake of clearness it may be well to quote from the specifications and to refer to the drawings. The patentee says:

"B designates the cut-off wheel, which is of novel and particular construction, which I will now proceed to describe. On the side rails of the supporting-frame is secured a frame, B', in which bearings, 8, 9, are oppositely formed. These are preferably conical bearings to take in sockets 10 in the shaft 11 of the wheel, B. This wheel consists of two disks fixed on or extended from the shaft 11, and formed with radial slots, 12, in the disks or arms, as illustrated in Figs. 1 and 3 of the drawings. In these slots are arranged the ends of the cutting-wire frames, 13, disposed therein so as to readily and easily slide to and from the axis of the cutting wheel. These cutting-wire frames are made of a cross-piece having extended therefrom side-pieces, as seen in Fig. 4 of the drawings, between the ends of which the cutting wire, 14, is secured and stretched. To operate the cutting-wire frames so as to cut off the forms from the column of clay, I fix cams 15 to the frame, B', which cams are of the tread or form seen in the drawings Figs. 1 and 3, which cams, as the cutting wheel revolves, are engaged by studs 16 on the ends of the cutting-wire frames, and the frames thus forced downward as the clay moves outward and cuts the column into determined shapes or bricks. To prevent the wire-cutting frames from falling from the slots, and to hold the lugs or studs, 16, in contact with the tread of the cams, I attach retracting springs, 17, to the cross-bar of the wire-cutting frames, and fasten the other end to the shaft of the cutting wheel, as shown in the drawings. The cutting wheel, on its side rims, has formed sprockets, 18, which engage in sprocket holes, 19, on the edges of the belt 6, as indicated in Fig. 1 and shown in Fig. 2 of the drawings, and the cutting wheel thus synchronously moved with the column of clay and belt. Directly under the cutting wheel is journaled a roller, 20, arranged with the upper radial point on a line with the vertical cut of the wires, so that at this point the brick or form is entirely severed from the column. It will be observed from the foregoing description, in association with the drawings, that the cut of the wires is vertical or in a straight line across the form or column of clay, because the wire moves with the same movement forward in relation that the

column moves in progression, and that the wires are lifted from the column after severance, with the same result."

The following drawing illustrates the foregoing description:



The device of defendant's is not exactly like that shown above. The cam is of a somewhat different shape, and is a slot in which the tappet or knot on the elastic wireholder works. In defendant's machine, the cut-off receives auxiliary power from a positive-driven shaft geared to the propulsion belt pulley, which in turn receives auxiliary power by friction gear with the main shafting. It has a friction belt, arranged in every substantial respect like the friction belt by which auxiliary power is communicated to the cut-off wheel of the complainant. In the defendant's machine, as in complainant's, the clay column is delivered onto a propulsion belt, carrying the column to the cut-off wheel. The clay cut into bricks is then delivered onto an off-bearing belt, the speed of which is considerably greater than that of the propulsion belt. The propulsion belt runs round a pulley just beneath the cut-off wheel, which does not differ from the so-called "measuring" pulley of the complainant.

Wood & Boyd, for appellant.

Joshua Pusey, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge. We are much impressed, as the learned judge at the circuit was, with the development in the art of stiff-clay brickmaking, due to the inventive genius of Cyrus Chambers, Jr., the president and manager of the complainant, and the patentee of the patents sued on. But we are constrained to consider only the questions which have been brought before us on appeal. We cannot widen

our investigation to determine whether the defendant, in his machine, has appropriated any of the many devices, elements, or combinations of which Chambers or his assignee, under the numerous patents, may have a monopoly. In the bill and at the hearing below complainant sought an injunction and damages in respect of the infringement, future and past, of the claims of some four or five of complainant's patents. The judge at the circuit found many of these claims to be invalid, and sustained others. As to those which he found to be valid, he held that the defendant had not infringed a number of them. As to those invalid, or not infringed, he dismissed the bill, and no appeal has been taken from his decree. The sole questions presented to us, then, are as to the validity and infringement of the claims which the circuit court found to be valid and infringed.

The most important question presented in the case is that arising upon the alleged infringement of the seventh, ninth, tenth, eleventh, and twelfth claims of complainant's patent No. 362,204. These claims, the circuit court held, were valid, and infringed by Penfield's machine. These are combination claims to cover the rotatable reel cut-off device disclosed in that patent. This reel was simpler in construction than the endless belt and other means of cutting the end of the clay bar disclosed in Chambers' earlier patents, but its practical use involved the solution of a problem of mechanics that was not free from difficulty. If the cutting wires were fixed to the periphery of the cut-off reel with a fixed axis, then the actual path in space described by each wire must be a cylindrical surface with the axis of the reel as its axis or center line. To make the resultant of the union of this circular movement of the wire and the continuous rectilineal movement of the clay bar, a vertical plane at right angles to the direction of the clay bar was a problem of relative motion which could only be solved by giving to the wires variable speed in relation to the speed of the clay bar. In previous patents Chambers had produced complete unison of motion between the clay bar and the cutting wires of the endless belt, which moved in a straight course at an acute angle to the clay bar, by gearing the propulsion belt and the cut-off wheels together with cogwheels. When he adopted his circular reel, however, while preserving a correspondence between the motion of the propulsion belt and the cut-off wheel, to secure proper brick lengths, he must make the motion of the latter vary in speed, in relation to the propulsion belt and clay bar. Instead of the cog gearing, he substituted a rotatable two-winged cam, which, while it was so geared as to revolve in complete unison with the motion of the propulsion belt and clay bar, variably interfered with and regulated the revolution of the cut-off wheel, and thus secured the necessary variable speed of the cutting wires on its periphery. The only serious question is whether Penfield's machine infringes. We have not the slightest doubt that this improvement involved the exercise of the inventive faculty in a high degree, and that the claims which cover it are valid. We shall refer to the prior art in considering the issue of infringement. It is enough now to say that there is nothing in it which destroys the novelty of Chambers' device for making a circular cut-off reel effect a square

cut. Penfield solved the same problem that Chambers had solved, not only by varying the relative speed of his cutting wires through the clay bar, as Chambers had done, but also by varying from the circular the actual path of each cutting wire through space. He unfixed the wires from the periphery, and imparted to each a capacity for radial movement in and out from the axis of the reel. The extent and variation of this radial movement he controlled by a cam or slot in the frame of the reel, in which the wires engaged as they progressed through the clay bar. As the distance of each wire from the axis diminished or increased, its speed through the clay bar necessarily diminished or increased. The motion of the clay bar and that of the periphery of the cut-off wheel in Penfield's machine are as nearly in unison as cog gearing can make them. He secures the needed variability in relative motion of the wires and the clay bar by varying the relative motion of the periphery of the cut-off wheel and the cutting wires. Chambers, on the other hand, secures this by varying the relative motion of the clay bar and the cut-off wheel.

Claim No. 7 of the patent No. 362,204 reads as follows:

"In a brick machine of the class recited, the combination of the rotatable wheel journaled above the continuously moving bar of clay, the series of transverse cut-off wires fixed to the periphery of said wheel, so as to successively cross the path of the clay bar as the wheel rotates, together with mechanism, substantially as shown, whereby said wheel is caused to rotate in the same direction as that of the movement of clay bar, and in unison therewith, so as to sever the bar into brick lengths, substantially as and for the purpose set forth."

Does Penfield's machine infringe this claim? Penfield certainly uses a rotatable wheel journaled above the continuously moving bar of clay. He has a series of transverse cut-off wires, but they are not "fixed to the periphery of said wheel." He combines these elements so that the wires successively cross the path of the clay bar as the wheel rotates. He uses mechanism whereby said wheel is caused to rotate in the same direction as that of the movement of the clay bar, and in unison therewith, so as to sever the bar into brick lengths. Is this mechanism substantially the same mechanism as that shown in the Chambers patent? The mechanism and all its parts are substantially the same, save in the substitution, for the rotatable cam and the wires fixed in the periphery of the reel, of the radially moving cutting wires and the fixed cam in the frame of the reel. Are these equivalents? If they are to be so regarded, then the defendant's machine infringes. The more meritorious the invention, the greater the step in the art, the less the suggestion of the improvement in the prior art, the more liberal are the courts in applying in favor of the patentee the doctrine of equivalents. The narrower the line between the faculty exercised in inventing a device and mechanical skill, the stricter are the courts in rejecting the claim of equivalents by the patentee in respect of alleged infringements. In order to determine the merit of this invention, and the advance in the art effected by it, we must examine the prior art, including the previous inventions of Chambers himself. As early as 1863 he had invented the general form of the present machine with its pug mill, the tempering knives, the former and the die, the delivery of the clay

bar upon an endless belt, later called the "propulsion belt," the cut-off at the end of the propulsion belt, and the second belt for removing the cut bricks, later called the "off-bearing" belt. In the patent No. 297,917, not yet expired, he had adopted an endless belt, to which he fixed his elastic bows holding the cutting wires. This endless belt was moved round pulleys journaled above the continuously moving bar of clay. The propulsion belt and the endless belt were geared together by cogwheels to run in unison, so that the clay should be severed into brick lengths. The endless belt and the propulsion belt received auxiliary power from the main shaft of the machine by means of a friction belt, and the power thus received was regulated by an idler roller held against the belt by a weighted lever. The invention of Chambers covered by the seventh claim of patent No. 362,204 was the substitution of a circular reel for the endless chain in the combination disclosed in his patent No. 297,917. This was not a fundamental step in the art. The endless-chain machine of Chambers was a successful machine, and, while the circular reel machine is a better one, it does not appear from the record that it has worked a revolution in the trade. The use of a reel cut-off had been twice suggested in the prior art, and, while the devices do not appear, for other reasons, to have been successful, they showed a mode of regulating the motion of the circular reel which would effect a straight cut through the bar of clay. The devices are disclosed in two French patents; one issued to Buzelin in 1876, and the other to Combe d'Alma in 1872. In these patents the belt carrying the clay column is armed with a series of upright projections serving as cams that engage tappets projected from the periphery of the cut-off wheel, which is journaled over the moving bar of clay; and these cams or projections propel the cut-off wires through the moving clay bar at the necessary speed to make the square or angular cut. The pressure of the upright cam against the tappet of the revolving cutting wire keeps the tappet constantly in contact with the vertical face of the cam as the wires move downward through the clay bar. The cam is constantly at right angles to the direction of the clay column, and moving with it. The cutting wires thus are made to take the same direction. Before Chambers applied for his latest patent, though not before he had conceived his invention, and constructed machines in accordance with it, one Frey built an operative and practical machine on the principle of the French machines.

It was thus suggested in the art, when Chambers began his solution of the problem, that the way to produce the variation in motion between the cutting wires of the reel and the clay bar needed to secure a straight cut was by a cam to control the motion of the wires. The cam shown was a movable cam, moving with the clay bar, and operated directly on the cutting wire. Chambers conceived and invented a movable cam revolving in unison with the movement of the clay bar between the belt carrying the clay bar and the cut-off wheel. Penfield made his cam stationary, and introduced it where it could vary the relative motion of the reel and its cut-off wires. After careful study of the three devices, it seems to us that the inventor of Penfield's device has taken a different way of solving the

problem of variable relative motion from that shown in the French patents or in Chambers'. It is true that the Chambers invention showed that it could be accomplished by a movable cam. But this had certainly been suggested by the French patents before Chambers'. We cannot say that the problem would not itself suggest the use of a cam somewhere in the mechanism to insure variable motion, but the question was, where and how? In spite of the suggestion of an upright movable cam fixed to the propulsion belt in the French patents, it clearly involved invention on Chambers' part to shape his movable cam revolving in unison with the progression of the clay bar, and to put it where he did put it. But we are unable to see that the inventor of Penfield's device derived any more aid from Chambers' movable cam than from the cam of the French patents. Indeed, the similarity between the French solution of the problem and Penfield's is much closer than that between Chambers' and Penfield's. The unfixing of the cutting wires and giving them radial motion were entirely new, and no suggestion of it can be found in either of the prior patents. It is said by counsel for complainant to be a general principle in mechanics "that the motion, or resultant of motion, imparted to a working tool or device by means of a rotating or moving cam can be secured by a fixed cam upon which or against which the device or tool or its connections to be moved work or run; the two cams being substantially of the same form as to working surface, the one, as stated, being movable, and the other fixed"; and that the inventor of Penfield's machine merely applied this principle to create the difference between that machine and Chambers', and so the two must be equivalent in the sense of the patent law. It is true that, where a mechanical result is obtained by the movement of one element upon another element of a combination, it does not usually involve invention merely to reverse the operation, and secure the same result by making the first element stationary and the second movable. And so, where resultant motion is secured by a stationary cam guiding a tool, it may often be an obvious change to reverse the parts by making the cam movable and the tool stationary. But the question whether it is obvious is to be determined by examination of the particular machine in which the change is made. Here the difficulty of inserting a cam anywhere in the machine to secure correct motion was such that we think the principle relied on could have but little application in any case, and it certainly does not apply to the change which the inventor of Penfield's machine made. He does not confine himself in the change to a cam to produce variable speed in the revolving wires, but he varied the actual path of the wires themselves from that of a circle. So far as reel cut-off mechanism is concerned, Chambers and the inventor of Penfield's cut-off pursued different paths from the prior art to reach the same result. The advantage in using cut-off reels was suggested in the prior art. We cannot hold that Penfield's device for regulating his cut-off reel is tributary to Chambers'. We do not decide, because it is not before us for decision, whether Penfield's machine, as organized, does not include all the elements of combinations claimed in earlier patents to Chambers. The only

question here is whether, with the prior art, including all that had been disclosed before the issue of patent No. 362,204, as well that which Chambers himself had shown in previous patents as that shown by other inventors, the combination of a reel cut-off with Penfield's mechanism to make a straight cut of the clay in brick length was substantially the same as Chambers'. If the idea of the use of a reel for such a purpose was entirely new, and if the cam principle of variable motion by which it was made to discharge its function had never been suggested before in such a case, it might very well be that the use of a reel by a subsequent inventor for the same purpose, with a cam introduced into another part of the machine, even if it required the inventive faculty to make the change, would nevertheless be an invention tributary to the first, and therefore an infringement. As already pointed out, however, such is not the case here. The conclusion that Penfield's machine does not infringe the seventh claim of patent No. 362,204 carries with it as a necessary corollary that the other claims of the same patent, the ninth, tenth, eleventh, and twelfth, are not infringed, because the charge of infringement as to each can rest only on the predicate that the radially moving cutting wires and fixed cam of the Penfield machine are the equivalent of the cutting wires fixed in the periphery of the reel and the two-winged rotatable cam of the patent.

The next question presented by the assignments of error is whether Penfield's machine infringes claim 24 of Chambers' patent No. 297,671. That claim is as follows:

"In combination with the propulsion belt and the off-bearing belt running over pulleys respectively in suitable frames, the independent transfer roller, I, located with relation to said belts, substantially as and for the purpose described."

The specifications and drawings show this roller to be located between the propulsion belt and the off-bearing belt. It is an idle roller, and receives power and motion from nothing except the moving brick as it is being severed, or immediately thereafter. Its operation is described by the patentee as follows:

"As the bar of clay, C, forcefully advances, its free end, nearly severed, is received by and upon an independent transverse roller, I, which performs an important function, soon to appear. It will be seen, by looking at Figs. 1 and 2, that this roller is journaled at the end of the propulsion belt frame, F, Fig. 1; that it is placed nearer to the pulley, P², at the end of the off-bearing belt frame, F², than to pulley, P', and that it is elevated a little above the line of the off-bearing belt; that is to say, in the same horizontal plane with the propulsion belt. Until the end of the clay bar is entirely cut off to form a brick, it advances on to roller, I, its free end extending over and above the off-bearing belt; but, by reason of the stated relative position of that roller at the moment or shortly after the severance of the bar is completed, the center of gravity of the brick, Br, passes beyond the supporting line of the roller, and the brick tilts over upon the rapidly moving off-bearing belt, the said roller then freely adapting itself to the increased speed acquired by the brick. In order to prevent the wire, which has just done its working, and is moving on its way to repeat it in its turn, from striking the under side of the brick as the belt carries it (the wire) on and upward over the pulley P³, I make the latter of relatively large diameter, so that the brick will have ample time to get out of the way before the wire can interfere with it. As the belt quickly turns the wire over the pulley P³, it will readily be understood that the wire cannot be struck by the end of the clay bar behind."

In Penfield's machine a roller is placed between the propulsion belt and off-bearing belt, so that its upper surface is on a level with the former, and a little higher than the latter. The roller is placed relatively a little nearer to the propulsion belt than in Chambers' machine, so that the cutting wire of the reel, in its movement after the severance of the brick, would strike against the roller, and be obstructed by it. To obviate this difficulty, a groove is cut in the face of the roller from end to end. The revolving wire enters this groove, and leaves it without contact with the roller. In order that the wire shall always register with this groove, the roller is geared by cog gearing to the shaft of the propulsion belt, and moves in unison therewith. The roller in the Penfield machine receives the severed brick, carries it on towards the off-bearing belt, onto which it tilts, and is drawn out of the way of the severing wire by that more rapidly moving belt. The wire does not enter the groove until after the brick has passed onto the off-bearing belt. The only real difference between the two rollers is that the Penfield roller is not so efficient as the Chambers roller for the purpose for which they are both designed, to wit, that of assisting the brick onto the off-bearing belt out of the way of the severing wire in its upward return. The Chambers roller, because it is an idle roller, after the brick tilts onto the off-bearing belt, takes the higher speed of that belt, and the brick moves more quickly, and without friction on the roller. The Penfield roller tilts the brick out of the way of the wire like the Chambers roller, but, because of its being driven positively by the propulsion belt, cannot take the higher speed of the off-bearing belt, and the latter, after it receives the brick, must, as it draws the brick more rapidly, cause some friction between the brick and the roller. Just why the designer of the Penfield machine found it necessary to put the roller so near to the propulsion belt as to make necessary the recess in the surface of the roller and the gearing of the roller with the propulsion belt does not clearly appear; but, whatever the cause, it is certain that this change does not prevent the Penfield roller, in combination with the two belts, from being an infringement of the Chambers roller in the same combination. An infringer cannot evade liability for his infringement by deliberately diminishing its utility without changing materially its form, its chief function, or its manner of operation. Sewing-Mach. Co. v. Frame, 24 Fed. 596.

It is, however, contended that it did not involve invention on Chambers' part to combine the roller with the two belts for his purpose. Counsel say that "the use of an idle roller to assist in transferring articles from one thing to another is as old as the art of endless carriers," and they cite a patent to Wise for an ice elevator consisting of two endless belts positively driven over rollers with the space or gap between them occupied by two rollers which are also positively driven. They also cite an English patent for a brick machine, issued to Porter in 1855, in which, after the brick is cut, it is pushed onto a more rapidly running roller, and thus out of the way of the next brick. While the inventive faculty required to devise the combination of the roller with the propulsion belt and the off-bearing belt in Chambers' machine may not have been of as high order as

that shown in other of his devices in this and other patents, we are nevertheless of opinion that it was invention. The necessity for preventing the wire from overtaking and injuring the rear end of a brick in the upward and return swing of the wire called for some remedy. An idle roller placed anywhere between the belts would not have done it. The roller must be so placed with reference to the two belts that the brick, after moving onto the roller, would tilt forward, lifting its rear end out of the way of the oncoming wire. This was accomplished by placing the off-bearing belt below the level of the propulsion belt and fixing the roller on a level with the propulsion belt. Neither the problem nor the solution of it is suggested in the Wise or the Porter patent. We conclude that the twenty-fourth claim of patent No. 297,671 is valid, and is infringed.

The next issue arises upon claim No. 6 of Chambers' patent No. 207,343, and claim No. 2 of patent No. 297,675. The first claim reads as follows:

"The expressing screw, S, having its mouth set a little back from, and opposite to, the first tempering knife, in the manner and for the purpose specified."

Patent 207,343 was for one of the improved brick machines of Chambers. The improvements over earlier forms were many in the pugging shaft, the screw, the cut-off, and in other parts. The chief improvement, as Chambers testifies, was in the arrangement of the tempering knives upon the pugging shaft, whereby the tempering of the clay, and its delivery through the screw and die in a column, was made more efficient, and at very much less expenditure of power. He says in his specifications:

"The pugging shaft, P, is provided with a series of tempering knives, K, arranged spirally around it on a curve running in the opposite direction to that of the spiral of the screw, S, which is attached to the forward end of the shaft, and presses the tempered clay out through the die, as herein-after explained. This arrangement of the knives obviates the tendency they would have if placed on the same spiral as the screw to drive the clay into the screw case, and compress it there, and produce clogging, and an unnecessary density. Less power is consequently required to drive the tempering knives, the function of each knife being merely to plow the clay over into the space left vacant by its predecessor, thus giving each knife a very narrow strip of clay to operate upon, and relieving it from sustaining the backward thrust of the entire mass of clay moving in front of it. * * * It is important that the mouth of the screw should be arranged relatively to the tempering knives, that the clay should be allowed to pass freely without clogging between the knives and the base of the screw. The spiral of the screw being opposite in direction to that of the line of knives, the two form at their point of junction the ends of a right and left handed thread, which would bring the second tempering knife from the screw end of the shaft so close to the thread of the screw as to cause the clay to lodge between them. By placing the mouth of the screw opposite to, and a little back of, the first knife, said knife will feed the clay over into the cavity and between the thread of the expressing screw, and the second one into the path of the first, and the third knife be sufficiently far from the screw to allow the clay to pass freely between them."

The second claim of patent No. 297,675 is as follows:

"In combination with the screw and the knives arranged on the shaft in the manner shown, the first two knives, located with relation to each other and the screw as and for the purpose specified."

The patent was for an improvement on the arrangement of knives shown in patent No. 207,343, in which their arrangement in a spiral reverse to that of the screw was generally maintained, but more space was secured between knives located in the same longitudinal line on the shaft. The patentee says:

"Referring now to Figure 1, it will be seen that the knife marked '1'—that is, the first knife of the spiral—is placed on a continuation of the spiral flange of the screw, S, some distance beyond the latter; also, that the knife 2 is located to the left, and in advance, of the end of the screw flange, about half way between the latter and knife 1, and that a considerable lateral space is left between said knife 2 and the screw. By this relative arrangement of these two knives and the rear end of the screw, sufficient space is left between the first knife and the opposite side or flange of the screw for the clay advanced by said knives to enter between it and the screw, and ample space is left between the second knife and the mouth of the screw for the body or furrow of clay advanced by both the first and second knives to easily enter the mouth of the screw without undue packing or jamming of the clay."

In speaking of the sixth claim of patent No. 207,343, Judge Severens, at the circuit, said:

"This claim consists of an expressing screw having its mouth set back from, and opposite to, the first tempering knife. This arrangement seems to have been the result of 'cutting and trying,' and it appears to me to be a close question whether it can be regarded as in the nature of invention or of mechanical skill applied to conditions which indicate the need. But upon giving effect to the presumption arising from the issue of the patent, I conclude the claim should be held valid."

The most important feature in the arrangement of knives in patent No. 207,343 was making the spiral in which they were set reverse to that of the expressing screw. It was this which so greatly reduced the expenditure of power needed to force the clay through the tempering chamber into the screw. Had this been a novel conception, we should have regarded it as certainly involving the inventive faculty; but the court below found that the claims covering this improvement were invalid, because such an arrangement had been shown before in the art. This finding has not been appealed from, and in the present hearing we must accept it as a basis for action upon the other claims. The question, therefore, is whether, in adjusting the two spirals at their junction, it involved anything but mechanical skill to place the mouth of the screw in relation to the first and second tempering knives so that the clay would not clog between the thread or blade of the screw and the second knife. It was a mere matter of distance between the screw blade and the second knife, and the change of position of the expressing screw by turning it on its axis would seem to have been an obvious means of varying this distance. It seems to us that it was a mere matter of simple experiment by one familiar with the operation of the machine, and did not rise to the dignity of invention. The slightly different adjustment of the first and second knives with respect to the mouth of the screw in patent No. 297,675 is, in our opinion, equally lacking in patentable invention. We must therefore find the two claims to be invalid.

The remaining issue on this appeal is that made upon claim No. 1 of patent No. 275,467 to Chambers. The claim is:

"The former die, M, having its top and bottom convex, and its sides straight or concave."

The former die, it will be understood, is the chamber into which the clay is forced by the expressing screw, and from which it emerges in the form of a column of stiff clay onto the propulsion belt, to be cut into brick lengths. The patentee says in the specifications of the former die that:

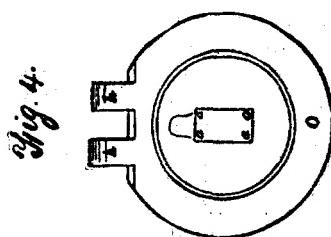
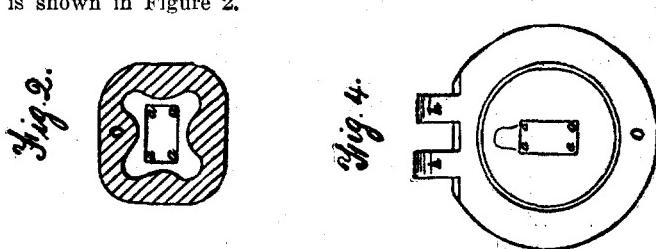
"The improvement consists in making the top and bottom of the former die convex, and its sides straight or more or less concave, * * * instead of, as heretofore, making the sides of the same convex. The new form, I find by experience, is a great improvement upon the old ones, as the body of clay, which is retarded in the middle by the convexity of the former die at the top and bottom, is better spread out laterally, and the clay more forcibly packed in the corners, than was the case when the sides of the former die were convex."

It is not denied that the defendant uses just such a former die as that described and claimed in this patent, but it is contended that such a former die is shown in the prior art, and that it lacks novelty. Here is, as the learned judge at the circuit said, "another instance where a question of doubt is presented,—whether that which was discovered is to be regarded as in the nature of invention, or, on the other hand, of supplying by mere mechanical skill the remedy which the result of the operation of the machine suggested." In 1863 Chambers took out a patent for a former die having both the top and bottom and the sides convex. In explaining the defect he was attempting to remedy, he said:

"It will be obvious upon reflection that the ordinary operation of a plunger or other propelling device in a machine with the ordinary form of die is to produce the greatest amount of velocity in the center of the mass, giving the outer edges and surfaces less, and hence rendering them more liable to be made ragged and broken by partial adhesion to the die while passing through it. The velocity being less, the density is also less of these outer portions; in other words, the quantity of matter in a given space is greater at the center than at the surface of the exuded bar of clay. The remedy for this is to be sought in a reversal of the ordinary disposition of the material, forcing the greatest amount of clay into the corners of the brick or tile, and compressing it there so that the last action of the die upon it will be to give it smoothness, instead of tearing it, and rendering it rough and ragged. The peculiar form of my dies completely effects this object."

He then describes the die:

"The cross section of this die is at its inner end circular and at its outer end rectangular, as seen in Figure 4. A cross section on a line (midway between) is shown in Figure 2.



"In this figure we see the angles or corners rounded out or grooved, and these grooves gradually tapering till they disappear altogether at the angles, a, a, of the rectangular opening of the die. These grooves constitute the main peculiarity of the invention, their object and effect being to crowd a

greater quantity of clay into the angles of the bar of clay as it passes through the die, so as to give them greater solidity and firmness, in accordance with the views hereinbefore stated."

The only change which the patentee made in the die of patent No. 275,467 was to remove the convexity of the sides, and substitute either straight or concave sides. This was merely a modification of the earlier former in degree, and not in principle. In the earlier Kells patent a former die is shown with its sides convexed and its top and bottom straight. It is true that the convexity is carried into the die itself so as to make the bricks of concave sides. But the convexity of the sides is said by the patentee to be adopted for the purpose of securing sharp corners, a purpose quite similar to that of Chambers in the device under consideration. On the whole, we are constrained to deny validity to this claim.

The decree of the circuit court is affirmed as to claim No. 24 of patent No. 297,671, and is reversed as to claims Nos. 7, 9, 10, 11, and 12 of patent No. 362,204 on the ground of noninfringement; and as to claim No. 2 of patent No. 297,675, claim No. 6 of patent No. 207,343 and claim No. 1 of patent No. 275,467 on the ground that the claims are invalid for want of patentable invention; and the case is remanded to the circuit court, with directions to dismiss the bill as to all the claims here involved except No. 24 of patent No. 297,671. The costs of the appeal will be taxed one-fourth to the appellant and three-fourths to the appellee.

HART & HEGEMAN MFG. CO. v. ANCHOR ELECTRIC CO. et al.

(Circuit Court of Appeals, First Circuit. March 13, 1899.)

No. 238.

1. PATENTS—REISSUES—VALIDITY.

Where a reissue is granted to correct an error of a single word in the specifications, as by changing "hole" to "slot," and a corresponding change is made in a single feature of one of the numerous figures in the drawing, but no change is made or needed in the claim, there is no reason for holding the reissue invalid.

2. SAME—INFRINGEMENT—ELECTRIC SWITCHES.

The only difference between a patented electric switch and an alleged infringing switch was that in the former the catch was released by a movement radially inward, while in the latter the release was by a movement radially outward, and the former was operated by a flat spring, one end of which was attached to a stud depending from a spring plate, while the latter was operated by a spiral spring, the corresponding end of which was attached either to a small cap at the top of the hub just beneath the operating handle, or was fastened by being cast through the hub itself, the cap in that case being omitted. *Held*, that these variations involved merely the use of mechanical equivalents, and the patent was infringed.

3. SAME.

The Hart reissue, No. 11,395 (original No. 459,706), for an electric snap switch, construed, and *held* not anticipated, valid, and infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Hart & Hegeman Manufacturing Company against the Anchor Electric Company and its officers for alleged infringement of a patent for an electric snap switch. The circuit court held that the patent must be construed narrowly, and consequently was not infringed. 82 Fed. 911. The complainant thereupon appealed to this court.

Charles E. Mitchell and Henry B. Brownell, for appellant.

Edward P. Payson, for appellees.

Before COLT, Circuit Judge, and BROWN and LOWELL, District Judges.

LOWELL, District Judge. This was a bill in equity brought for the infringement of reissued letters patent No. 11,395, granted to Gerald W. Hart, December 12, 1893, for electric snap switches. The alleged infringing switch was made in accordance with the description of letters patent No. 547,149, granted to Norman Marshall, October 1, 1895. To the complainant's patent the defendants have raised objections, both formal and substantial.

As the patent in suit shows two specific constructions, the defendants contend that the complainant must be limited to one of these. Both constructions, however, are embodiments of the same inventive idea, and both are sufficiently covered by the claim. Hart's original patent taken out for the invention in question was No. 459,706. The reissue was granted to correct the error of a single word in the specification (by changing "hole" to "slot"), and a corresponding modification was made in a single feature of one of the 11 figures illustrating that patent. The error was caused by oversight, and was unconnected with the gist of the invention, though its adoption rendered the machine inoperative. No change was made or needed in the claim. If the patentee made a meritorious invention, he ought not to lose the benefit of it by reason of a defect so narrow and technical. See Walk. Pat. § 218a.

We pass to the substantial objections made by the defendants to the maintenance of this suit. The only claim of the reissue is as follows:

"The herein-described snap switch, consisting of a stop plate having stopping shoulders, a central hub, an operating handle, an eccentric moving with said hub, a switch plate, a spring plate, a spring, and a catch operated by said eccentric for releasing and stopping the switch plate, substantially as described, and for the purpose specified."

It is obvious that none of the elements set forth in the claim are new. The invention, if any, must be found in the combination of these elements. Again, it was not new in the art to make electric snap switches. Plainly, none of those made prior to Hart's invention were so satisfactory in their operation as to check the demand for improvement, or the patenting of machines devised to secure it. An examination of some of the many patents and machines introduced in evidence in this case suggests the cause of the failure of the earlier devices,—a failure sometimes complete and sometimes partial. The machines made under the patent in suit have gone into large general use, though there is no evidence that the plaintiff has monopolized the

manufacture of positively operating electric snap switches. Hart's combination of stop plate, hub with rigidly connected eccentric operating radially, spring, and catch, seems to us to contain important novelty. Certainly his invention was not primary, but we think that it was of value, unless anticipated in the prior art.

To show anticipation, the defendants have introduced in evidence many patents. We need mention but a few of these; for, if no one of those mentioned anticipated the complainant's invention, there was no anticipation in any of those passed over. The Bourne British patent, No. 15,617, resembles Hart's in little except the presence of a spring and eccentric. It has no stop plate, no locking against backward movement, no certainty of operation. Its switch plate is operated directly by the eccentric, and not indirectly, as are the switch plates of both complainant and defendants. It is a far cruder machine than Hart's or the defendants', though one of the same general class. Between it and Hart's we think there was meritorious and considerable invention; yet upon the anticipation alleged to be found in the Bourne device the defendants very largely rely.

The Norton patent, No. 430,252, contains no eccentric, strictly speaking, and its catch moves vertically, not radially. These differences, and others of less importance, give it a mode of operation quite unlike that of the patent in suit. No. 376,976, issued to Bergmann, is a reciprocating switch. Its operation is altogether different from Hart's, and its resemblance to the latter quite remote.

The Davis patent, No. 476,613, comes closer to the complainant's device. The complainant has introduced considerable direct evidence that his invention was made before that of Davis, though the latter was first applied for. This evidence was not shaken on cross-examination, and there is nothing to control it. It is true that evidence of prior invention, unsustained by proceedings to obtain a patent, is properly regarded with suspicion, but in this case we are inclined to find it sufficient. Even if, however, the Davis invention be taken to be prior to that of Hart, we think it does not anticipate Hart's switch. The Davis switch has no eccentric, properly so called, and its operation is materially different. It may be true that an imaginable combination of the Bourne and Davis patents would closely resemble the patent in suit, but such a combination is not obvious, and would require patentable invention.

Defendants rely also upon Hart's prior patent, No. 447,728. There is uncontrolled evidence that the switch described in the patent in suit was first invented and first reduced to practice. In any case, it was invented before the issue of No. 447,728. That patent, therefore, is not in the prior art, properly so called, and has priority only as a prior patent issued to the same inventor. We think that it is not so nearly identical with the patent in suit as to deprive the latter of real and useful novelty. The earlier Hart patent has no eccentric, properly so called, and no radially moving catch, and its stop plate, if there be one, is very different from that of the patent in suit. The entire operation of the mechanism is different. It may be added that the difference between some of the patents above mentioned, such as those of Bergmann and Davis, and the patent in suit, appears more

plainly when all are embodied in actual machines than when the specifications, drawings, and claims alone are examined.

It seems to us, then, that the patent in suit represents a valuable and useful, though limited, invention. If it be really valuable, we think there can be little doubt that it is infringed by the defendants' machine. The only differences between the two machines are: (1) The defendants' catch is released by a movement radially outward, while in the patent in suit the releasing movement is radially inward. In this respect, the two devices are plainly the mechanical equivalents, the one of the other. (2) The patent in suit is operated by a flat spring, one end of which is attached to a stud depending from a spring plate. The defendants' switch is operated by a spiral spring, the corresponding end of which is attached either to a small cap at the top of the hub and just beneath the operating handle, or is fastened by being passed through the hub itself, the cap in that case being omitted. That the spiral spring is the equivalent of the flat spring is clear, and it is equally clear that the defendants' cap in which the end of the spring is inserted is the mechanical equivalent of the complainant's spring plate and depending stud. It cannot help the defendants that in some of their machines the end of the spring is thrust through the hub itself instead of thrust into the cap. In considerable degree this is recognized, even by their expert, Mr. Freeman, who testified:

"If the Hart claim covers any equivalent of the spring plate, then the number of elements in the defendants' switches would be the same as the number of elements of complainant's switch broadly stated in the claim of complainant's patent. So too, broadly stated, the general mode of operation of defendants' switches is substantially the same as the general mode of operation of complainant's switches."

The learned judge in the circuit court seems to have been of the same opinion, for he says:

"Moreover, if the court was able to ascertain that the complainant's device was of a broad character, indicating a substantial advance in the art, it might be justified in holding that, although the spring plate is omitted in the respondents' device, yet inasmuch as, taken as a whole, it has what is equivalent to the complainant's device as a whole, including the substance of it, the complainant's patent should, therefore, be construed liberally and broadly, so that any infringement might be prevented if found."

As our examination of the prior art has led us to the opinion that the complainant's device did indicate a substantial advance in the art, it follows that the Hart claim does cover a mechanical equivalent of its spring plate. The difference between the two switches seems to us to be merely that which usually distinguishes an infringing machine from that which it infringes. Nonpatentability, rather than noninfringement, is the substantial defense to the action. The defendant corporation was therefore liable.

Two minor questions arise in dealing with the case. The defendants' answer alleged that the complainant had made or sold his switches without marking them or the packages containing them "Patented," and without notifying the defendants of any alleged infringement. In *Sessions v. Romadka*, 145 U. S. 29, 49, 12 Sup. Ct. 799, 805, a similar objection was raised, but the court said:

"Although there is the averment in the answer that the defendants have no knowledge or information, save from said bill of complaint, whether the packages were marked with the word 'Patented,' etc., and therefore deny the same, there is no denial of their knowledge that the Taylor device was patented; and in view of the fact that all letters patent are recorded, with their specifications, in the patent office,—a record which is notice to all the world,—it is not an unreasonable requirement that the defendant who relies upon the want of knowledge on his part of the actual existence of the patent should aver the same in his answer, that the plaintiff may be duly advised of the defense."

This objection of the defendants is therefore unfounded.

Some of the defendants further contend that, even if the defendant corporation should be enjoined in this case, no injunction should issue against the other defendants, its officers. Entirely apart from the question of the liability of an officer of a corporation for damages caused by infringements committed by him on behalf of the corporation, there can be no doubt that in a case like this the officers of the corporation may be enjoined from further infringement.

The decree of the circuit court is reversed, and the case is remanded to that court for further proceedings in conformity with this opinion, the appellant to recover its costs in this court.

LOEWENBACH v. HAKE-STIRN CO. et al.

(Circuit Court of Appeals, Seventh Circuit. February 23, 1899.)

No. 527.

PATENTS—INVENTION—RECEIPT AND RECORD BOOKS.

The Loewenbach patent, No. 390,087, for a combination, in a carbon copying receipt and record book, of series of permanent and detachable leaves bound together, each of the former having a portion of its edge cut off so as to expose part of the leaf below, if not covering a mere aggregation, is void, in view of the prior state of the art, for want of patentable invention.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

This was a suit in equity by Hugo Loewenbach against the Hake-Stirn Company and others for alleged infringement of a patent for improvement in receipt and record books. The circuit court dismissed the bill, and the complainant appealed.

J. B. Erwin, for appellant.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

PER CURIAM. This appeal is from a decree dismissing a bill for an injunction against infringement of the fourth claim of letters patent No. 390,087, granted on September 25, 1888, to Hugo Loewenbach, for improvements in receipt and record books. The claim reads as follows:

"In a carbon-copying receipt and record book, the combination of series of permanent and detachable leaves bound together, each of the former having a portion of its edge cut off or out, so as to expose part of the leaf below, substantially as and for the purpose set forth."

While it is true that the exact counterpart of the patented device is not found in the prior art, every feature of it is to be found in earlier patented devices, combined in the same immediate relations and performing the same functions as in the present combination; and whatever of novelty there may be said to be in the combination, if it be not merely an aggregation, is a matter of selection and arrangement, which did not involve invention. For a further statement of the case, and for a presentation of the prior art, we quote from the opinion delivered below:

"The object in view, as stated in the brief of complainant, 'is to provide a book by which an original and one or more copies of a receipt or other record may be conveniently and quickly made by one writing,' and the advantages which are there asserted for the construction are: 'First, to facilitate opening it quickly at the place of the last entry; second, to make conveniently and quickly the original receipt and one or more copies by a single writing; third, to facilitate identifying and grasping the copy or copies to be detached without moving or turning back the permanent leaf above; and, fourth, to facilitate tearing out the copy or copies without the aid of a straightedge or other instrument.' That each of the essential elements entering into this combination is old appears from the proofs, and is conceded; and analogous use of each is shown as follows: (1) That the use of carbon sheets for manifolding was long anterior to the date of the patent is shown in several prior patents, and may be accepted as of common knowledge. (2) The 'combination of a series of permanent and detachable leaves bound together' was not only well known, but is fully set forth in S. Hano's patent, No. 224,529, granted in 1880, for copying books, in which the leaves are in sets of three,—two of nontransparent paper, made detachable by a 'line of punctures,' and an intermediate sheet of tissue paper to receive a copy and nondetachable; the pressure of the pen or pencil in writing on the upper sheet causing copies to be made on the under two sheets 'by means of a sheet of offset paper' coated upon both sides placed between the latter. The two sheets of writing paper were then detached for use, leaving the tissue copy to be retained in the book for a record. Patent No. 261,245, issued in 1882, to J. S. McDonald, for a manifold order book, shows like provision of a series of permanent and detachable leaves, of which the former is retained in the book for record. The binding of leaves to make them either permanent or detachable, and the various methods adapted to effect the latter purpose, were too well known to require mention, and are exemplified in several patents introduced by the defendants. (3) The permanent leaf, 'having a portion of its edge cut off or out, so as to expose part of the leaf below,' is designed to facilitate turning at once to the place for use. Of this feature the assertion is made on behalf of the patent that it covers any form of cutting the outer edge of the page; that it is immaterial 'which portion of the edge, or which edge of the leaf, is cut away, or what shape is given to the cut or removed portion of the leaf'; and such interpretation is reasonable. But, surely, it was not new at the date of the patent to provide similar devices for ready reference, as in digests, index books, etc. The Mott and Carroll patent of 1875, No. 169,828, for an 'Improvement in Account Books,' clearly described a construction in which one corner of the leaves is perforated for removal as the pages are filled, thus indicating the place of last entry. Earnshaw's patent of 1883, No. 283,872, shows provision in a sales book of alternate long and short leaves for the same object so that 'a salesman can at once get access to the proper sheet and fold thereof preparatory to making a record thereon'; and in Soesbe's patent of 1875, No. 169,491, and Burwell's patent of 1883, No. 285,794, the same feature clearly appears of alternate long and short leaves in series in which removal in the course of use left exposed the long leaf which is next to be used.

"From these references it is manifest that the several elements of the combination in question are not only old, but are found in prior combinations in which both employment and purpose are analogous. Each element works in the old way, and for its accustomed purpose. No new function is given

to either by the combined use. It is a mere aggregation of elements, which may produce better results, but not 'by their collocation a new result,'—the indispensable requirement for a patentable combination. *Richards v. Elevator Co.*, 158 U. S. 299, 302, 15 Sup. Ct. 831; *Id.*, 159 U. S. 477, 16 Sup. Ct. 53. In this view the patent must be held invalid under the numerous authorities in point. See *Palmer v. Village of Corning*, 156 U. S. 342, 15 Sup. Ct. 381, and cases reviewed; *Olmsted v. A. H. Andrews & Co.*, 23 C. C. A. 488, 77 Fed. 835; *Lumber Co. v. Perkins*, 25 C. C. A. 613, 80 Fed. 528.

"Aside from the construction thus placed upon the patent, I am of opinion that this fourth claim is anticipated by the combination set forth in letters patent No. 285,794, issued to E. C. Burwell October 2, 1883, for a 'book' which is stated to be especially designed for use by railway conductors for 'checks given upon the payment of cash fare.' The book consists of a series of similar sets of three leaves each, one of ordinary writing paper, one carbonized, and the third of 'cardboard or thick, stiff paper (the latter being made longer), thus affording a tongue,' which both aids detachment and marks the place for use. It is true that the Burwell device differs from the complainant's in this: That the former shows each sheet perforated for ready detachment, a carbon sheet bound in, and the lower leaf of thick paper. But each of these performs a function in that device, and both element and function are omitted by the complainant without any substitute device. This does not constitute patentable invention. *Richards v. Elevator Co.*, 159 U. S. 477, 16 Sup. Ct. 53."

The decree below is affirmed.

THE SANDFIELD.

(Circuit Court of Appeals, Second Circuit. November 3, 1898.)

1. SHIPPING—DAMAGE TO CARGO—SEAWORTHINESS.

A stipulation in a contract of affreightment exempting the vessel from liability for loss and damage to the cargo occasioned by any latent defects in the hull of the vessel does not extend to such as were in existence at the commencement of the voyage; nor does the provision of section 3 of the Harter act, by which, if the owner has exercised due diligence to make the vessel in all respects seaworthy, neither he nor the vessel is liable for losses arising from the dangers of the sea, relieve the owner or vessel from the consequences of unseaworthiness at the inception of the voyage, though due diligence be shown.

2. SAME.

A vessel is not required to be impregnable to the assaults of the elements, to be seaworthy, but the test is whether or not she is reasonably fit for the contemplated voyage. The fact that a single rivet, among many thousands used in the construction of her hull, was not as strong as the average, and parted under the stress of extraordinarily stormy weather, does not raise a presumption of unseaworthiness, rendering the owner liable for a resulting damage to the cargo.

3. SAME—PRESUMPTION OF SEAWORTHINESS.

A steel steamship was of first-class construction and rating. She was new, and had been thoroughly surveyed by the Lloyds within a year preceding the voyage in question. She had thereafter made a number of voyages without injury, and two weeks after she entered upon that voyage she was uninjured. After that, the testimony of the crew showed, she encountered the worst weather they ever experienced, and she received much injury. During such time one of the rivets fastening the steel plates to the frame of the hull broke, and sea water entered through the space, and injured the cargo. It was shown that the holes through the plate and the frame were not exactly true, and that, in driving the rivet when hot, it had received a cant which perhaps weakened it somewhat, but not to any substantial extent. *Held*, that such facts were in-

sufficient to raise a presumption of unseaworthiness at the inception of the voyage.

4. SAME—MANAGEMENT OF SHIP—NEGLECT TO OPEN SLUICES.

The opening of a sluice gate designed to empty the bilges was neglected for 20 days, during heavy weather. The accumulating water overflowed the bilges, and damaged the cargo properly stowed in the hold. Held, that the neglect to open the sluices, if a fault, was one pertaining to the "management of the ship," within section 3 of the Harter act, and that the ship and owners were exempted thereby from liability for the resulting damage.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by the American Sugar-Refining Company against the steamship Sandfield to recover damages for injury to a cargo of sugar. From a decree dismissing the libel (79 Fed. 371), the libellant appeals.

Harrington Putnam, for appellant.

J. Parker Kirlin, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. Since the argument of this appeal, the case of The Carib Prince has been determined by the supreme court (170 U. S. 655, 18 Sup. Ct. 753), and that adjudication narrows the consideration of the cause to the question whether the steamship was seaworthy at the inception of the voyage. If she was, as it is not open to dispute that the injuries which caused the libellant's loss were caused by the perils of the sea, and could not be repaired during the voyage, the exception in the bill of lading against liability for losses caused by such perils protects the vessel from responsibility. According to the doctrine of The Carib Prince, a stipulation in the contract of affreightment exempting the vessel from liability for loss and damage occasioned by any "latent defects in the hull of the vessel" does not extend to such as were in existence at the time of the commencement of the voyage; and the provisions of the statute known as the "Harter Act" (section 3), by which, if the owner "has exercised due diligence to make the said vessel in all respects seaworthy —neither the vessel, her owners, agent or charterer—shall be held liable for losses arising from dangers of the sea" (27 Stat. 445), does not relieve the vessel, notwithstanding it is satisfactorily proved that due diligence was thus exercised by the owner. The case illustrates the inadequacy of language, whether used in a contract or statute, to modify the rigorous common-law obligation of the carrier by water, importing an absolute warranty that the vessel is seaworthy at the outset of her voyage. That decision is, of course, controlling upon this court.

The libellant's sugar, shipped upon the Sandfield at Alexandria, Egypt, for transportation to New York, was damaged by sea water which entered the hold of the vessel by leakage around a rivet in one of the steel plates below the water line in the port bilge aft, and which became loosened on the voyage by the vibration of the vessel while straining and pounding in weather of extraordinary severity.

The Sandfield was a first-class steel steamship, built in England, 1890. She was entered in Lloyds' Register as of the highest class in 1890, had been surveyed periodically according to the rules of Lloyds, and retained her classification at the time of the voyage in question. She had been surveyed by Lloyds' surveyor in the preceding February, and was then thoroughly examined and overhauled. Between that time and the voyage in question she went on a voyage from Blyth to Alexandria with a cargo of coals; from Alexandria she went to Taganrog in ballast; from Taganrog she went to Rotterdam with a cargo of grain; from Rotterdam she went to Cardiff in ballast; from Cardiff she went to Port Said with a cargo of coals; from Port Said she went to Nicolaieff in ballast; from Nicolaieff she went to Hamburg with a cargo of grain; from Hamburg she went to Newport in ballast; from Newport she went to Las Palmas with a cargo of coals; from Las Palmas she went to Muramichi in ballast; from Muramichi she went to Glasgow with a cargo of deals; from Glasgow she went to Cardiff in ballast; from Cardiff she went to Barcelona with a cargo of coals; from Barcelona she went to Cartagena in ballast; from there she went to Baltimore with a cargo of iron ore; from there she went to Londonderry with a cargo of grain; from there she went to Newport in ballast; from there she went to Genoa with a cargo of coals; from there she went to Alexandria in ballast, where she loaded sugar on the voyage in question.

In constructing such a vessel, the plates are riveted to the frames by driving a hot rivet from the inside, and battering down the head so as to fill up the countersink in the outer surface of the plate. Apparently, in the case of this particular rivet, the hole in the plate was not perfectly fair with the hole in the frame when the rivet was driven, there being a deviation in the inside surfaces of one-eighth of an inch in diameters of seven-eighths of an inch; and, in consequence of the rivet following the irregular passageway, it was not long enough when battered down to completely fill the countersink. When the ship was docked in New York after the voyage, the countersunk part of the rivet was found broken off and gone, but the rivet, though loosened, had to be driven out with a hammer and punch.

The witnesses say that on the voyage in question the weather was the worst ever encountered in their experience. The steamship received much sea damage. Two lifeboats were damaged,—one washed away; the winches were damaged; pipes and ventilators on deck were carried away; bridge rails and stanchions were bent and broken; the after deck was started in two places on the port and starboard sides; the wheel chains were parted several times, and after shackles were put on the shackles parted; and the propeller shaft was fractured from racing. At times she fell into the trough of the sea, and quantities of water came through the skylight into the engine-room.

The theory upon which it is insisted that the steamship was unseaworthy is that the rivet in question was defective. Undoubtedly the rivet was not as perfect as the workman might have made it, and was less capable of resisting the effects of strain and vibration

than if it had been as absolutely strong and perfect as the best or average of the many thousand rivets in the vessel, but we agree with the district judge who decided the case in the court below that "any such mere inequality in the strength of the rivets does not amount to unseaworthiness." Whether the vessel was unseaworthy or not is to be determined by the test whether she was reasonably fit for the contemplated voyage. *Dupont v. Vancee*, 19 How. 162; *Carv. Carr. by Sea*, § 18; *The Silvia* (Oct., 1898) 19 Sup. Ct. 7. If she was, it matters not that she was not impregnable to the assaults of the elements. If a vessel is reasonably sufficient for the voyage, and is lost by a peril of the sea, her owner is not responsible, as a carrier, for the cargo lost, upon proof that a stouter vessel would have outlived the storm. *Ang. Carr.* 173. It does not follow, because the rivet loosened in consequence of the extraordinary strain which the vessel encountered, that it was one which would have been pronounced insufficient by men of competent judgment, upon an examination and full appreciation of its condition at the beginning of the voyage. No expert testified that such a rivet would have been considered unsafe. On the contrary, the only witness to whom such a question was addressed—a shipbuilder and mechanical engineer of great experience and intelligence—testified that the irregularity was not an unusual one, and was not enough to affect the strength of the rivet substantially. Persuasive evidence that the rivet was originally reasonably strong and sufficient is found in the fact that it had proved to be so throughout the previous voyages of the vessel. There was no leakage during the first two weeks of the voyage. The sluices were opened February 14th, and no water was found. Owing to the continually heavy weather that followed, they were not opened again until March 6th, and it was during the intervening time that the rivet became loosened. The excessive strain to which it was subjected during the exceptionally severe weather of this period of 20 days in which it broke adequately explains the cause of the mishap. Whether a more perfect rivet, if it had been located precisely where this rivet was, would have endured without breaking, is wholly a matter of conjecture. What are termed the "factors of safety" in estimating the capacity of different materials to endure tensile or torsional strains are within the knowledge of competent shipbuilders; but whether a particular rivet, though inherently perfect, will hold or break, is a problem, to use the words of Rudyard Kipling, "depending upon that unknown force men call the 'pertinacity of materials,' which now and then balances that other heart-rending power, the perversity of inanimate things."

In the case of *The Warren Adams*, 38 U. S. App. 356, 20 C. C. A. 486, and 74 Fed. 413, this court had occasion to consider the presumptions to be indulged upon the question of the seaworthiness of a vessel at the outset of the voyage. The court said:

"Where a vessel soon after leaving a port becomes leaky, without stress of weather, or other adequate cause of injury, the presumption is that she was unsound before setting sail. The law will intend the want of seaworthiness, because no visible or rational cause other than a latent or inherent defect in the vessel can be assigned for the result. But, where it satisfactorily appears that the vessel incurred marine perils which might well disable a

staunch and well-manned ship, no such presumption can be invoked. And where for a considerable time she has incurred such perils, and shown herself staunch and strong, any such presumption is not only overthrown, but the fact of her previous seaworthiness is persuasively indicated."

We conclude in the present case that the vessel was seaworthy, and that the rivet was fractured and loosened by the extraordinary strain inflicted upon it by stress of weather.

We have not overlooked the contention for the appellant that the steamship should be held liable for negligence because of the omission to open the sluices during the 20 days of the storm. If this was a negligent omission, it occurred as a part of the "management of the vessel"; and the owners having exercised due diligence to make her in all respects seaworthy, and properly manned, equipped, and supplied, she is not liable for faults in her management, and the terms of the Harter act (section 3) apply. In the recent case of *The Silvia* (decided at the present term) *supra*, the supreme court defined the meaning of the words "management of said vessel," as used in the "Harter Act," as follows:

"They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas."

The decree is affirmed, with costs.

THE FREY.

(District Court, S. D. New York. March 10, 1899.)

1. SHIPPING—DAMAGE TO CARGO—UNSEAWORTHINESS FROM IMPROPER LOADING.

The loading of drums of glycerine, which, from their shape and weight, require care in loading, in the between-decks, without filling the entire cargo space to prevent them from jumping, and when the entire loading was so light as to bring the glycerine very high above the water, where it would be subject to the greatest effect of the rolling of the vessel, and the result of which was that the drums shifted and the cargo was damaged thereby, although no extraordinary weather was encountered, constitutes such improper loading as rendered the vessel unseaworthy at time of sailing, and the damage resulting is not within exceptions in the bill of lading against "unseaworthiness" or "damage by leakage, breakage, or contact with other goods," since the bill of lading also bound the owners to the exercise of "due diligence to render the vessel seaworthy"; nor are they, for the same reason, relieved from liability by section 3 of the Harter act (2 Supp. Rev. St. p. 81), which does not cover negligence in loading, stowing or ballasting the ship.

2. SAME—HARTER ACT—EFFECT ON FOREIGN VESSELS.

Foreign vessels being entitled to the benefit of the Harter act (2 Supp. Rev. St. p. 81), they will be held subject to its limitations by courts of the United States in suits for damages to cargo arising on the high seas on voyages to this country.

This was a libel by Frederic Marx and others against the steamship Frey for damage to cargo.

Carter & Ledyard, for libelants.
Convers & Kirlin, for claimant.

BROWN, District Judge. The above libel was filed to recover the damage caused to some drums of glycerine and to certain bales of rabbits' skins on board the steamship Frey, on a voyage from Dunkirk, France, to New York in January, 1898. Through excessive rolling of the ship, the drums of glycerine stowed in the 'tween-decks, forward of the forward hatch, got adrift and shifted. Some of the drums were cut and their contents spilled, which, after the ventilator had been carried away, leaked through the opening upon the rabbits' skins in the hold beneath. The defendant claims that the loss arose from the heavy weather, constituting a sea peril, and further claims exemption under the exceptions contained in the bill of lading.

The Frey is a schooner-rigged steamer of 1,948 tons net, 3,000 tons gross, 322 feet long, 41 feet beam and drawing about 23 feet. Upon this trip she was very lightly loaded, carrying only about one-sixth of her cargo capacity. Drums of glycerine constitute a somewhat difficult cargo to stow safely for heavy weather, both from their shape and their weight. The libelants gave some evidence tending to show that such drums should not be loaded in the 'tween decks; but this evidence is, I think, fully met by the evidence for the claimant, showing that stowage in the 'tween-decks is by no means uncommon, and that it is safe and proper, if the other weights of the cargo are properly distributed, and the ship properly ballasted. The evidence for the claimant also, in my judgment, shows good ordinary stowage of the drums of glycerine in the 'tween-decks considered by itself alone and independently of its relation to the light loading of the ship, except possibly in one particular, namely, the absence of a complete filling of the cargo space up to the deck above in order to prevent the drums from jumping. In this case, as I understand the evidence, there was more or less of vacant space above the drums, which permitted them to jump. But besides this, the evidence shows two additional difficulties, viz.: (1) That the extremely light load brought the glycerine in the 'tween-decks very high above the water where the rolling was most felt; and (2) the lack of sufficient additional weights above, whether of cargo or of ballast, to prevent short and jerky rolling, and to make the vessel's motions easy. To avoid these difficulties with so light a cargo, the drums of glycerine, being from their nature somewhat difficult to stow securely, should have gone in the lower hold, and other and sufficient heavy weights stowed above to make the vessel easy.

The defendant contends that the shifting of the cargo should be attributed to sea perils. The proof leaves no doubt that this shifting was due to the excessive rolling of the ship; and the only question in this regard is, whether the excessive rolling should be ascribed to extraordinary weather, or to the improper loading and ballasting of the ship. On careful consideration of all the testimony upon this question, I do not think that the excessive rolling of the steamer can fairly be ascribed to extraordinary weather. There were one or two gales, but they were not of any unusual character; and neither arose until after the shifting of cargo began. There were heavy seas and cross seas; but the testimony does not show that it

was these seas that were extraordinary, but the behavior of the ship. The steamer shipped no sea forward, and but one or two aft, which, as the master says, were of no account; nothing on deck was carried away; there was no unusual racing of the propeller; her engines were kept in motion about as usual, and the ordinary voyage of 17 days was prolonged but a single day. On the third day after passing the Lizard, it was found that the drums of glycerine were loose, and on account of the heavy rolling of the ship it was impossible to readjust them, and the whole cargo in the 'tween-decks forward was soon in confusion. The ship had never behaved so before; but at that time there was no gale, but only a heavy rolling sea. The rolls of the ship were short and jerky; and the glycerine in the 'tween-decks, being high above the water, was more affected than it would have been in the hold. Under such conditions, it is clear that the 'tween-decks was not a proper place for drums of glycerine; or if stowed there, that they should have been more thoroughly wedged in from the top as well as the sides, and that more weights should have been stowed above.

Questions pertaining to the proper distribution of heavy and light cargo or proper ballasting and stowage in order to make the ship sufficiently easy and safe where the cargo is light, are not questions that devolve upon the shipper to determine, nor is he in any way responsible for their solution. The responsibility is upon the carrier alone; and as I cannot find in this case that there was any such extraordinary weather or seas as might not have been reasonably anticipated in crossing the Atlantic in the month of January, or any such weather as naturally to cause such a shifting and destruction of cargo in a well-loaded and well-ballasted ship, I must ascribe the primary cause of this loss to the deficiencies in the ship's condition in that regard at the time of sailing; in other words to unseaworthiness at the time of sailing as respects the needed loading and ballasting for the carriage of glycerine in the 'tween-decks as it was there stowed.

The exceptions in the bill of lading do not reach this case. Conceding, as the respondent claims, that the exceptions of "unseaworthiness," "damage by leakage, breakage or contact with other goods," throw the burden of proof in the first instance upon the libelants to prove some negligence in the ship (*The Pereire*, 8 Ben. 301, Fed. Cas. No. 10,979; *The Flintshire*, 69 Fed. 471; *The Lennox*, 90 Fed. 308), this burden is met when it is made to appear that the leakage, breakage and contact arose from shifting of the cargo, caused by the improper condition of the ship at the time she sailed (*The Thames*, 61 Fed. 1014; *Kopitoff v. Wilson*, 1 Q. B. Div. 377; *The Whitlieburn*, 89 Fed. 526). As the shipowner, moreover, is responsible for any shortcomings of his agents or subordinates in making the steamer seaworthy at the commencement of the voyage for the transportation of her particular cargo (*The Mary L. Peters*, 68 Fed. 919; *The Alvena*, 74 Fed. 252, 254, affirmed in 25 C. C. A. 261, 79 Fed. 973; *The Niagara*, 77 Fed. 334, affirmed in 28 C. C. A. 528, 84 Fed. 904, 905; *The Colima*, 82 Fed. 678), he is in this case precluded from claiming exemption for unseaworthiness by the

terms of the bill of lading, which make it a condition that the owners shall have "exercised due diligence to make the vessel seaworthy"; and for the same reason, the Harter act (2 Supp. Rev. St. p. 81) does not avail him. As was observed in the case of *The Whitlieburn*, 89 Fed. 528:

"The loading, stowing and ballasting of a light cargo are all so interdependent on one another, as affecting the seaworthiness of the ship, that they all fall under the first section of the act, which expressly confirms the owner's previous responsibility; and to cases which fall under the specific provisions of the first section, the general exemptions of the third section are not applicable. *Worsted Mills v. Knott*, 76 Fed. 582, 584; *The Colima*, 82 Fed. 665."

Nothing has been cited from the law of France, from which country the vessel sailed, showing that her owners can there lawfully exempt themselves from responsibility for negligence in not making the ship seaworthy on sailing; nor do I understand that to be the French law. But even if it were, the provision in this bill of lading shows a contrary stipulation in this case; and in any event, since the passage of the Harter act, no validity could be given to such a defense in our courts for damage arising on the high seas from negligent and unseaworthy loading upon voyages to this country. As foreign vessels receive the benefits of that act, they are bound by its limitations and are subject to the declared policy of this country in that regard, as established by the federal decisions and by the positive provisions of that statute. *Worsted Mills v. Knott*, 27 C. C. A. 326, 82 Fed. 471, affirming 76 Fed. 582, and cases there cited; *The Silvia*, 15 C. C. A. 362, 68 Fed. 230, 231.

Decree for the libelants with costs.

THE GUADELOUPE.

(District Court, S. D. New York. March 13, 1899.)

1. SHIPPING—DAMAGE TO CARGO—SEAWORTHINESS.

The beams of the main hatch of a vessel had been cracked some time previous to a voyage, and on the discharge of her cargo, at the end of the voyage, were found to be in worse condition and her deck to have sunk in consequence. *Held*, that such fact, where the vessel encountered a hurricane during the voyage, which would account for her condition at its end, did not overcome the presumption of her seaworthiness when she sailed, arising from the fact that the beams had been repaired and strengthened, and that her classification had been kept up thereafter on repeated surveys, and had not expired.

2. SAME—MANAGEMENT OF SHIP—REPAIRS IN PORT OF DISTRESS.

When a ship is obliged, during a voyage, to put into a foreign port for repairs, owing to injuries received in a storm, an error of judgment of the master, as to the extent of repairs necessary, where he exercises diligence and care, and acts in good faith, pertains to the management of the ship, within section 3 of the Harter act (2 Supp. Rev. St. p. 81), and does not render the owners liable for an injury to the cargo which might have been prevented had more extensive repairs been made.

In Admiralty. Damage to cargo. Sea perils.

Cowen, Wing, Putnam & Burlingham, for libelants.

Benedict & Benedict, for claimant.

BROWN, District Judge. On the 31st day of March, 1898, the French schooner La Guadeloupe, being then at Santos, Brazil, was chartered to E. Johnston & Co. for the carriage of a cargo of coffee to New York. She was loaded by the charterers and left Santos on May 4, 1898. Shortly after, she met with a pampero, or hurricane, in which she lost her anchors, damaged her windlass, and was subjected to considerable strain, whereupon she returned to Santos for repairs. After an official survey there, and the making of all such repairs as were deemed necessary, she again sailed on the 31st day of May, and arrived in New York on the 13th of August. Upon discharging, considerable of the coffee was found damaged by sea water, to recover which damage the above libel was filed.

1. The libel charges unseaworthiness on sailing from Santos, and bad stowage. The evidence shows that two beams of the main hatch had been cracked at some time previous to this voyage, and that under the direction of the Bureau Veritas repairs had been made and the beams strengthened by nailing slabs or planks across the cracks in or prior to December, 1896. Her classification had been kept up on repeated surveys, and had not expired at the time this voyage was made. I am of opinion that the evidence offered is sufficient to afford presumptive evidence of seaworthiness at the time the vessel first sailed from Santos, and that the extraordinary weather she soon after experienced, together with her subsequent voyage, is sufficient to account for the widening and increase of the cracks in the beams, and for the sinking of the deck, as they were found to exist after her discharge in New York.

2. The evidence does not show any established custom requiring in the 'tween-decks of a ship like this any wooden dunnage between the matting and the ceiling. The mode of stowage used in this vessel seems upon the evidence to have been equally common, and to be regarded as good and sufficient stowage.

It was doubtless the duty of the master to use diligence in making all necessary repairs at Santos to put the ship in a seaworthy condition, and for that purpose to make such surveys as were apparently needed in order to determine what repairs were necessary. This obligation, however, was not a warranty, but a duty to use due diligence only. An official survey as I have said was made, and everything was done by the master that was recommended. But the question whether the cargo should be removed, and to what extent, for the purpose of examining the interior of the ship, thereby incurring certain considerable expense, was a question for the exercise of the master's judgment. There is nothing to indicate that he did not act fairly and in good faith; he consulted, as was proper, with the agent of the underwriters representing to a large extent the cargo interests, and they opposed any opening of the hatches, as no leak had yet been disclosed. If any error was committed in this respect, I think it was an error of judgment. It was an error, moreover, pertaining to the "management" of the ship; since the question arose after the voyage had commenced, at a port of distress, far from the home port, and away from any supervision by the owners, and was wholly subject to the master's determination.

In procuring the survey and doing the repairs, as the master acted with due and reasonable care and diligence, the case falls within the express provision of section 3 of the Harter act (2 Supp. Rev. St. p. 81). This renders it unnecessary to determine whether the injury to the deck occurred solely during the hurricane immediately before the repairs, or partly from that cause and partly from the subsequent additional strain upon the hatch beams, through the heavy weight of water taken aboard on the voyage to New York after the repairs were made.

The libel should be dismissed but without costs.

UNITED STATES v. YOUNGER.

(District Court, D. Washington, N. D. March 6, 1899.)

SEAMEN—PENALTY FOR DETAINING CLOTHING—PROCEEDING TO ENFORCE.

A criminal information will not lie for the violation of 28 Stat. 667, c. 97, which exempts the clothing of a seaman from attachment, and provides that any person who shall detain such clothing when demanded by the owner shall be liable to a penalty, as a penalty imposed by an act of congress is a debt, to be recovered by a civil action, and for which, in a state where imprisonment for debt has been abolished, imprisonment by a federal court is prohibited by Rev. St. § 990.

This is an application for a bench warrant on an information filed by the district attorney of the United States.

Wilson R. Gay, U. S. Atty.

HANFORD, District Judge. In this case the United States attorney has filed an information charging that the defendant did unlawfully detain the clothing of a seaman, contrary to the statute of the United States in such case made and provided, and has moved the court, ore tenus, to order a bench warrant to issue for the arrest of the defendant. The information is founded upon 28 Stat. 667, c. 97, which provides:

"That the clothing of any seaman shall be exempt from attachment, and that any person who shall detain such clothing when demanded by the owner shall be liable to a penalty of not exceeding one hundred dollars."

And it is proposed to prosecute the case for the recovery of the penalty in the manner and by the forms of procedure appropriate in criminal cases, and the purpose of this motion for process is to subject the defendant to imprisonment, or compel her to give bail for her appearance while the case shall be pending. The statute, however, does not declare the act of the defendant to be a crime, nor authorize procedure of a criminal nature for the purpose of recovering the penalty. Blackstone, after saying, in effect, that, on the principle of an implied original contract to submit to the rules of the community whereof we are members, a forfeiture imposed by law or an amercement immediately creates a debt, in the eye of the law, and such forfeiture or amercement, if unpaid, works an injury to the party or parties intended to receive it, for which the remedy is by an action of debt, then proceeds as follows:

"The same reason may with equal justice be applied to all penal statutes; that is, such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound, by the fundamental contract of society, to obey the direction of the legislature, and pay the forfeiture incurred to such persons as the law requires." 3 Wend. Bl. Comm. 161.

Mr. Justice Thompson, in the case of *Stearns v. U. S.*, Fed. Cas. No. 13,341, says:

"Actions for penalties are civil actions, both in form and in substance, according to 3 Bl. Comm. 158. The action is founded upon that implied contract which every person enters into with the state, to observe its laws."

The supreme court has held that a civil action is the proper method of proceeding to recover penalties imposed by acts of congress. *Stockwell v. U. S.*, 13 Wall. 531-553; *Chaffee v. U. S.*, 18 Wall. 516-546. For other authorities, see 5 Enc. Pl. & Prac. p. 907.

Section 990, Rev. St., provides that:

"No person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where by the laws of such state, imprisonment for debt has been or shall be abolished."

The constitution and laws of this state have abolished imprisonment for debt within this state, and as the authorities, including the decisions of the supreme court of the United States, hold that a penalty, when incurred by the transgression of a statute, becomes immediately a debt, therefore cases in which the government proceeds for penalties come within two positive rules, one of which prescribes a civil action as the proper remedy, and the other forbids use of the harsh method of imprisonment. For these reasons the request of the United States attorney for a bench warrant must be denied.

THE PRESIDENT.

(District Court, N. D. California. January 23, 1899.)

No. 11,410.

1. SHIPPING—CARRIAGE OF PASSENGERS—CONSTRUCTION OF CONTRACT.

A vessel which contracts to carry passengers to a port, where they are to procure boats to land themselves and their stores, is bound, on reaching such port, to remain a reasonable length of time to enable the passengers to procure boats and to make their landing, and is only excused from so remaining by act of God or the public enemies.

2. SAME—FARE FURNISHED PASSENGERS.

Where the fare furnished passengers on a long sea voyage is such as is usually provided, and is sufficient in quantity, and properly cooked, and the passengers do not really suffer, they have no ground for the recovery of damages because it is not so good as might have been furnished, or as is provided on vessels making short voyages.

3. DAMAGES—BREACH OF CONTRACT OF CARRIAGE.

In an action against a vessel for damages by reason of a failure to afford passengers an opportunity to land on reaching their port of destination, and their carriage to a distant port, the measure of recovery is the actual damage sustained, which includes the fare paid, and, where the passenger returns to the port at which he took passage, the cost of

such return, together with a reasonable sum as compensation for the loss of time necessarily resulting from the breach of the contract.

This was a libel by Benjamin F. Gray and others against the steamship President to recover damages for breach of contract to carry libelants as passengers, and for alleged mistreatment on the voyage.

Page, McCutchen & Eells and W. H. Payson, for libelants.
Chickering, Thomas & Gregory and Andros & Frank, for claimant.

DE HAVEN, District Judge. This action is one to recover damages for the alleged breach of an agreement to transport the libelants on the steamship President from St. Michaels, in the territory of Alaska, to Unalaklik, in the same territory. The libel alleges that in pursuance of their agreement for such passage the libelants went on board the President at St. Michaels, proceeding thence on the voyage to Unalaklik; that, when the latter place was reached, the master of the steamer refused to land the libelants or their stores, and, against their protests, carried them to San Francisco. It is further alleged that the master used towards them during the voyage to San Francisco profane and intemperate language; that, owing to the crowded condition of the steamer and lack of preparation for such a voyage, the libelants were not given proper accommodation or food, and by reason thereof "suffered great inconvenience and discomfort on the said voyage." Each of the libelants claims damages in the sum of \$2,000. The claimant, in its answer, admits that the libelants took passage on the President on her voyage between St. Michaels and Unalaklik on October 19, 1897; and in this connection it is alleged "that it was then and there further understood and agreed by and between the master and said libelants that the service so contracted for as aforesaid was to be limited to transporting said libelants to a point off the beach at Unalaklik, where it would be safe for said steamer to lie, and that said libelants agreed themselves to provide the means for and secure a landing at said point; and the master of said vessel did not agree to land any of said libelants, or any of their said stores, but then and there expressly stated to them that he would not, and it was then and there mutually agreed that he should not, guaranty said libelants a landing at said point"; and as a defense to the action it is alleged that on the morning the President left Unalaklik for San Francisco, in attempting to raise her anchor the winch used for that purpose broke, and became useless, so as to render it impossible to again bring the vessel to anchor; that the weather was stormy, rendering it impossible to make the land without imminent danger of wrecking the vessel and losing the lives of those on board; that in its disabled condition, and in the then state of the weather, it was impossible for the steamer to make St. Michaels, or any other place in Alaska; "that the season of navigation in the Behring Sea was then about to close, and that the safety of the ship and the lives of those on board rendered it imperative to put to sea; that the port of San Francisco was the most available port for the safety and best interests of all concerned." The answer denied that the master of the President used towards the libelants profane and

intemperate language during the voyage to San Francisco, and also contained a denial of the further allegation of the libel that he failed to provide them with proper food and accommodation. There is no substantial conflict in the oral evidence as to the terms of the contract between the libelants and the master of the President. The contract was that in consideration of the sum of \$15, paid by each, and labor performed by them in assisting to discharge the cargo of the President at St. Michaels, the libelants, with their stores, were to be carried by that steamer from St. Michaels to Unalaklik, and upon arrival there they were to procure, at their own expense, boats properly manned, and assist the boats belonging to the steamer in landing themselves and stores. In fulfillment of this agreement the libelants were taken on board the President at St. Michaels, the steamer leaving there on the morning of October 19, 1897, and arriving at a point about two miles off the shore at Unalaklik early in the afternoon of the same day, where the steamer was anchored. Several of the libelants then went on shore, and made arrangements with the natives to assist with their skin boats in landing libelants and their property, and they also brought with them, upon returning to the steamer on the same afternoon, a whaleboat to be used for the same purpose. One small load of freight was also taken ashore by a skin boat, and it then being near dark and the tide too low for loaded boats to reach the beach, the master of the President determined to wait until the next morning before further attempting to discharge the freight belonging to libelants. The whaleboat was then taken on board, and the steamer moved further from shore, to what was deemed a safer place of anchorage for the night. In raising the anchor on the following morning, a reversing link, part of the steam winch used for raising and dropping the anchor, was broken. The anchor was, however, after some delay and difficulty, raised, and the steamer then ran to within three or four miles of the shore, blowing her whistle from time to time as a signal to those on the shore to come out. The interval between the first and the last whistle was about half an hour; and, no boats having come from the shore, the whaleboat was launched and anchored, and the President immediately, and without the consent of libelants, steamed for the port of San Francisco, without giving them any further opportunity to land with their stores at Unalaklik.

The question for decision is whether the refusal of the master of the President to longer remain off Unalaklik, and the carrying of libelants to the port of San Francisco, was a breach of the agreement above stated. The libelants were entitled to a reasonable opportunity to land with their stores at the place of destination. The fact that it was also provided by the agreement that they were to procure at Unalaklik boats to assist in the landing, did not, in the least, release the President from its obligation to lay off Unalaklik a reasonable length of time so as to permit the landing of the libelants and their stores in the manner contemplated by the contract. The undertaking on the part of the master of the President was an absolute one to carry the libelants to Unalaklik, and to remain there a reasonable length of time for the purpose of giving the libelants

an opportunity to disembark with their stores, and the nonperformance of such an agreement can only be excused by the "act of God" or "public enemies." There is, of course, an implied condition in a contract of this character that human life shall not be put in imminent peril in its performance. If the condition of the wind and sea on the morning of October 20th was such that it was not possible to land the libelants without exposing them to extreme danger, or if it was apparent, in view of all the surrounding circumstances, that longer to remain in the vicinity of Unalaklik would endanger the safety of the vessel and the lives of those on board, the master of the President was justified in no longer remaining, and the burden of proving that there was such apparent danger is upon the claimant. Upon the trial of this action the master testified, in substance, that on the morning the President left Unalaklik, the wind was blowing with a velocity of 25 or 30 miles an hour; that the sea was so rough that it would not have been possible to have landed the libelants; that the weather was extremely cold, and ice was forming around the vessel; that under these circumstances, and in view of the fact that the winch used in operating the anchor was disabled, the vessel could not safely remain longer off Unalaklik; that, as the season for navigation in that latitude was about to close, and ice was liable to form at any time, it was imperatively necessary for the President at once, and without any delay whatever, to steam for San Francisco. The testimony of the master is corroborated by the engineer and the first officer of the President, and by other witnesses. On the other hand, those of the libelants who were witnesses, and several other persons who were passengers on board the President, and who are not parties to this action, testified that on the morning the President left for San Francisco there was nothing to prevent the landing of the libelants at Unalaklik; that, while the weather was cold, and a strong breeze blowing, the sea was not much, if any, rougher than upon the previous afternoon, when small boats passed between the steamer and the shore without difficulty. Upon questions like those arising here, as to whether the wind was blowing a gale or only a strong breeze, or whether the ocean was very rough or otherwise, the testimony of a seafaring witness is not entitled to any greater weight than that of any other person who has reached years of discretion, and who has observed the sea in different kinds of weather. Certainly any person of ordinary judgment and observation who was on the President when she left Unalaklik, and on the day before, is competent to say whether the sea on the morning of leaving Unalaklik was rougher than on the previous afternoon, when small boats passed between the steamer and the shore, and such a person would be able to form some opinion whether boats from the shore could have succeeded in reaching the steamer and taking passengers therefrom on the day in question. The fact, also, that a whaleboat was launched without difficulty just as the President was leaving Unalaklik tends very strongly to show that the opinion of these witnesses that it was possible to have landed without danger is correct; so, also, the fact that some of the libelants requested the captain to remain for a few minutes longer so as to give the boats time to come

from shore, if there was any intention upon the part of the natives to come out, tends strongly to show that the sea was not so rough as to impress such libelants with a feeling that they would have incurred great personal danger in attempting to land at that time. After giving careful consideration to the conflicting evidence, I have reached the conclusion that it was possible for the libelants to have landed at Unalaklik, without danger to themselves, if reasonable opportunity had been given therefor. I am entirely satisfied from the evidence that the injury to the winch was one which could have been easily repaired, and there was nothing in the situation or circumstances surrounding the President to justify her master, under the law as I have stated it, in leaving Unalaklik without giving libelants sufficient time to ascertain whether boats were coming out to land them and their stores. The opinion of the master that the safety of the vessel and the lives of those on board imperatively required that he should take the action he did is not conclusive, and constitutes no defense to an action for the breach of his contract. The evidence must be sufficient to show that such opinion was a reasonable one, in view of all the circumstances then surrounding him.

The allegations of the libel charging the master with improper treatment of the libelants in the use towards them of profane and intemperate language, and in failing to provide them with proper accommodations and food during the voyage, are not, in my judgment, sustained by the evidence. The food was such as is usually furnished on long sea voyages, and was sufficient in quantity, and properly cooked. It was not so good, or served so well, as on passenger steamers making shorter voyages; but this fact is not ground for damages. To adopt the language of Lord Denman, C. J., in *Young v. Fewson*, 8 Car. & P. 55:

"There is no real ground of complaint, no right of action, unless the plaintiff has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had that he is therefore to have a right of action against the captain who does not provide all that he ought. You must be satisfied that there was a real grievance sustained by the plaintiff."

Upon the question of damages, the recovery must be limited to the actual loss sustained by the libelants in consequence of the breach of the contract. This will include the value of their services in assisting to discharge the President at St. Michaels, and the amount paid by them for transportation to Unalaklik; also a reasonable sum by way of compensation for the loss of time consumed on the voyage from Unalaklik to San Francisco. Such of them as have returned to Alaska are entitled to recover, in addition, the expense of transportation from San Francisco to St. Michaels, and a reasonable sum for the loss of time consumed on the return voyage. There is evidence showing that some of the libelants sustained damages by reason of the loss of a portion of their stores left on the beach at Unalaklik, and stores damaged by water on the voyage from Unalaklik to San Francisco. The libel makes no claim for such damages, but the libelants will be permitted to amend the libel in this respect, and the case will be referred to United States Commissioner Manley to report on the evidence already taken, and such

further testimony as may be presented, the amount of damages sustained by the respective libelants; the report to show each item of damage allowed.

THE MAURICE B. GROVER.

(Circuit Court of Appeals, Second Circuit. January 25, 1899.)

No. 11.

1. COLLISION—STEAMER AGROUND—CARRYING SAILING LIGHTS.

Under the navigation rules on the lakes (Act Feb. 8, 1895 [28 Stat. 645] Rules 1, 3), a steamer should not carry sailing lights when aground, and is in fault for a collision resulting from her misleading an approaching vessel by such lights.

2. SAME—SIGNALS.

A passing steamer, having the right of way, is not in fault for a collision because she failed to give the signal to indicate which side she expected to take, when the other vessel was aground, and her movements could not have been influenced by such signal.¹

3. SAME—ERROR OF JUDGMENT—ACT IN EXTREMIS.

One of two passing vessels cannot be held in fault for a collision merely because of an error on the part of her master, where he acted in an emergency, and upon a reasonable judgment, in view of the circumstances as they were presented to him at the time.

Appeal from the District Court of the United States for the Northern District of New York.

Norris Morey, for appellant.

Harvey S. Goulder, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The circumstances of the collision are sufficiently stated in the opinion of Judge Coxe (79 Fed. 378), and we agree substantially in his conclusions of fact. We also agree in the legal conclusions that the Moran was in fault, and the Grover should be exonerated from liability, though not altogether with the reasons assigned in the opinion. The facts, briefly stated, are these: The collision took place in St. Mary's river, opposite the island known as "Sailor's Encampment." The river around the island is shallow, has a rocky bottom, has a current of two miles an hour, and is navigable by vessels of size only in the narrow channel constructed by blasting out the rock. The Moran, bound up the river, ran aground at the westerly side of the channel, below what is known as the "Crib," and lay there, with her stem projecting at right angles with the channel, until about dusk,—a period of about two hours,—until the collision. The channel at that point, for half a mile up the river, and running in a northerly direction, is straight, and then deflects sharply to the west around Sailor's Encampment, and below the crib runs southerly a short distance, and turns again somewhat abruptly to the westward. The Moran's stem projected so far into the channel as to very seriously impede the maneuvers of vessels descending the river in making

¹ As to signals of meeting vessels, see note to The New York, 30 C. C. A. 630.

the turn below the crib. At all times navigation at that point was difficult, and it had become customary in 1895 and 1896 for ascending vessels to lie still below the turn, and wait for the descending vessel to pass. The place where the Moran was grounded was near the location sometimes selected by vessels thus awaiting descending vessels. The Grover, as she rounded the northerly side of Sailor's Encampment, gave the customary whistle at the bend to indicate her approach. Those in charge of her navigation saw the Moran, saw her masthead and red lights, saw that she was stationary, although her propeller was moving, and assumed that she was an awaiting vessel. They did not observe her vigilantly, and devoted themselves to the navigation of their own vessel until they passed a dredge lying in the channel about halfway between the bend and the Moran, and then they gave and maintained vigilant attention to the Moran, and made preparations to pass her. As she approached nearer, her master concluded that he could not pass across the bows of the Moran and make the channel turn with safety to his own vessel. He therefore increased the speed of the Grover, which up to that time had been proceeding very slowly, and, when she was about 300 feet above the Moran, ordered her helm hard a-port, and soon after her engines backed, intending to pass the Moran on the port side, and expecting to see the Moran go ahead under a helm to throw her stern to starboard and out of the way of the Grover. Whether this maneuver would have been successful, if the Moran had been free and had made such a maneuver, is doubtful. She could not assist the Grover, and the latter, though only under sufficient motion to give steerageway, struck the Moran nearly amidships on the port side. We are convinced that the master of the Grover acted upon his best judgment at the time he starboarded the course of his vessel, and the proofs do not satisfy us that she could have passed in front of the Moran's bow, and made the turn in the channel, without risk of running upon the rocks. If those in charge of the Grover had known, or should have known, the Moran to be aground, the Grover would have been in fault for not reversing when or before she got opposite the dredge; and the most serious question in the case is whether they were not negligent in assuming that she was an awaiting vessel. She was lying nearer the crib than awaiting vessels usually did, but vessels had passed near that place before, and the rock upon which she grounded was not generally known to navigators. If the water had not been lower than usual, she probably would not have grounded. The master of the Grover was an experienced navigator, familiar with the locality; and there is not the slightest doubt that he and the others on the Grover, after carefully observing the Moran, continued to think she was an awaiting vessel. They undoubtedly assumed that she was lying further below the crib than she really was, but miscalculations of that sort are not inconsistent with the exercise of reasonable vigilance. Seeing her sailing lights burning, they had a right to suppose she was not aground until the contrary became manifested. Upon a careful reading of the proofs, we conclude that those in charge of the Grover were justified in their assumption that the Moran was an

awaiting vessel, and in relying upon that supposition until it was too late to take any more effective measures for avoiding collision than those which were taken. The Moran was in fault because she was under her sailing lights while aground. The Lorne, 2 Stu. Adm. 177. Rule 3 requires the lights to be carried by steam vessels "when under way," and by rule 1 a vessel is not under way for the purpose of carrying lights, when she is grounded. Act Feb. 8, 1895 (28 Stat. 645), regulating navigation on the Great Lakes and their connecting waters. By carrying her sailing lights, the Moran advertised herself as being under way, and actually misled the Grover.

It is urged that the Grover was in fault for omitting to give the signal prescribed by rule 24 (28 Stat. 649), by which the descending vessel is given the right of way, and required, when two steamers are meeting, to indicate which side she elects to take. This fault is not charged in the libel. It is doubtful whether the rule applies to a case like the present, where one of the vessels is lying still. The failure to give it in this case did not influence, and could not have influenced, the movements of the Moran. Whether the Moran could have given any signal to the Grover to indicate her inability to control her movements we are unable to say. The court below was of the opinion that when she heard the signal given by the Grover, while rounding the bend, she ought to have sounded an alarm signal. The case is not one covered by any formulated rule; and while it may be that such a signal might have led those in charge of the Grover to apprehend that the Moran was not under control, and to take earlier precautions for avoiding her, it is so doubtful whether they would have understood the signal to be meant for them that we are indisposed to treat the omission as a fault contributing to the collision. It is probable that the Grover could have passed across the bow of the Moran and made the turn in the channel safely. Other vessels had done so while the Moran was aground, but at that time she did not obstruct the channel to the same extent, and it does not follow that the Grover could have done so because the others did. The Grover was so heavily laden that she might have failed, although the others succeeded. We cannot resist the conclusion that the master of the Grover acted upon a reasonable judgment, in view of the circumstances as they were presented to him at the time; and, if he made a wrong judgment, it was an error, and not a legal fault. The decree is affirmed, with costs.

THE LYNDHURST et al. (two cases).

(District Court, S. D. New York. March 14, 1899.)

1. COLLISION—TUG AND TOW—LOOKOUT.

A tug cannot be exonerated from fault for a collision in the night, where she failed to keep a lookout at the bow of the float she was towing, which projected about 100 feet beyond the tug, and it is not shown that the maintenance of such lookout would not have prevented the collision.

2. SAME—LIGHTS.

A tug, in charge of a tow consisting of a tier of canal boats, which left the tow adrift in the night for upwards of an hour without proper lights at the bow and stern of the outside boats of the tier, as required by the inspectors' rules (rule 11), promulgated under 30 Stat. 102, is in fault for a collision occurring during such time, by which the tow was injured, both on the ground of the abandonment of the tow, and of towing without proper lights on the tow.

3. SAME—LIABILITY OF TOWS.

The requirement of inspectors' rule 11 (30 Stat. 102), that "barges and canal boats when towed at a hawser, two or more abreast in one tier, shall carry a white light on the bow and a white light on the stern of each of the outside boats," imposes a duty on the tow, as well as on the tug, to see that such lights are maintained, and not only on the outside boats, but on each one in the tier, since the requirement is for the benefit of all; and for a collision resulting when such requirement is not being observed each boat injured should be held in fault.

These were libels, respectively, by John O'Brien and Edward Montgomery against the steam tugs Lyndhurst and Andrew J. White for damages for collision.

James J. Macklin, for libelants.

Cowen, Wing, Putnam & Burlingham, for defendant the Lyndhurst.
Carpenter & Park, for defendant the Andrew J. White.

BROWN, District Judge. I do not see sufficient reason for changing the former decisions in these causes.

1. I cannot relieve the tug White from responsibility for failure to have a lookout at the bow of the float which projected about 100 feet beyond the tug. The man stationed 100 feet more or less, aft on the float, nearly abreast of the tug's pilot house, in order to communicate the necessary orders of navigation to the wheelsman on the tug, was the responsible person in charge of the navigation. The authorities are full of cases insisting on the necessity of a lookout, having no other duties to perform, and stationed at the proper place, namely, at or near the front. Had a lookout been so stationed, there is no reason to suppose that this tier of canal boats would not have been observed in time to avoid them, just as they were observed and avoided by the ferry boat below them. The boats were merely drifting with the tide and had no motion through the water. It was not such a night as would have prevented seeing such boats, even without a light, at a sufficient distance to avoid them. As it is impossible for the tug to show that a lookout properly stationed, and without other duties, would not have enabled the tug to have avoided the collision, she must be held in fault. The Pennsylvania, 19 Wall. 137.

2. The tow did not have the lights required by law. By rule 11

of the inspectors' rules promulgated in accordance with the new regulations of 1897 (30 Stat. 102), and approved June 7, 1897, the tow was bound to have a white light at the bow and a white light at the stern of each outside boat of the tier. There was no light at all at the bow, and the light in the cabin, if there was any, was dim. The requirements of the law were not complied with; the omission was evidently material. The tow being in charge of the Lyndhurst, it was the duty of the Lyndhurst not only to see that the proper lights were set on starting, which she did not do, but also by a proper occasional observation of the tow behind, to see that these lights were properly maintained. She was therefore responsible for towing without proper lights on the tow, as well as for the abandonment of the tow for upwards of an hour, left adrift in the stream, unattended and unwatched.

3. The requirement of inspectors' rule 11 that

"Barges and canal boats when towed at a hawser, two or more abreast, in one tier, shall carry a white light on the bow and a white light on the stern of each of the outside boats"

imposes a duty also on the tow to carry lights as specified; and this includes the duty of attention to the lights required to be exhibited so as to keep them in proper condition. In towing upon a hawser, it is not reasonable to hold that the tug alone should attend to and keep up such lights. The men in charge of the boats forming the tier should see to this, and be ready to answer any hails from the tug in that regard, without requiring the tug to stop her towing and come alongside of the tow in order to give any necessary attention to the lights during towage. The latter interpretation of the rule, would be not only an unreasonable burden upon the tug, but sometimes very embarrassing, if not dangerous. The outside boat is, therefore, in fault on this ground. The case is strictly analogous to that of The Raleigh and The Niagara, 44 Fed. 781, in which on appeal, both were held liable under rule 15 D of section 4233, Rev. St.

4. The maintenance of these lights being in the interest and for the benefit of each boat in the tier, and not for the outside boats alone, the duty of attending to these lights by whomsoever on the tow that duty may be performed, is a duty undertaken in behalf of all the adjacent boats in the tier. The rule, in form, imposes the duty upon the tier as a whole, and not on the outside boats alone. I see no reason for confining this duty to the outside boat alone, when the lights and necessary watch are for the benefit of the inside boats as well. The present case shows that all are interested in the performance of this duty. The Le Roy next inside the Drum Major was injured by the transmission of the blow of collision from the latter. One man as a watchman is probably sufficient for a tier, and the common duty should be divided and shared as the boatmen may arrange among themselves. But whoever acts should be deemed acting for all, since it is in the interest of all; and any negligence in that regard should, therefore, be treated as negligence on the part of the boat injured. Each canal boat should, therefore, recover two-thirds of her damage from the other two tugs.

THE CHERUSKIA.

(District Court, S. D. New York. March 8, 1899.)

1. COLLISION—LIGHTS—SHIP NOT UNDER COMMAND.

Article 4 of the sailing rules, requiring two vertical red lights to be exhibited by a ship when not under command, refers to vessels in some way disabled, and does not apply to a brigantine which was simply moving very slowly in a light wind, though she had not complete steerageway for all maneuvers, but sufficient to keep her course.

2. SAME—EXCESSIVE SPEED IN FOG.

Where the full speed of a steamer was $10\frac{1}{2}$ or 11 knots, a reduction of from 1 to $1\frac{1}{2}$ knots in a fog still leaves the speed excessive. The reduction, even in a moderate fog, should be at least to two-thirds of full speed.

3. SAME—STEAMSHIP AND SAILING VESSEL—CROSSING OR OVERTAKING—SIGNAL LIGHTS—EVIDENCE CONSIDERED.

Evidence considered in relation to a collision between the German steamship Cheruskia and the British brigantine R. L. T. at sea, in the evening, during a fog, by which the brigantine was lost, and held to show that the steamship alone was in fault as a crossing and not an overtaking vessel, and that no signal lights were required.

This was a libel by Edward E. Hutchings and others against the steamship Cheruskia to recover damages for collision.

Everett P. Wheeler and Charles S. Haight, for claimant.

Eustis, Jones & Govin and Mr. Benedict, for libelants.

BROWN, District Judge. The above libel was filed to recover the damages arising from a collision between the British brigantine R. L. T. going southerly and the German steamship Cheruskia going westerly, which took place to the southward of Nantucket Shoals lightship in a low but not very dense fog on the evening of July 4, 1898, at about 9:15 p. m. The brigantine was struck on her port quarter a little aft of the main rigging by the stem of the steamer within two or three points of a right angle. A large hole was knocked in her side and she speedily careened on her beam ends, turning to port, and being light, she drifted away without sinking, her officers and crew being rescued on the steamer.

The weather was nearly calm, so that the sailing vessel had little motion, though most of her sails were set and closehauled with the wind from W. to W. by S. on her starboard side. The fog was low, and such that lights could be seen about one-fourth of a mile to one-third of a mile distant; while it was clear and bright starlight above. The brigantine was in charge of the mate at the time, the captain being below. The captain's son and another seaman were forward, the latter acting as lookout, the former blowing a mechanical fog horn. A negro seaman was at the wheel. The course as given an hour before was S. by W., but so light was the wind that for more than an hour before collision the helm had been kept hard down, the vessel coming up and falling off, as the seaman testifies, about half a point from time to time. The two high white lights of the steamer were first seen from the brigantine, variously estimated from quarter of a mile to one-half a mile or more distant. The seamen forward estimate the distance at from 800 yards to one-half a mile, and say that immediately afterwards her green light was

seen about abeam on the port side. The mate saw first the white lights and then the colored lights dead abeam, as he says, and estimated to be about 1,500 feet off. About 1½ minutes afterwards, as he estimates, he called the master, who coming at once on deck, saw, as he says, the steamer's green light about three lengths distant, i. e. about 400 feet. This was estimated by him and the mate to be about 2 minutes before collision. The distance at that time was probably about 1,000 feet instead of 400. None of the seamen speak of seeing the red light except the wheelsman, who afterwards said he did not know what he saw. All say that the steamer seemed to come straight towards them from about abeam and without any material change in speed. The captain and mate were thrown down by the shock of collision, and the captain had some ribs broken by the fall.

On board the Cheruskia, running W. $\frac{1}{2}$ S., a blast of the brigantine's fog horn was first indistinctly heard, and the wheel was immediately ordered hard aport. A few seconds afterwards her red light was seen about two points on the steamer's starboard bow and the order to slow was given, followed 10 seconds afterwards, as the master says, by the orders to stop and reverse which were received so nearly together that they were entered in the engine room as one order at 9:14 and immediately obeyed, and the order to stop reversing was received at 9:17, which was probably about half a minute after collision. The time of reversing was, therefore, from about 1½ minutes to 2 minutes before collision. Under her port wheel and while reversing the steamer swung from 3 to 5 points to starboard. The master's statement that she swung 3 points to starboard before reversing, is inconsistent with the other testimony and is probably an error. When the brigantine's red light was first seen it was estimated by the master to have been from 400 to 600 meters distant; by the mate, 400 meters. The maneuvers indicate that it was about a quarter of a mile, and could not have been much more. Soon after the red light was seen the brigantine herself was distinguished. The full speed of the steamer, as she was running before entering the fog, was about 10½ or 11 knots; but at 9:04 p. m. on running into the fog, the order "Attention" i. e. to stand by, was sent to the engine room, which meant a reduction of about 1½ knots in speed by changes in the drafts. But the assistant engineer, who was alone in the engine room at that time, says that on this occasion he made no changes in the draft or any actual reduction in speed, but waited for the next order. The master estimated that the steamer could be stopped from 9 or 10 knots in going 600 feet, but he is mistaken in this supposition. Stopping from full speed in 3½ minutes, she would advance about 550 yards; and from 10 knots speed, at least 400 yards. The steamer was running upon a course heading W. $\frac{1}{2}$ S.

For the defense, it is contended that the steamer's speed was not excessive in so light a fog; that her speed had been reduced to 9½ knots and that lights could be seen at an abundant distance to enable her at that speed to avoid other vessels; and that the explanation of the collision is (1) that the steamer was overtaking

the brigantine, coming up from behind the range of her red light, and that the brigantine failed to exhibit a flare-up light or a white light over her stern, as required by new article 10; and (2) that the brigantine was unmanageable from lack of wind, and was not under command, nor making any substantial headway; and should therefore have exhibited 2 vertical red lights visible all around the horizon, as required by article 4.

As to the last point, the testimony of the captain is quite positive. He says that the wind was W. or W. by S.; that there was "quite a breeze at 4 o'clock and we tied up some light sails and tied a reef in the mainsail. It commenced to die out just about sundown." He went below soon after 8 o'clock, and he testifies:

"At that time I suppose she was going about $\frac{3}{4}$ of a mile an hour, but the wind was dying out all the while."

In answer to the question: "Q. Did you give any order in regard to handling the ship when you came on deck, a few moments before the collision," he answered as follows:

"A. No, we couldn't handle our ship, our ship was unmanageable at that time. We couldn't answer the helm, we could neither way nor steer.

"Q. She couldn't have changed her course if she had wanted to? A. No, I guess not.

"Q. Didn't you know that she didn't have steerageway as soon as you came on deck? A. I knewed that she was unmanageable as soon as I got on deck.

"Q. Before you had asked the question? A. Oh, yes."

The captain's son who was forward blowing the fog horn testifies:

"Q. Did you notice how fast she was going? A. She wasn't going ahead at all, wasn't going not more than a mile an hour, didn't have no steerage on her."

The fact that she did not have proper steerageway is further shown by the testimony that before the watch was changed at 8 o'clock, the helm had been put hard down and was kept down; and Britto, who was at the wheel from 8 o'clock until the collision, testifies on this point as follows:

"Q. How was the wind? A. I couldn't tell you how the wind was; the wheel was down all my watch. We were under short canvas; we did not alter the wheel at all from the time I relieved the man.

"Q. Did you follow the same course or did you change it? A. The wheel was down; she came up half a point and went off half a point. * * * The man said go by the wind. We were going S. S. W. or something like that; * * * followed the same course; it went off half a point and up half a point."

From this it is probable that the vessel was not moving over a mile an hour, as I do not credit the mate's estimate of 2 to 3 knots. Had the steamer been aware of this slow speed she would naturally have kept on without stopping or porting; and having the brigantine 2 points on her starboard bow when nearly $\frac{1}{4}$ of a mile distant, she would have gone ahead of her by several hundred feet, even without starboarding her wheel.

I do not think the brigantine, however, was "not under command," in the sense of article 4. I understand that article to refer to vessels in some way disabled, so as to be no longer under control. That was not the situation of the brigantine. She was in perfect condition.

She was simply moving very slowly in a light wind. She had not complete steerageway for all maneuvers. She could not change her tack by luffing; but she could do so by wearing around. She was substantially keeping her course and had sufficient steerageway for that purpose, whether making only $\frac{1}{4}$ of a knot, or from 2 to 3 knots as the mate testifies. I think article 4 is not applicable to such a case.

1. Upon the facts as above found the steamer must be held to blame for this collision, because her speed was not materially reduced from full speed. The testimony of the officers and the entry in the log of reduced speed under the order of "Attention," are based only upon inference from the ordinary practice to reduce speed on that order 1 or $1\frac{1}{2}$ knots. But the assistant engineer's testimony shows that the ordinary practice under that order was in this instance not observed. But even had the ordinary reduction under the order "Attention" been made, I should have been bound under the authorities to hold a speed so near to full speed to be excessive in so considerable a fog as hung upon the water at that time.

At the moment of collision the speed of the Cheruskia must have been greatly reduced or she would have cut off the stern of the brigantine. The officers of the steamer think she was nearly stopped; but the blow was too severe to admit of that conclusion, and the brigantine was turned around towards the port side of the steamer as she backed away. I think she was still moving at the rate of $3\frac{1}{2}$ or 4 knots, to which speed she would naturally be reduced in the $1\frac{1}{2}$ minutes of actual reversal before collision, advancing during this interval from 300 to 400 yards. Had she been going at even "half speed," i. e. about $7\frac{1}{2}$ knots or about two-thirds of full speed,—as much as is justifiable in moderate fog,—the collision would have been avoided. See The Chattahoochee, 173 U. S. 540, 19 Sup. Ct. 491.

2. The contention that the steamer was overtaking the brigantine and coming up astern of the range of the latter's red light, so that it was incumbent upon the brigantine to exhibit a flare-up light, or a white light from her stern, under article 10, was not set up in the original answer. It was interposed by amendment at the trial. Most of the libelants' testimony had been taken previously, by depositions, at a time when no such defense was raised; and it has therefore in its favor the merit of not being given with any reference to this defense. All the direct testimony on the libelants' part, however, is opposed to such a situation of the two vessels. The libelants' witnesses all speak of seeing the steamer's lights, from the first, either abeam or nearly so. The mate, indeed, testified on the last day of the trial that he observed his own heading to be by compass S. by W. and the steamer's bearing from him to be E. by S. when her lights were seen. This would place her exactly abeam; and this I find would very nearly correspond with the computed position of the steamer when 500 yards distant from him, assuming, as the mate says, that the brigantine's heading was S. by W. and that the steamer swung four points to starboard and pointed at collision, as the weight of testimony indicates, including the steamer's witnesses, two points aft of the brigantine's beam, i. e. two points towards her stern.

From the testimony of the defendant's experts that the brigantine could head within five points of the wind, it is argued that the wind was W. and the consequent heading of the brigantine S. W. by S. With that heading of the brigantine, the steamer would have been astern of the range of the red light when a little less than half a mile distant from it, provided the steamer at collision did not point at all towards the stern of the brigantine.

I find that in order to sustain the claimant's contention that a stern light should have been exhibited by the brigantine, each of the following points must be established: (a) That the steamer's lights were visible at least half a nautical mile distant, since at a less distance, even on defendant's hypothesis, they would not be seen astern of the range of the brigantine's red light, and hence no duty to display a stern light would arise; (b) that the wind was W.; and (c) that the brigantine in so light a wind as then prevailed would head within 5 points of it, so that her actual heading should not be south of S. W. by S.; and (d) that at collision the steamer was not pointing towards the brigantine's stern, but was either at right angles to the brigantine or pointing somewhat towards her stem. A substantial variation from either of the above requirements would vitiate the defendant's hypothesis.

(a) Upon a fair consideration of the evidence, I do not think it can be held that either one of the above conditions is satisfactorily proved. The one most nearly established is probably that the steamer's lights could be seen half a mile; yet this is sustained only by two of the seamen at the bow of the brigantine, who estimated the distance at 800 or 1,000 yards, while the mate estimates the distance as only 500 yards. It is obvious that not much reliance can be placed upon estimates either of the distance, or the time that elapsed until collision, where they are not corroborated by other circumstances.

(b) The precise direction of the wind cannot be determined. The weight of evidence of the brigantine's witnesses is clearly that the wind was somewhat south of W.; while the master, second officer and lookout of the steamer all say that the wind came from the port side of the steamer, which would make it considerably S. of W., the master and second officer saying that it was S. W., which however must be erroneous.

(c) The brigantine's experts say that in a very light wind she would not sail within 5 points of it, but from $5\frac{1}{2}$ to 6 points off. The defendant's experts base their contrary testimony upon the assumption that the yards would be more sharply braced in a very light wind; but there is no evidence that the yards were so sharply braced in this case.

(d) The weight of evidence, as above stated, is that at collision the steamer was heading, at least, 2 points towards the stern of the brigantine. This appears from the testimony and diagrams of the master, second officer, quarter-master and carpenter. With that angle of collision, even had the brigantine been heading S. W. by S., the steamer would have been within the range of the brigantine's red light for considerably above the distance of half a mile before collision, as the backward tracing of her course will show.

Three, at least, of the data necessary in order to sustain the defendant's contention, seem, therefore, to be disproved; and I may add that the angle of collision directed two points towards the brigantine's stern is in another respect incompatible with the defendant's hypothesis that the brigantine was heading S. W. by S.; that upon that heading of the brigantine, the steamer, in order to head 2 points towards the brigantine's stern at collision, must have swung about 6 points from her previous course, and this is about 2 points in excess of what her testimony supports. The fair deduction from the steamer's evidence on this head is, that she swung about 4 points to starboard; and this would give the brigantine's heading as S. by W., if the steamer at collision was heading 2 points aft of abeam.

It should be observed also, that while mere estimates of time and distance may be very erroneous, seamen are able to judge approximately of the bearing of the lights seen from the deck; and the united testimony of all on board the brigantine that the steamer's lights from the first were seen about abeam, should receive fair credence in the absence of any impeaching circumstances. If the lights were seen in fact more than 2 points aft of abeam, they would naturally speak of them as on the quarter, or coming up aft, rather than about abeam. In this case the fact that at the time when their testimony was given no issue had been raised on this subject, makes their testimony less liable to the suspicion of misrepresentation or bias on this point. My own judgment is that the steamer's lights were probably not seen more than about 600 yards distant; and if the curve of the steamer's course in swinging 4 points to starboard while traversing about 1,100 or 1,200 feet, the distance she would naturally travel in making that change, be carried back from the point of collision and from a heading of 2 points aft of the brigantine's beam, and thence further backwards straight on her previous course of W. & S., it will be seen that the lights she would exhibit to the brigantine would not vary half a point from abeam while traversing that 600 yards prior to collision. The consistency of the brigantine's account of the bearing of the lights with the alleged heading of S. by W. and with the angle of collision as established by the steamer's witnesses, and especially with the maneuvering power and previous maneuvers of the steamer, which they could not possibly have understood or foreseen, is very persuasive of its truth in this regard.

I am constrained, therefore, to find the Cheruskia alone to blame for the collision and that the libelants are entitled to a decree with costs.

UNITED STATES v. MARSH.¹

(Circuit Court of Appeals, Fifth Circuit. March 21, 1899.)

No. 781.

JURISDICTION OF CIRCUIT COURTS—SUITS AGAINST UNITED STATES—EFFECT OF AMENDMENT OF STATUTE.

The effect of the act of June 27, 1898 (30 Stat. 494), amending section 2 of the judiciary act of 1887-88, which gave the circuit and district courts jurisdiction of suits on claims against the United States, by excepting from such jurisdiction cases brought to recover fees, salary, or compensation for official services of officers, was to deprive the circuit and district courts of jurisdiction to further proceed in such cases then pending therein; and a judgment thereafter rendered in such a case will be reversed on appeal, with directions to dismiss.

In Error to the District Court of the United States for the Northern District of Florida.

J. Ward Gurley, for the United States.

F. W. Marsh, in pro. per.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is a suit brought on the 28th day of February, 1898, by Frederick W. Marsh, clerk of the circuit and district courts for the Northern district of Florida, against the United States, to recover certain fees for services rendered as clerk in said courts, which had been disallowed by the accounting officers of the United States. Various proceedings were had therein, culminating on July 11, 1898, in a judgment against the United States for the sum of \$292.65, with interest from February 28, 1898. 88 Fed. 879. On the 19th day of November, 1898, the United States sued out a writ of error, removing the case to this court; and the record was filed on November 26, 1898. By a supplemental record it appears that on January 25, 1899, at the same term in which the judgment was rendered, the United States, through its attorney, moved in the district court to vacate and annul the aforesaid judgment because at the date of entry of said judgment the said court had no jurisdiction to hear or determine this suit, nor to enter said judgment on its record, as the jurisdiction of said court to hear and determine causes of the kind had been taken away by the act of congress approved June 27, 1898 (30 Stat. 494), and that on March 6, 1899, the said motion to vacate and annul the judgment for want of jurisdiction was granted, and an order to that effect entered on the minutes of the court. On this state of facts, the case has been submitted in this court.

During this term, in the case of U. S. v. McCrory, 91 Fed. 295, we had occasion to consider the effect of the act of congress approved June 27, 1898, as follows: "Sec. 2. That section two of the act aforesaid, approved March third, eighteen hundred and eighty-seven, be, and the same is hereby, amended by adding thereto at the end thereof the following: 'The jurisdiction hereby conferred upon the said circuit and district courts shall not extend to cases brought to recover fees, salary or compensation for official services of officers of the United States or brought for such purpose by persons claiming

as such officers or as assignees or legal representatives thereof." 30 Stat. 495,—and to hold that, as the act in question took away the jurisdiction of the district court in suits brought by officers for fees, its effect was to defeat the useful exercise of the appellate jurisdiction of this court, and the proper action was to enter an order abating the writ of error. The difference between the Case of McCrory and the present one is that in the former the judgment of the district court was rendered before the passage of the act in question, and in the present case the judgment was rendered after the act was passed. The proceedings had in the district court on the motion to vacate and annul, although at the same term, were had after the case had been removed to this court, and after the district court was for the time being deprived of any jurisdiction in the case which it may have originally had. It is probable that, if the present writ of error should be abated, the proceedings already had in the district court would show an annulment of the judgment; but, for greater certainty in the matter, it is deemed proper, as we have jurisdiction to review the judgment of the district court, to enter a judgment reversing the judgment of the district court rendered on July 11, 1898, and remanding the case, with instructions to dismiss the suit; and it is so ordered.

TRAVIS COUNTY v. KING IRON BRIDGE & MANUFACTURING CO.¹

(Circuit Court of Appeals, Fifth Circuit. March 14, 1899.)

No. 795.

1. CIRCUIT COURTS OF APPEALS—JURISDICTION TO ISSUE CERTIORARI AS ORIGINAL PROCESS.

Act Cong. March 3, 1891, § 2, declares that the jurisdiction of the circuit courts of appeals is "appellate," as "limited and established" by the act. Section 11 provides that no appeal or writ of error by which any judgment or decree may be reviewed in said courts shall be taken or sued out, except within six months after the entry of the judgment or decree. Section 12 provides that said courts shall have the powers specified in Rev. St. U. S. § 716, which authorizes the federal courts "to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." *Held*, that the circuit courts of appeals cannot issue writs of certiorari as original process. They can review no cause except by an appeal taken or a writ of error sued out as prescribed.

2. JUDGMENTS—FINALITY—EFFECT OF CHANGE IN INTERPRETATION OF LAW.

A change in the interpretation of a law applicable to a cause prosecuted to judgment does not entitle the party who was cast in the suit by reason of the prior interpretation to reopen the controversy.

This is an application by the county of Travis, Tex., for a writ of certiorari to bring up for review from the United States circuit court for the Western district of Texas the cause of Travis county against the King Iron Bridge & Manufacturing Company, in which suit, on July 13, 1893, a final judgment was rendered by that court against the county of Travis, plaintiff in the cause. The present petition for

¹ Rehearing denied March 28, 1899.

certiorari was, on January 9, 1899, presented to this court by counsel, who moved the court for leave to file it. The motion was taken under advisement, and on the following day, January 10, 1899, leave having been granted, the petition was filed.

The petition for certiorari alleges that the county of Travis brought suit in the United States circuit court for the Western district of Texas against the King Iron Bridge & Manufacturing Company upon a certain indemnity bond for \$47,000, executed and delivered by the bridge company to the county of Travis. The bond recited that on July 3, 1888, the bridge company entered into a contract with the representatives of the county of Travis to build a certain bridge across the Colorado river at Montopolis Ford, in the county of Travis, for the sum of \$47,000, payable in 6 per cent. bonds of the county; \$25,000 in said bonds having been issued to the bridge company, leaving a balance of \$22,000 unpaid. The indemnity bond further recited that a question had arisen as to the correct high-water mark of the year 1869 (the contract requiring the floor or bed of the bridge to be five feet above the highest flood level of that year). The indemnity bond recited that, provided the county's representatives should issue and deliver to the bridge company the remaining bonds, amounting to \$22,000, with certain interest, the bridge company guarantied the bridge "for the term of ten years against the flood level of A. D. 1869, and, if the bridge continue to stand against said flood level of 1869 for a term of ten years," the bond to be void; otherwise to remain in full force. The petition for certiorari proceeds to allege that in accordance with the indemnity bond the county executed and delivered to the bridge company the remaining 22 county bonds, amounting to \$22,000, mentioned in the indemnity bond, and that within about one month thereafter two spans of the bridge washed away, and several piers were damaged, in a flood in the Colorado river that did not rise as high, by several feet, as the flood level of 1869,—the terms of the indemnity bond being thus broken, and the bridge company made liable to the county; that the bridge company refused to either pay anything or to repair the bridge, and the county was compelled to repair the bridge at a cost of \$23,910.50. The county brought suit for the amount of the indemnity bond, and, in the alternative, for the actual outlay in repairing the bridge. The bridge company set up as a defense, among other matters, that the indemnity bond sued upon was without good and valuable consideration in law, and was, therefore, of no binding force against it. By stipulation, the cause was tried by the judge sitting in the United States circuit court without a jury. The judge's conclusions of fact show: That the contract for the building of the bridge was entered into on July 3, 1888, the price being \$47,000, to be paid in county bonds. That on May 13, 1889, the bridge company tendered the bridge as being completed, and demanded payment in county bonds of the remaining \$22,000 due on the bridge, 25 bonds of \$1,000 each having theretofore been delivered. That the representatives of the county refused to accept the bridge, upon the ground that it was not as high as required by the contract. That a controversy thus arose, which was finally adjusted on July 3, 1889. The controversy as to the height of the bridge was compromised by the execution on July 12, 1889, of the indemnity bond sued on. That shortly afterwards the county delivered 22 of its bonds of \$1,000 each to the bridge company. That the bridge company sold the bonds, but the amount realized from them was not shown. That neither before the issuance of these bonds, nor at any reasonable time afterwards, did the county levy any tax, or make any provision whatever, for the payment of the interest on the bonds, or to provide a sinking fund for the payment of the principal. As conclusions of law the judge found that the 22 county bonds mentioned in the contract of guaranty of July 12, 1889, are null and void, as having been issued contrary to the constitution and laws of the state of Texas, and that, therefore, they are not binding on the county; that there was no consideration for the guaranty entered into by the bridge company, and such contract is void, and not binding on the parties. The petition for certiorari proceeds to show that on March 19, 1896, one Albert Wade brought suit in the United States circuit court for the Western district of Texas against the county of Travis on interest coupons attached to the bonds issued by the county in accordance with the indemnity

bond of July 12, 1889, above mentioned. The suit was decided against Wade (72 Fed. 985), the judgment being, on writ of error, affirmed by this court (26 C. C. A. 589, 81 Fed. 742) on June 16, 1897. The petition for certiorari avers that the county of Travis was defeated in its suit against the bridge company, and was successful in defending the suit brought by Wade because of the construction then placed on the constitution of Texas by the highest court of that state, which construction was followed by the federal courts. The petition alleges that subsequently, on January 10, 1898, the supreme court of Texas, in the case of Mitchell Co. v. City Nat. Bank of Paducah, 43 S. W. 880, rendered a decision, the effect of which, as contended, is to declare county bonds, such as the bonds issued to the bridge company by the county of Travis, to be lawful and binding; that after the decision of the supreme court of Texas, Wade, who, as already stated, had been defeated in his suit on the interest coupons, applied to the supreme court of the United States for a certiorari to this court, upon the ground that since this court affirmed the judgment against him the supreme court of Texas had rendered the decision just mentioned; that Wade's application to the supreme court of the United States for certiorari was granted in March, 1898, and his suit is now pending in that court. The petitioner, the county of Travis, evidently in anticipation of a charge of laches on its part in not suing out a writ of error from this court in its suit against the bridge company, and in allowing a great lapse of time before applying for certiorari, alleges that the United States circuit court "followed, and was bound in comity and the custom and practice of federal courts to follow, the jurisprudence of the supreme court of the state of Texas on the question at issue; and that petitioner, recognizing that the decisions of the Texas supreme court were, in effect, as held by the circuit court in this case, and further recognizing that the circuit court of appeals and the supreme court of the United States would likewise consider themselves bound to follow those decisions of the state supreme court, construing a provision of the state constitution, submitted to the decision of the circuit court, without seeking to have the same reviewed by the federal appellate courts. That petitioner could not have obtained relief in this court is conclusively shown by every decision on the same question since the judgment of the circuit court in this case, not only by the said circuit court and the Texas supreme court, * * * but also by this court"; citing numerous cases. The petitioner alleges that it would be a great hardship, brought about by no laches or negligence on its part, if Wade should succeed in his suit against it, and yet that it should have no relief against the bridge company. The petitioner further states: "That, if the decision of the said circuit court in this case be allowed to stand, the result will be that, through a change in the decisions of the highest state court, the federal court sustains a defense alleging the invalidity of the said county bonds when urged by one litigant (the bridge company), and overrules the same defense as to the invalidity of the identical bonds when relied upon by another litigant (your petitioner)." The King Iron Bridge & Manufacturing Company has moved to dismiss the application for certiorari, and has also demurred and excepted to the same, for the following reasons: Because it appears from the face of the application that the judgment of the lower court undertaken to be reviewed on certiorari was rendered in July, 1893, and this application for certiorari was not filed in this court until January 10, 1899, and therefore is too late, even if, under any circumstances, the same could at any time have been entertained by this court. Because, if any errors existed in the judgment complained of, such errors could have been revised by this court on writ of error, and the failure of the applicant to avail itself of such remedy is a conclusive bar to any revision of the supposed errors by certiorari. Because under the act of congress creating this court, and fixing its jurisdiction, it has no power to review by certiorari the proceedings of the United States circuit courts. Because, in the suit in which the judgment complained of was rendered, the applicant has filed, on January 9, 1899, and there is now pending in the lower court, an application to file a proposed bill of review, in which the judgment is sought to be reviewed and set aside, and therefore the lower court still has the case before it, and this court has no jurisdiction over it. Because, to grant the application for certiorari would be virtually to abrogate the statute fixing the time within which a judgment

shall be brought to this court for revision by writ of error or appeal, and this court is without power to review a judgment of a United States circuit court except upon a writ of error or appeal duly taken within the time prescribed by law. Because, even if this court had the power to grant the application, no good reason is given why the same was not made more promptly. Because it is not shown that the lower court committed any error in rendering the judgment under the law as it then stood. And because there are no such questions of gravity or importance involved in this cause as would authorize the granting of a certiorari, even if this court had the power to grant it.

C. H. Miller, for petitioner.

M. W. Garnett, for respondent.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge, after stating the facts, delivered the opinion of the court.

The only authority which this court has to issue writs of certiorari is conferred by section 12 of the act of congress of March 3, 1891, which established the circuit courts of appeals. This section provides that the circuit courts of appeals "shall have the powers specified in section 716 of the Revised Statutes of the United States"; that is to say, that the circuit courts of appeals shall "have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law." 26 Stat. 826. The counsel for the county of Travis, petitioner for a writ of certiorari, admit and show in their brief that prior to *Ex parte Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385, the supreme court issued the writ only as auxiliary process. The counsel quote from *American Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 13 Sup. Ct. 758, wherein the supreme court, speaking of the writ of certiorari, said: "It was used by this court as an auxiliary process only to supply imperfections in the record of a case already before it, and not, like a writ of error, to review the judgment of an inferior court." But the petitioner's counsel contend that *Ex parte Chetwood*, supra, has virtually operated a complete reversal of the previous jurisprudence on the question of the issuance of the writ of certiorari, and that the language of the supreme court in that case, while not used specifically in construing the power of this court in the matter of the issuing of writs of certiorari, is such as to warrant this court to issue the writ as an original process for the purpose of reviewing the judgment rendered by the circuit court in July, 1893. The counsel's contention has no force or merit. Authority to issue the writ of certiorari as original process in all cases is distinctly conferred on the supreme court by section 6 of the act of March 3, 1891. No such power has ever been conferred on this court, and we are clear that our authority in issuing the writ of certiorari is wholly confined to Rev. St. U. S. § 716, which allows the writ only as auxiliary process. The decision in *Ex parte Chetwood*, supra, was rendered after the enactment of the act of March 3, 1891. That act conferred in clear terms the fullest authority upon the supreme court to issue the writ of certiorari as an original process, and it is evident that there was no occa-

sion for the supreme court to overrule—as the counsel for the petitioner contend that it did—the jurisprudence which, prior to the act of March 3, 1891, allowed the writ only as auxiliary process. In our opinion, it is clear that nothing was said in *Ex parte Chetwood, supra*, which indicates that the supreme court intended to disturb its previous construction of its powers under Rev. St. U. S. § 716, and very certainly the supreme court did not even intimate—and had no occasion to do so—that this court could issue the writ as original process. Besides the fact that Rev. St. U. S. § 716, is the only statute authorizing this court to issue writs of certiorari, it should be noted that section 2 of the act of March 3, 1891, declares that the jurisdiction of this court is appellate, as “limited and established” by that act; and that section 11 of the act provides that “no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals * * * shall be taken or sued out except within six months after the entry of the order, judgment, or decree.” Other provisions of the act specify the causes which may be reviewed in this court. The inference is irresistible that this court can review no cause except by appeal or writ of error taken or sued out within six months.

It is true that courts have issued writs of certiorari as original process without a statute expressly conferring the authority to do so. But those courts were invested with general supervision of the inferior courts to which they issued the writs. Thus we find that the courts of king's bench and of common pleas could issue the writ because they had “superintendence of all inferior jurisdictions.” Tidd, *Prac.* marg. p. 398. Thus again, state courts of last resort, exercising a general superintendence of all inferior courts, have issued the writ as original process. But the circuit courts of appeal have not been vested with a general control or supervision over the courts below them.

We wish to remark that, even if we had the power to issue the writ of certiorari as an original process to review a cause tried in a circuit court, we would not issue the writ in this cause if the issuance of the writ was left to our discretion.

The complaint in this matter is not that the trial court committed an error. On the contrary, the petitioner, in anticipation of a charge of laches on its part in not taking a writ of error to the lower court, admits and asserts that the decision of the trial court was, at the time it was rendered, consonant with the jurisprudence then existing. The gist of the complaint is, therefore, not that the trial court erred in rendering judgment on July 13, 1893, but that on January 10, 1898,—nearly 4½ years after the judgment complained of,—the supreme court of the state of Texas reversed its prior jurisprudence. Even after this decision of the supreme court of Texas, the petitioner allowed almost a year to elapse before applying to this court for certiorari. We can well understand that the petitioner regrets that it cannot enjoy the benefits of the later decision of the supreme court of Texas. This alleged reversal of the former state jurisprudence may appear to work a hardship on the petitioner. But the speedy ending of litigation has always been considered to be a mat-

ter of great public importance. It concerns not only suitors, but those who may derive rights from them. "Interest reipublicæ ut sit finis litium." Practically, a suit would never be finally terminated, if, as contended by the petitioner, it were true that a change in the interpretation of the law applicable to a cause prosecuted to judgment entitled the party who had been cast in the suit by reason of the prior interpretation to reopen the controversy. In the present matter the alleged change of interpretation took place nearly 4½ years after the final judgment, and the petition for certiorari was presented to this court nearly 5½ years after that judgment. This is a great lapse of time. But, if the petitioner's contention were correct in principle, it would seem to be immaterial whether the lapse of time were of long or short duration, and that such a petition as the one now before us could be urged successfully at any time. If, afterwards, the court should return to the overruled doctrine, the controversy would again have to be readjusted, and so on, indefinitely, as long and as often as the jurisprudence should vary. It is evident that it is far better, in the general interest, that there should be a few cases of apparent hardship, such as the one presented, resulting from a change of jurisprudence, than that litigation should never end. The application for certiorari is refused.

QUINLAN v. CITY OF NEW ORLEANS.¹

(Circuit Court, E. D. Louisiana. February 10, 1897.)

No. 12,501.

JURISDICTION OF FEDERAL COURTS—DIVERSE CITIZENSHIP—ASSIGNEE OF CHOSE IN ACTION.

Under section 1 of the judiciary act of 1887–88 a circuit court of the United States, where the requisite diversity of citizenship exists between the parties, has jurisdiction of an action by an assignee on a chose in action payable to bearer, and made by a resident municipal corporation, without regard to whether the assignor could have maintained the suit.

This was a suit brought by Mary Quinlan against the city of New Orleans to recover on certain certificates of indebtedness, executed and issued by the city of New Orleans, and made payable to bearer. The city of New Orleans excepted to the jurisdiction of the court, on the ground that "plaintiff's petition contains no averment that this suit could have been maintained by the assignors of the claims or certificates sued upon by Mary Quinlan, and which form the basis of this action." On the argument of the exception, the counsel for the city of New Orleans contended that the plaintiff should have alleged that the assignors of the certificates could have sued in the United States circuit court; and the further contention was made, on behalf of the city of New Orleans, that, even if, under section 1 of the act of March 3, 1887, a suit may be brought in the United States circuit court on a chose in action payable to bearer, and made by a corporation, without alleging that the assignor could have brought such suit,

¹Affirmed on error. See 19 Sup. Ct. 329.

this suit should be dismissed for want of jurisdiction, because the statute just mentioned refers to nonresident, and not to resident, corporations. *City of New Orleans v. Benjamin*, 153 U. S. 411, 14 Sup. Ct. 905, was relied upon by the counsel for the city of New Orleans as sustaining his contentions. The exception was overruled by the court.

Charles Louque, for plaintiff.

W. B. Sommerville, for defendant.

PARLANGE, District Judge (after stating the facts as above). In the leading case of *Newgass v. City of New Orleans*, 33 Fed. 196, Judge Billings—the circuit judge concurring—held that the proper construction of the first section of the act of congress of March 3, 1887, relative to suits brought by assignees of promissory notes and choses in action, is:

"That the circuit court shall have no jurisdiction [of such suits], * * * except over—First, suits upon foreign bills of exchange; second, suits that might have been prosecuted in such court, to recover the said contents, if no assignment or transfer had been made; third, suits upon choses in action payable to bearer and made by a corporation."

So that Judge Billings maintained the jurisdiction as to suits on choses in action payable to bearer, and made by the city of New Orleans; and he denied the jurisdiction as to suits on choses in action made by the city, but requiring assignment (i. e. not payable to bearer). Judge Billings' construction seems to have been adopted, without dissent. *Rollins v. Chaffee Co.*, 34 Fed. 91; *Laird v. Assurance Co.*, 44 Fed. 712; *Justice Miller, in Wilson v. Knox Co.*, 43 Fed. 481; *Bank v. Barling*, 46 Fed. 357; *Searcy Co. v. Thompson*, 6 C. C. A. 674, 57 Fed. 1036; *Nelson v. Eaton*, 13 C. C. A. 523, 66 Fed. 377. *City of New Orleans v. Benjamin*, 153 U. S. 411, 14 Sup. Ct. 905, was a suit upon warrants payable to the order of certain persons, and upon other warrants which simply stated that the metropolitan police board was indebted to certain persons. See the warrants in 153 U. S. 419, 14 Sup. Ct. 908. While the warrants in the Benjamin Case were choses in action made by a corporation, yet, as they were not payable to bearer, the supreme court held (153 U. S. 433, 14 Sup. Ct. 912) that, to sue upon them, the assignee must bring himself within the above class 2 (i. e. he must allege that his assignor could have sued). As the board of metropolitan police was a Louisiana corporation, the Benjamin Case also virtually disposes of the contention that section 1 of the act of March 3, 1887, applies only to nonresident corporations. The exception to the jurisdiction is overruled.

ALGER v. ANDERSON et al.

(Circuit Court, M. D. Tennessee. March 15, 1899.)

1. EQUITY JURISDICTION OF FEDERAL COURTS—SOURCE—STATE RESTRICTIONS.

Subject to the constitutional and statutory limitations imposed on the chancery jurisdiction of the courts of the United States, and in the absence of a special act of congress, the jurisprudence of the high court of

chancery in England furnishes the chancery law which is exercised by the federal courts, and this law is administered uniformly throughout the several states of the Union, free from restraint of state legislation.

2. SAME—ADEQUATE REMEDY AT LAW.

The adequate remedy at law, which is the test of equitable jurisdiction in the courts of the United States (Judiciary Act 1789, § 16), is that which existed when the judiciary act was adopted, unless subsequently changed by act of congress.

3. SAME—FRAUD—WAIVER—EFFECT.

When a purchaser of real estate, either by election or laches, waives fraud of the vendor as a ground of rescission, he thereby loses also the right to urge the fraud as a ground of any other equitable relief.

4. SAME—RETENTION OF JURISDICTION—RESCISSON—COMPENSATION.

Under the seventh amendment to the constitution, which declares that, in suits at common law, when the value in controversy exceeds \$20, the right of trial by jury shall be preserved, and section 16 of the judiciary act of 1789 (Rev. St. § 723), which provides that suits in equity shall not be sustained in the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law, where a contract of sale of real estate has become executed by a deed of conveyance with the usual covenants, and the purchaser files a bill in a circuit court of the United States to rescind on the ground of fraudulent misrepresentations of the vendor concerning his title, and it appears on the hearing that the purchaser has lost his right to rescind by election or laches, compensation for the price of portions of the land to which the vendor's title has failed cannot be decreed as alternative or secondary relief, on the ground that when equity once acquires jurisdiction it will award complete relief.

5. SAME—INTRICATE ISSUES AND COMPLICATED FACTS.

Nor will such relief be granted on the ground that intricate issues, with complicated facts, in suits at law, will be thereby avoided, since the purchaser may institute one suit against the vendor, or his personal representative if he be deceased, and recover on the covenants in the deed for all the land to which there is a failure of title.

6. SAME—VENDOR AND PURCHASER—FAILURE OF TITLE.

Where a purchaser of land has taken a deed with covenant of warranty, and has been let into possession, he cannot, before eviction, in the absence of insolvency of the vendor or fraud on his part, obtain a rescission in equity or resist payment of the price, merely because of defect of title in the vendor.

This is a bill by Russell A. Alger against T. B. Anderson and others. Dismissed without prejudice.

Albert D. Marks, J. J. Lynch, and Floyd Estill, for Russell A. Alger.

Williams & Lancaster, J. B. Branhan, Brown & Spurlock, A. S. Colyar, and W. J. Clift, for Mrs. Keith and the Andersons.

J. J. Vertrees, W. T. Murray, and Mr. Mathews, for John W. Goncze.

CLARK, District Judge. The bill, as originally presented, is one by the vendee against the vendor for rescission, upon the ground of fraudulent misrepresentation. I have concluded, upon the additional proof presented under a petition to rehear, that the plaintiff, with knowledge of the fraud, elected to abide by the transaction, and that with such knowledge he unreasonably delayed instituting suit to rescind, and the case in this aspect is justly subject to the objection of

laches, and upon both grounds the bill, in so far as rescission is concerned, must be dismissed.

An amended bill has been filed, which presents the question of compensation or damages as alternative or secondary relief in the event the primary relief of rescission cannot be had. Under this amended bill, it is sought to recover damages to the extent that there is a deficiency in the quantity of land conveyed by reason of a defect or want of title in the vendor to certain parts of the land actually embraced in the deed. The case presented by the record is really not one of defect of quality or surface deficiency, but of defective title in the vendor; for the deficiency in area comes about, not because the quantity of land called for and embraced within the deed is incorrectly given, but because the title to parts of this land fails by reason of superior conflicting claims, as plaintiff insists. It must be observed that the case is not one of an executory contract, but is one where a contract of sale of real estate has been executed by a deed of conveyance with the usual covenants, including one of warranty. The contention is that if the plaintiff, with knowledge of the fraud, has elected to affirm the transaction, or by laches has defeated his right to rescind, then, the fact of fraud being established, the court may proceed to decree, as secondary relief, compensation against the defendants for the purchase price of that portion of the land to which the vendor did not have valid legal title, and in this way grant complete relief in this suit. In addition to this, it is said that intricate issues, with complicated facts, in suits at law, would be avoided by this form of relief; but as the plaintiff could obviously institute one suit against the personal representative of the deceased vendor, and recover in an action on the covenants in the deed for all the land as to which there is a failure of title, it is not perceived that there is any real ground on which to base this suggestion. There would be only the question of the quantity of land to which there is a failure of title in such a suit. Furthermore, if I am right in the conclusion that the plaintiff has, by election and acquiescence, waived any right to the equitable relief of rescission upon the ground of fraud, it is not believed that it would be consistent to hold that the fraud may, nevertheless, be made the basis of equitable relief in a different form and to a less extent. My opinion is that when the plaintiff has, by affirmative election or laches, waived the fraud as a ground of rescission, he has also thereby lost the right to insist upon such fraud as a ground of any equitable relief at all. The proposition that the fraud, as a ground of one form of relief, is lost, while it may be made the basis of relief in a different form, cannot, in my opinion, be maintained. Fraud, as a ground of equitable relief, when once lost, is lost for all purposes. The objection of fraud, once waived, leaves the contract just as if the fraud had not occurred. *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. 29, reaffirming *Grymes v. Sanders*, 93 U. S. 55.

In considering and determining this question of compensation, then, I must treat the case as one from which fraud is eliminated, and determine whether or not relief, by way of compensation or damages, can be granted, and, if so, upon what ground consistently with the established jurisdiction of this court in equity. In dealing with this

question, it must be remarked that the jurisdiction of the circuit courts of the United States as courts of equity is subject to two important limitations. A case, with respect to the rights to be enforced and the remedy desired, must be one of such a character as to come within the recognized boundaries of jurisdiction in equity, as distinguished from jurisdiction at law, and the case must be one also which, by reason of the character of the parties or of the subject-matter of the suit, is one of federal, as distinguished from state, jurisdiction. In this case the court is concerned only with the limitation which marks the boundary of its jurisdiction in equity. In dealing with such a question, it must be borne in mind that chancery jurisdiction is conferred on the courts of the United States under certain limitations, constitutional and statutory, and that, under such limitations, the jurisprudence of the high court of chancery in England, in the absence of a special act of congress, furnishes the chancery law which is exercised by those courts in all of the states. *State of Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 518; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820. And this equity jurisdiction conferred on federal courts, being the same as that of the high court of chancery in England, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union. *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75; *McConihay v. Wright*, 121 U. S. 205, 7 Sup. Ct. 940.

Under the provisions of the seventh amendment to the constitution, it is declared that in suits at common law, when the value in controversy exceeds \$20, the right of trial by jury shall be preserved; and in section 16 of the original judiciary act of 1789, re-enacted in the Revised Statutes as section 723, it is provided that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." So, too, in relation to the practice of the federal courts, the supreme court of the United States, pursuant to authority conferred by section 719 of the Revised Statutes, among other rules regulating equity practice, promulgated, in 1842, rule 90, which provides that:

"In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

Of this rule, Judge Sawyer, in *Lewis v. Shainwald*, 7 Sawy. 403, 48 Fed. 492, said:

"The jurisdiction of this court is derived from the constitution and laws of the United States, and these rules are simply rules of practice, for regulating the mode of proceeding in the courts. They do not, and could not, properly, either limit or enlarge the jurisdiction of the court. The rule quoted simply regulates the practice in exercising the jurisdiction of the court in those respects wherein the rules adopted do not apply; but the practice of the high court of chancery is to be applied, not as controlling, but simply as furnishing just analogies to regulate the practice."

It will be thus seen that the foundation of equity jurisprudence, as well as of equity practice, in the courts of the United States, lies in

the system of the English court of chancery. But the practice of the English court of chancery adopted by rule 90 affects only matters of procedure, and does not apply in the determination of questions of jurisdiction, which depends upon, and is limited by, the constitution and laws of the United States. *Lewis v. Shainwald*, 48 Fed. 492.

But the question of jurisdiction is here to be considered and decided, and this must be determined by the essential character of the case. *Van Norden v. Morton*, 99 U. S. 378. And the right asserted, as well as the relief sought, must be equitable (*Smith v. Bourbon Co.*, 127 U. S. 105, 8 Sup. Ct. 1043); for it is this which distinguishes the suit in equity from one at common law.

In *State of Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 462, Mr. Justice Nelson, delivering the opinion of the court, said:

"Original jurisdiction in equity, in a particular class of cases, conferred by the constitution on this court, has been interpreted to impose the duty to adjudicate according to such rules and principles as governed the action of the court of chancery in England, which administered equity at the time of the emigration of our ancestors and down to the period when our constitution was formed."

See, also, *Fontain v. Ravenel*, 17 How. 384.

And in *McConihay v. Wright*, 121 U. S. 206, 7 Sup. Ct. 942, Mr. Justice Matthews said:

"The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by act of congress."

See, also, *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, and *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75.

Both forms of statement of the rule are correct. The court in the former cases was discussing the question as affected by the seventh amendment of the constitution, securing the right of trial by jury in suits at common law, while in the latter cases the restrictive effect of the provision contained in the sixteenth section of the judiciary act was being considered. The judiciary act was adopted or passed September 24, 1789, while the same congress, five days later, proposed the article subsequently ratified as the seventh amendment of the constitution, making them contemporaneous, as was remarked by Mr. Justice Story in *Parsons v. Bedford*, 3 Pet. 446. See, also, *Grether v. Cornell's Ex'rs*, 43 U. S. App. 782, 23 C. C. A. 498, and 75 Fed. 742; *Klever v. Seawell*, 22 U. S. App. 719, 12 C. C. A. 661, and 65 Fed. 393. The cases all agree that the power of the courts of chancery of the United States, under the constitution and the judiciary act, must be regulated by the law of the English chancery in administering the remedy for an existing right. Any special act of congress upon the subject, or any enlargement of equitable rights by state statute (as distinguished from an extension of the equitable remedy), enforceable in the equity courts of the United States, is put out of view now, as not affecting the matter under consideration. Jurisdiction in equity of the federal courts being subject to limitations substantially the same as that of the English courts of chancery, as understood and construed at the time of the adoption of the constitution and judiciary act of 1789, it will aid in the solution of the question to examine

briefly the history of this original source of jurisdiction in relation to the subject of compensation or damages. The rule being that this equity power must be construed according to equity jurisdiction in England as exercised at the time of the adoption of the constitution and of the judiciary act, any jurisdiction exercised by that court in its earlier history, but subsequently abandoned, and any enlargement of its jurisdiction by statute subsequent to 1789, are to be excluded. What may be called the common-law or original equity jurisdiction at that date has been changed and influenced so much subsequently by statute in England, at different periods, that the common-law and statutory jurisdiction must be understood, and at all times distinguished, in order to avoid confusion and apparent conflict in the English decisions themselves, by reason of a failure in the cases and in the books to notice or make clear the two sources of jurisdiction. In the absence of close attention to the influence of English statutes, the decisions of the English chancery courts, particularly since 1858, would become misleading, in relation to the subject of compensation or damages, with which I am now dealing. It has been said that the principle of compensation, in connection with specific performance, is a creation of the English courts of equity, and is a jurisdiction unknown to the law of Scotland. *Stewart v. Kennedy* (1890) 15 App. Cas. 102. The only right known to the common law of England, upon the nonperformance of a contract, in favor of the party injured by the breach, was a claim for damages, and the remedy of specific performance was a peculiar one, confined to chancery, and exercised in relation to executory, as distinguished from executed, contracts.

In *Wolverhampton & W. Ry. Co. v. London & N. W. Ry. Co.* (1873) L. R. 16 Eq. 439, the court said:

"There is a class of suits in this court, known as 'suits for specific performance of executory agreements,' which instruments are not intended between the parties to be the final instruments regulating their mutual relations under their contracts. We call those 'executory' contracts, as distinct from 'executed' contracts; and we call those contracts 'executed' in which that has been already done which will finally determine and settle the relative positions of the parties, so that nothing else remains to be done for that particular purpose. The common expression 'specific performance,' as applied to suits known by that name, presupposes an executory, as distinct from an executed, agreement,—something remaining to be done, such as the execution of a deed or a conveyance,—in order to put the parties in the position relative to each other in which, by the preliminary agreement, they were intended to be placed. Of course, if you pass from the technical to the etymological effect of the words, 'specific performance' might signify any direction given by the court for the doing of anything whatever in specie; and I cannot help thinking, in this class of cases, a little confusion has sometimes arisen from transferring considerations applicable to suits for 'specific performance,' properly so called, to questions which have arisen as to the propriety of the court requiring something or other to be done in specie."

The remedy, as originally administered, was confined mainly, though not exclusively, to contracts in relation to land. The original foundation of this jurisdiction in specific performance being the inadequacy of the common-law remedy for breach of contract, the jurisdiction was limited to that class of cases in which either there was no remedy at all at law, or no adequate or complete remedy, available to the party

aggrieved, and the remedy was closely restricted. The remedy was one which might be invoked either by the vendor or by the purchaser. Among cases in which the jurisdiction was exercised, and the limits of the remedy stated, may be mentioned *Halsey v. Grant* (1806) 13 Ves. 77, 79, and *Alley v. Deschamps*, Id. 224, 229. When this equitable jurisdiction, in relation to specific performance, had become well established, a party to a contract, within the scope of that jurisdiction, had open to him two remedies, in the event of the other party refusing to perform his part of the contract: He might either institute a suit in equity for specific performance, or bring an action at common law for damages for the breach; and in the subsequent case of *Todd v. Gee* (1810) 17 Ves. 278, Lord Eldon said:

"My opinion is that this court ought not, except under very particular circumstances, as there may be upon a bill for the specific performance of a contract, to direct an issue, or a reference to a master, to ascertain the damages. That is purely at law. It has no resemblance to compensation."

And the English cases throughout distinguish between damages and compensation in this sense; and I think it may be said that, prior to 1858, relief, by way of compensation, was granted only in cases of specific performance when the contract could not be fully executed, but only partially so, and for the purpose of satisfying the unexecuted part of the contract, and making the relief complete in one suit. As thus understood, compensation was incidental to, and in aid of, specific performance, where that could be granted only in part. It became apparent in time, however, that justice would be best done by giving damages as such in lieu of, or in substitution for, specific performance; but jurisdiction of the court, as defined in the previous decisions, did not permit such relief. Accordingly, in the year 1858, an act (21 & 22 Vict. c. 27), commonly called "Lord Cairns' Act," was passed in relation to this subject, the material provisions of which are found in section 2 of the act, and are as follows:

"In all cases in which the court of chancery has jurisdiction to entertain an application for an injunction against the breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance; and such damages may be assessed in such manner as the court shall direct."

It will be observed that the very language of this act made it a condition precedent to the exercise of this discretionary power of awarding damages conferred by the act that the case should be one only in which an injunction or specific performance might be granted. Where, therefore, at the time of the commencement of the litigation, relief, by way of specific performance, was impossible, as where the plaintiff sought to enforce the allotment to him of shares, and these had been allotted to other persons before filing the bill, the plaintiff could not, under the Cairns act, get damages, as specific performance was, in such cases, impossible. *Ferguson v. Wilson* (1866) 2 Ch. App. 77.

By the judicature act of 1873, the jurisdiction conferred by the Cairns act, as well as all the jurisdiction in relation to damages, previously vested in, or exercised by, the common-law courts, became

vested in the high court of justice; and under this act, whether the high court can or cannot, in a given case, grant specific performance, it can give damages for breach of the contract in substitution for specific performance; and, although the Cairns act was repealed in 1883 by the statute law revision act (46 & 47 Vict. c. 49), the jurisdiction of the court under that act was saved by the repealing act itself. In the case of *Dreyfus v. Guano Co.*, 43 Ch. Div. 316, it was decided that, under the Cairns act, jurisdiction to substitute damages for the injunction only arose where an actual wrong had been committed, and that the power was not applicable to *quia timet* actions. And in relation to damages in cases of specific performance it is said, in Adams, Eq. (8th Ed.) p. 91: "And the compensation given must be real compensation for a present loss, and not indemnity against a future risk."

In 2 Dart, Vend. (6th Ed.) p. 1103, the rule is thus laid down:

"The primary, and until recently the only, relief to be obtained in equity for the nonperformance of the contract, is a decree for specific performance. At one time there was a floating idea in the profession that the court might, under its general jurisdiction, award compensation for nonperformance, in the event of the primary relief failing. Possibly the power of granting such subsidiary relief may be inherent in the court, but, if so, the whole current of modern authorities is against its exercise; nor in cases prior to Lord Cairns' act did it make any difference that compensation was sought, not against the owner of the estate, but against a person who falsely assumed authority to sell; nor, except under special circumstances, would a prayer in the alternative for the return of the deposit prevent the dismissal of the bill. Lord Cairns' act has been repealed, but the effect of the repealing act is to preserve, if not to enlarge, the jurisdiction which the former act conferred; and accordingly now, whenever the court has jurisdiction to entertain a suit for specific performance, it may, in its discretion, award damages to the party injured, either in addition to, or substitution for, the primary relief, such damages to be assessed as the court shall direct. It need hardly be added that the jurisdiction conferred by Lord Cairns' act related to the remedy only, and created no new right to damages where none were formerly recoverable. It must be remembered that an alternative claim for damages, merely as a substitute for specific performance, cannot succeed, if the plaintiff has himself made the performance of the contract impossible, and, in order to obtain damages for the defendant's breach in such a case, the plaintiff should at once, on his becoming incapable of performing his part, amend his claim to that effect."

And in *Newham v. May* (1824) 13 Price, 751, Alexander, L. C. B., said:

"If I thought that this case turned upon the question of jurisdiction, I should take time to consider the point further. It is not in every case of fraud that relief is to be administered in a court of equity. In the case, for instance, of a fraudulent warranty on the sale of a horse, or any fraud upon the sale of a chattel, no one, I apprehend, ever thought of filing a bill in equity. The cases of compensation in equity I consider to have grown out of the jurisdiction of the courts of equity as exercised in respect of contracts for the purchase of real property, where it is often ancillary, as incidentally necessary to effectuate decrees of specific performance. This, however, appears to me to be no more than a common case of fraud by means of misrepresentation, raising a dry question of damages; in effect, a mere money demand."

And in *Williams v. Higden* (1828) Coop. Ch. Prac. 500, it was said:

"The defendant, conceiving himself to be entitled to an estate, had agreed to sell the same to the plaintiff, who paid the purchase money. Subsequently it was discovered that the defendant had not a right to the estate, but only

to a sum of money to be raised by the sale of it. The object of the bill was that the plaintiff might be paid such sum of money, and also damages in respect of the defendant's defect of title. The plaintiff takes whatever interest in the estate the defendant had; but the authorities giving damages in this court, by reason of a vendor's selling property that was not his own, have been reviewed of late years, and overruled."

See, to the same effect, *Sainsbury v. Jones* (1839) 5 Mylne & C. 13. The same proposition is stated in another form, as follows:

"Where either of the parties to the contract has procured the other to enter into it by means of a material misrepresentation, or such a concealment of a material fact as is considered in equity equivalent to a misrepresentation, the court will not merely decline to enforce, but will even rescind, the contract, unless, it seems, the party defrauded elect to have the misrepresentation made good, and, in a suit by a purchaser, will direct his deposit to be returned, and declare a lien for it on the property, but it cannot award damages by way of compensation to the plaintiff under its general jurisdiction; nor does Lord Cairns' act (21 & 22 Vict. c. 27) apply to a case where the suit is *not for the specific performance*, but for the *rescission of the contract*; and since the judicature acts, although the courts have power to administer all kinds of relief, it is plain that there is no substantive right to damages, where, as in the present case, there was none before the acts." (The italics here and elsewhere are mine.) 1 Dart, Vend. (6th Ed.) p. 116.

See, also, 2 Dart, Vend. pp. 898, 900, 1105.

Sugden (Lord St. Leonard), discussing the common-law action of deceit where the right to rescind is lost, declares the rule as follows:

"Although in equity a party may be entitled to get rid of a contract founded on fraudulent representations, still cases may occur where a purchaser might recover damages at law for false representations, and yet be prevented, from his own conduct, from rescinding the contract in equity, and the relief in equity can only be to rescind the contract. Damages or compensation must be sought at law. In equity, after the contract is executed by payment of the money and conveyance, a bill cannot be filed for compensation. Thus the jurisdiction stood before the recent legislation, which, as we have seen, has authorized courts of equity to give damages in certain cases, and courts of law, to some extent, to enforce equitable rights and to admit equitable defenses. Generally speaking, a purchaser, after a conveyance, has no remedy except upon the covenants he has obtained, although evicted for want of title; and however fatal the defect of title may be, if there is no fraudulent concealment on the part of the seller, the purchaser's only remedy is under the covenants." Sugd. Vend. (14th Ed.) p. 251.

The same author, treating the subject of damages in equity, says:

"Equity will not give the purchaser compensation where he filed a bill to have the contract delivered up on account of the defective title of the vendor. But he could obtain a decree for the delivering up of the contract without prejudice to his remedy at law for breach of it. Neither could he require such interest as the seller had in the estate and damages in respect of his defect of title."

See, also, Sugd. Vend. (14th Ed.) p. 55.

It is unnecessary to say that these books by Sugden and Dart, from which I quote, have often been pronounced standard works by the English courts, and also cited and relied on by those courts, as containing a correct exposition of the law of England upon the subject treated.

In the recent case of *Joliffe v. Baker*, 11 Q. B. Div. 255, the court of queen's bench division undertook expressly to examine the English cases upon the subject here in question. As a result of a review of the cases, that court, approving *Todd v. Gee* (1810) 17 Ves. 278, said (Williams, J., delivering the opinion):

"After the best consideration that I am able to give to these conflicting authorities, I am of opinion, in the first place, that it has been the established practice of the court of chancery that a bill for 'compensation,' properly so called, the purchaser retaining the property, could not be entertained after the completion of the contract and execution of the conveyance, and that the jurisdiction under which compensation was granted was exercised *only as ancillary to specific performance, and was never exercised independently.* The evidence of this is principally negative, but it was distinctly recognized and stated in the case of *Newham v. May*. In that case the purchaser of freehold houses filed his bill after conveyance praying for compensation for the difference in value of the property by reason of the amount of rent having been misrepresented by the vendor. The bill was dismissed, Alexander, C. B., stating it as his opinion that the remedy in such cases was by action at law for damages, and that the jurisdiction of equity in cases of compensation had grown up only as ancillary to, and incidentally necessary to effectuate, decrees of specific performance of contracts for the sale of real property. A similar opinion was expressed by Lord Eldon in *Todd v. Gee*, in which he followed the course of earlier authorities. See *Gwillim v. Stone*, 14 Ves. 128, and *Blore v. Sutton*, 3 Mer. 237. This rule seems to me, also, to rest upon sound principles of law and equity; because, if it were otherwise, a purchaser might have conveyances, and, while still insisting upon retaining the estate, ask for an abatement of the agreed purchase money, which would be wholly contrary to every principle. If he came before conveyance, he might, if misled, even by an innocent error, fairly say to the vendor: 'I have been misled, and do not wish to have the estate, and, if you insist upon my performing the contract and taking it, a fair abatement from the price ought to be made,' in which case the vendor would be placed in a fair position, because, if he was unwilling to part with his estate at the reduced price, he might retain it. On the other hand, if the purchaser were entitled to insist upon retaining the estate, and at the same time claim an abatement of the price, the result would be that a vendor, on account of a perfectly innocent and unintentional error, might be compelled to part with his estate for a price that he never had, and never would have, agreed to, which appears to me contrary, not only to the express terms of the contract, but to every principle of law and justice."

See, also, *Palmer v. Johnson* (1884) 13 Q. B. Div. 351.

It will thus plainly appear, I think, without more extended review of the English cases and the history of equity in the English system, that, in the absence of statutory authority, relief by way of compensation was limited almost entirely to cases of specific performance, and was relief in those cases incidental to specific performance granted in part at least. The English cases seem to furnish no instance in which compensation was allowed, or damages assessed, when on the final hearing other relief equitable in its nature was not granted, and those cases recognize throughout the clear distinction between compensation as allowed in connection with specific performance and damages as a distinct form of relief or remedy. I refer, of course, to the state of the decisions at the time our constitution was adopted. I have been unable to find any case in which damages or compensation was sought or allowed in bills for rescission of an executed contract when rescission was denied and there was no independent ground of equity jurisdiction. Discussing the remedy of rescission and cancellation by reason of fraud, Mr. Adams, in his work on Equity (8th Ed.) at page 176, says:

"On the other hand, all unfounded allegations of fraud are discouraged by the court; and if such allegations are made, and not established, the plaintiff will not, in general, be allowed to resort to any secondary ground of relief."

In 2 Daniell, Ch. Prac. (6th Ed.) *1080, stating the doctrine of the English court of chancery in relation to the assessment of damages, it is said:

"Formerly, the court of chancery had, in no case, power to award damages; but now, whenever it has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, the court may, if it think fit, award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct."

The Cairns act is then referred to as sustaining this statement in regard to the existing law in England on the subject. That act is then commented upon as follows:

"These provisions, however, do not extend the jurisdiction of the court; and damages will not, therefore, be given in cases where, previously to the act, the court would not have ordered an injunction or decreed specific performance. Where the court is of opinion that the plaintiff should have proceeded at law, no assessment of damages will be directed in equity, but the bill will be dismissed without prejudice to the plaintiff's right to proceed at law."

This is a statement of the effect of the Cairns act and of chancery jurisdiction before the act.

The rule, as laid down in the works of Dart and Sugden and the English cases subsequent in time to Todd v. Gee, is no longer the subject of doubt or question. As I have said, the English chancellors maintained a distinction between damages as such and compensation as decreed in specific performance cases. This was really a distinction in name, and not in substance. In reference to such a distinction, it has been well said:

"In certain cases of fraud (that is, willfully or recklessly false representation of fact), the court of chancery had, before the judicature acts, concurrent jurisdiction with the courts of common law, and would award pecuniary compensation, not in the name of damages, indeed, but by way of restitution or 'making the representation good.' In substance, however, the relief came to giving damages under another name, with more nicety of calculation than a jury would have used." Pol. Torts, 227.

It is significant that the English chancellors were unwilling to acknowledge that they were exercising legal jurisdiction even to the limited extent of ancillary relief in specific performance. To have acknowledged that such relief was by way of damages would have implied the exercise of jurisdiction at law to that extent, and the new name of "compensation" or "restitution" was adopted for what was nothing but damages.

Passing now from English authority, it remains to examine briefly the doctrine enunciated on this side of the Atlantic. A somewhat full and separate treatment of this subject of compensation and damages will be found in 2 Story, Eq. Jur. §§ 794-799. After reference to the English decisions, the author, apparently approving the decision in Todd v. Gee, already referred to, says:

"Indeed, Lord Eldon seems to have doubted the authority to decree compensation, and to have held the opinion that a court of equity ought not to give relief in the shape of damages, but only compensation out of the purchase money; or, at least, that a court of equity ought not, except under very par-

ticular circumstances, upon a bill for specific performance to direct an issue or a reference to a master to ascertain damages, as it is a matter purely at law, and has no resemblance to 'compensation,' strictly so called. And his opinion seems to have been adopted on other recent occasions."

Continuing the discussion, the author then gives what may be regarded as his own views on the subject, in sections 798 and 799, as follows:

"There is, however, a distinction upon this subject which is entitled to consideration, and may perhaps reconcile the apparent diversity of judgment in some of the authorities. It is that courts of equity ought not to entertain bills for compensation or damages except as incidental to other relief, where the contract is of such a nature that an adequate remedy lies at law for such compensation or damages. But, where no such remedy lies at law, there a peculiar ground for the interference of courts of equity seems to exist, in order to prevent irreparable mischief or to avoid a fraudulent advantage being taken of the injured party. Thus, where there has been a part performance of a parol contract for the purchase of lands, and the vendor has since sold the same to a bona fide purchaser for a valuable consideration without notice, in such a case, inasmuch as a decree for a specific performance would be ineffectual, and the breach of the contract, being by parol, would give no remedy at law for compensation or damages, there seems to be a just foundation for the exercise of equity jurisdiction. In the present state of the authorities, involving, as they certainly do, some conflict of opinion, it is not possible to affirm more than that the jurisdiction for compensation or damages does not ordinarily attach in equity except as ancillary to a specific performance or to some other relief. If it does attach in any other cases, it must be under very special circumstances, and upon peculiar equities; as, for instance, in cases of fraud, or in cases where the party has disabled himself, by matters *ex post facto*, from a specific performance, or in cases where there is no adequate remedy at law."

Whether or not the apparent diversity of judgment in some of the authorities has reference to a conflict in the English cases only, is not stated. It is probable that the diversity of opinion mentioned had reference to the cases before, and not to those subsequent to, *Todd v. Gee*; for it is certainly true that the English cases do involve some conflict of opinion, that is, the decisions before *Todd v. Gee*.

I do not think that it is to be doubted that *Todd v. Gee* and other more recent decisions correctly declare the true doctrine upon the subject as it existed at the date of our judiciary act, in 1789, overruling, at least, one or two earlier cases to the contrary.

In *Ferson v. Sanger*, 8 Fed. Cas. 1165 (No. 4,751), it was distinctly adjudged that courts of equity will not entertain jurisdiction of a suit for damages arising out of fraud, where damages are the sole object of the bill, the remedy at law being complete. This proposition is conceded by the plaintiff's eminent counsel. It was further adjudged in this case that, where relief is sought which can be had only in equity, and damages are claimed as incidental to that relief, equity, having proper possession of the cause for relief that is purely equitable, to prevent a multiplicity of suits will proceed to determine the whole cause. The opinion makes it clear that this jurisdiction to grant incidental relief, which is legal in its nature, is exercised only when the equitable relief is granted, and not when a case for equitable relief, although stated in the bill, fails on the hearing. It is pointed out, also, in this case, that the English case of *Todd v. Gee*, 17 Ves. 278, materially modifies the opinion expressed in some earlier cases in the English courts.

In the early case of *Russell v. Clarke's Ex'rs*, 7 Cranch, 69, it was adjudged that on questions of fraud there was a complete remedy at law, and that where the only ground of equitable jurisdiction was the discovery of facts solely within the knowledge of the defendant, and the defendant, by his answer, disclosed no such facts, the bill should be dismissed, and the plaintiff permitted to assert his rights in a court of law. So, in *Paton v. Majors*, 46 Fed. 210, it was ruled that fraud, of itself, would not bring a case within the cognizance of a court of equity, and that there must be some additional circumstances which must be found among those recognized as conferring equity jurisdiction; that an action simply to recover money upon the ground of a fraud was insufficient to give equity jurisdiction. Nor can a bill be sustained which seeks to recover damages for a fraudulent misrepresentation (*White v. Boyce*, 21 Fed. 228), or for a fraudulent conspiracy (*Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. 556).

In *Hipp v. Babin*, 19 How. 271, the court, through Mr. Justice Campbell, said:

"Nor can the court retain the bill under an impression that a court of chancery is better adapted for the adjustment of the account for rents, profits, and improvements. The rule of the court is that when a suit for the recovery of the possession can be properly brought in a court of equity, and a decree is given, that court will direct an account as an incident in the cause. But, when a party has a right to a possession which he can enforce at law, his right to the rents and profits is also a legal right, and must be enforced in the same jurisdiction. The instances where bills for an account of rents and profits have been maintained are those in which special grounds have been stated, to show that courts of law could not give a plain, adequate and complete remedy."

This language is expressly approved and adopted in *Root v. Railway Co.*, 105 U. S. 213, which is now a leading case upon this subject.

Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, is an instructive case. Suit was brought to reinstate a contract for which an assignment of another contract had been substituted, and to cancel the assignment on the ground of fraud in procuring the exchange, and, as alternative relief, to restore to the plaintiff certain sums of money paid to the defendants, and for damages sustained by fraudulently obtaining surrender of the original contract from the plaintiff. Mr. Justice Gray, speaking for the court, said:

"In the judiciary act of 1789, by which the first congress established the judicial courts of the United States and defined their jurisdiction, it is enacted that 'suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law.' Act Sept. 24, 1789, c. 20, § 16 (1 Stat. 82); Rev. St. § 723. Five days later, on September 29, 1789, the same congress proposed to the legislatures of the several states the article afterwards ratified as the seventh amendment of the constitution, which declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' 1 Stat. 21, 98. The effect of the provision of the judiciary act, as often stated by this court, is that 'whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' *Hipp v. Babin*, 19 How. 271, 278; *Insurance Co. v. Bailey*, 13 Wall. 616, 621; *Grand Chute v. Winegar*, 15 Wall. 373, 375; *Lewis v. Cocks*, 23 Wall. 466, 470; *Root v. Railway Co.*, 105 U. S.

189, 212; Killian v. Ebbinghaus, 110 U. S. 568, 573, 4 Sup. Ct. 232. In a very recent case the court said: "This enactment certainly means something; and, if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule and to impress it upon the attention of the courts." New York Guaranty & Indemnity Co. v. Memphis Water Co., 107 U. S. 205, 214, 2 Sup. Ct. 286. Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the equity side than on the common-law side, as, for instance, by compelling a specific performance; or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not recoverable at law, as in Watson v. Sutherland, 5 Wall. 74; or where an agreement procured by fraud is of a continuing nature, and its rescission will prevent a multiplicity of suits, as in Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215, and in Jones v. Bolles, 9 Wall. 364, 369. In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received. Parkersburg v. Brown, 106 U. S. 487, 500, 1 Sup. Ct. 442; Ambler v. Choteau, 107 U. S. 586, 1 Sup. Ct. 536; Litchfield v. Ballou, 114 U. S. 190, 5 Sup. Ct. 820.

After stating that the case did not require the court to consider the question under what circumstances a bill showing no ground for equitable relief, and praying for discovery as incidental only to the relief sought, would be open to demurrer to the whole bill, nor whether, if discovery were obtained, the case could be retained for the purpose of granting full relief, within the rule stated in the books, but as to the limits of which the authorities were conflicting, the court observed:

"It is enough to say that the case clearly falls within the statement of Chief Justice Marshall: 'But this rule cannot be abused by being employed as a mere pretext for bringing causes, proper for a court of law, into a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the established rules, limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law.' Russell v. Clarke's Ex'rs, 7 Cranch, 69, 89. See, also, Horsburg v. Baker, 1 Pet. 232, 236; Brown v. Swann, 10 Pet. 497, 503."

The decree of the circuit court dismissing the bill was affirmed, without prejudice to an action at law.

Scott v. Neely, 140 U. S. 111, 11 Sup. Ct. 712, was a suit in equity to subject the property of the plaintiff to the payment of a simple contract debt, and in aid thereof to set aside as fraudulent certain conveyances to the wife of the debtor defendant. It was sought to uphold the jurisdiction to maintain such a suit in the courts of the United States upon the ground that the statutes of Mississippi had created a new equitable right in the creditor, which might be enforced in the courts of the United States. The decree of the court below sustaining the jurisdiction was reversed, and the bill dismissed, without prejudice to an action at law. The court said:

"All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the federal courts only on their law side. Demands of this kind do not lose their character as claims cognizable in the courts of the United States only on their law side because in some state courts, by virtue

of state legislation; equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States."

And as was declared in the subsequent case of *Scott v. Armstrong*, 146 U. S. 512, 13 Sup. Ct. 152:

"The jurisprudence of the United States has always recognized the distinction between law and equity, as, under the constitution, matter of substance, as well as of form and procedure, and, accordingly, legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States, nor are equitable defenses permitted."

It is a clear implication, I think, from well-considered cases of the highest authority, that where equitable relief is sought, and along with it also secondary or alternative relief of a legal nature, if the suit fails entirely as to the equitable relief sought the courts of the United States cannot retain the case on the equity side for the purpose of administering relief purely legal in its character, in substitution for the equitable relief. It is not sufficient that the bill may present a case for equitable relief. That this is the English rule sufficiently appears in the authorities already cited. A suggestion will be found in favor of a contrary proposition in a dictum by Mr. Justice Woodbury at the circuit in *Warner v. Daniels*, 29 Fed. Cas. 246 (No. 17,181), while a similar suggestion in relation to the same subject, by the same learned judge, in *Ferson v. Sanger*, 8 Fed. Cas. 1,170 (No. 4,752), points in an opposite direction. The difficulty felt upon the subject obviously grew out of the conflict in some of the earlier English cases. In *Clark v. Wooster*, 119 U. S. 325, 7 Sup. Ct. 218, Mr. Justice Bradley, delivering the judgment of the court, said:

"It is true that where a party alleges equitable ground for relief, and the allegations are not sustained, as where a bill is founded on an allegation of fraud, which is not maintained by the proofs, the bill will be dismissed in toto, both as to the relief sought against the alleged fraud and that which is sought as incidental thereto."

Manufacturing Co. v. Williams, 37 U. S. App. 109, 15 C. C. A. 520, and 68 Fed. 489, was a suit in equity for the infringement of patents and for an account of damages and profits. On the facts of the case, the court held that inexcusable delay on the part of the plaintiff was such as to require a court of equity to refuse the equitable relief sought, which was relief through injunction, and that, the equitable relief having been refused, the suit would not be entertained for the mere purpose of an account of past damages and profits, that relief being legal in its nature. Judge Lurton, in giving the opinion of the court, said:

"That this doctrine of courts of equity requiring reasonable diligence as a condition precedent to the exercise of their discretionary powers is applicable in patent cases is manifest from a consideration of the nature of the relief sought against an infringer. Equity will not entertain a suit merely involving an ascertainment of damages and profits. This question was elaborately considered, and expressly decided, in *Root v. Railway Co.*, 105 U. S. 189. Equitable jurisdiction in patent cases is therefore subject to the *general principles of equity jurisprudence*, and the power to grant injunctions in such cases, according to the provisions of section 4921 of the Revised Statutes, must be 'according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable.'"

In *Smith v. Bourbon Co.*, 127 U. S. 105, 8 Sup. Ct. 1043, the bill was brought by a judgment creditor of a railroad, alleging that the board of commissioners of Bourbon county had subscribed to the stock of the railroad company, and had become bound to the company to issue to it bonds of the county equal to the par value of the stock subscribed for, and that the bonds had not been issued, and seeking to compel the company to assign to the complainants its claim against the county, and, second, a decree against the county ordering it to issue the bonds and deliver them to complainant. It was held that the relief sought against the railroad might be granted by compelling it to assign this claim to the complainant, with a right to sue for the bonds in the name of the company; but it was further adjudged that the equitable nature of the complainant's relief against the company furnished no ground for the support of such a bill in equity against the county, as the right to proceed against the county and its officers, to compel the issue of the bonds, was a purely legal right, to be prosecuted at law, and that the bill should be dismissed as to the county, without prejudice to an action at law. This case was followed and applied in *Association v. Hutsell*, 31 U. S. App. 244, 14 C. C. A. 97, and 66 Fed. 799, where it was again held that fraud alone furnishes no ground upon which a court of equity will afford relief, and that, unless preventive or other equitable relief is sought, the remedy for fraud is at law. It was further said that such a bill, alleging fraud and asking a mere judgment for damages upon a transaction which was passed and affirmed, was a case over which there was a want of equitable jurisdiction. See, to the same effect, *Smyth v. Banking Co.*, 141 U. S. 656, 12 Sup. Ct. 113.

In *Dowell v. Mitchell*, 105 U. S. 430, the facts were that a surviving partner had executed a note for a debt of the firm, and, to secure its payment, executed a mortgage on real estate which was in fact the individual property of the deceased partner. Foreclosure suit was brought against the surviving member and administrator and heirs of the deceased partner. So much of the bill as sought foreclosure was dismissed, and decree rendered against the administrator and surviving partner for the amount due on the notes purporting to be secured by the mortgage. The supreme court, affirming so much of the decree as declared the real estate the individual property of the deceased partner, said:

"When this fact was established by the evidence, the court below, sitting as a court of equity, had no jurisdiction to proceed in the cause. There was nothing on which it could act but the promissory notes, and to enforce their payment the complainants had a plain, adequate, and complete remedy at law. The rule is that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice. *Russell v. Clarke's Ex'rs*, 7 Cranch, 69; *Price's Patent Candle Co. v. Bauwen's Patent Candle Co.*, 4 Kay & J. 727; *Baily v. Taylor*, 1 Russ. & M. 73; *French v. Howard*, 3 Bibb, 301; *Robinson v. Gilbreth*, 4 Bibb, 183; *Nourse v. Gregory*, 3 Litt. 378."

The money decree upon the note was accordingly reversed, with a direction to dismiss the bill without prejudice.

Without further statement of the cases, this review must be limited by reference to some well-considered cases in which this distinction between legal and equitable relief is recognized and enforced. *Klever v. Seawell*, 22 U. S. App. 715, 12 C. C. A. 661, and 65 Fed. 393; *In re Mudsill Min. Co.*, 31 U. S. App. 112, 13 C. C. A. 77, and 65 Fed. 647; *Grether v. Cornell's Ex'rs*, 43 U. S. App. 770, 23 C. C. A. 498, and 75 Fed. 742; *McConnell v. Society*, 37 U. S. App. 213, 16 C. C. A. 172, and 69 Fed. 113; *Lewis v. Cocks*, 23 Wall. 466; *Brown v. Swann*, 10 Pet. 496.

In *Klever v. Seawell* it was said the phrase, "suits at common law," found in the seventh amendment to the constitution, preserving trial by jury, is used in contradistinction to equity and admiralty and maritime jurisprudence; adopting the language of *Parsons v. Bedford*, 3 Pet. 433.

In a recent, but standard, work on Equity, the rule is laid down in language as follows:

"In England, prior to St. 21 & 22 Vict. c. 27 (commonly known as 'Sir Hugh Cairns' Act'), damages or compensation were decreed in favor of a complainant in equity *only as incidental to other relief sought by the bill and actually granted*, or where there was no adequate remedy at law, or where some peculiar equities intervened. By that statute it is, in substance, enacted that, in cases of contracts, where the court has jurisdiction by way of injunction or specific performance, it shall be lawful for the same court, if it shall think fit, to award damages to the injured party, either in addition to or in substitution for such injunction or specific performance. There had, indeed, been some decisions in England in which the right of a court of equity to decree compensation for the injury sustained by the nonperformance of a contract, in the event of the primary relief for a specific performance failing, had been recognized, and bills were not unfrequently filed in which such relief was prayed. But the case of *Denton v. Stewart*, in which that doctrine was promulgated, was subsequently overruled, and the law was stated by Lord St. Leonards, in the last edition of his Treatise on Vendors and Purchasers, to be against the power of the court to award compensation in such cases, independently of the statute." *Bisp. Eq.* (5th Ed.) § 477.

For the same proposition, stated in a different form, see *Id.* § 395.

Stebbins v. Eddy (1827) 22 Fed. Cas. 1192, 4 Mason, 414, so much relied on by plaintiff's counsel, is inapplicable. The language quoted as supporting plaintiff's contention was used in reference to the case of a mutual mistake as to the quantity of land in a sale by the acre, or a case of fraudulent misrepresentation as to the acreage. Fraud was a necessary element, as the rule was stated. This is a case in which fraud can no longer be considered, and, furthermore, the statement was a mere dictum. Where failure or defect of title is the objection, and there is a complete remedy at law in an action on the covenant, the dictum, if sound, could hardly apply.

The discussion of this subject of relief by way of damages or compensation in equity has been thus far somewhat in its general aspect. I think it will sufficiently appear that in the courts of the United States, following in this respect the English equity jurisprudence at the time of the adoption of the constitution, relief by way of compensation or damages is limited mainly to cases of specific performance, and that the jurisdiction to grant such relief is and has been exercised in other cases only under extraordinary and peculiar circumstances, and then only to grant ancillary relief. I have also re-

ferred sufficiently to the distinction between "compensation" in this limited sense and "damages" in the general sense of compensation for the breach of a contract. It seems to me that it can also be safely affirmed that, in the exercise of the limited equity jurisdiction in the courts of the United States, a bill which makes a case for equitable relief, and also in the alternative for the enforcement of a legal right, cannot be sustained when no part of the equitable relief is granted, as this would be to exercise jurisdiction over a purely legal demand, as to which the right of trial by jury is secured.

I will now refer to another aspect of this case, which leads to the same result. The secondary relief sought, it seems, is legal, and the right on which the claim is based such as grows out of the covenants in the deed only, and is therefore also legal. This is an executed, and not an executory, contract. The purchaser is in possession under a deed with covenant of warranty, and, so far, his possession does not appear to have been disturbed. The right to relief on the ground of fraud or fraudulent misrepresentation having been lost by delay, eliminates that element from the case. The case, then, is one where a purchaser of land has taken a deed with covenant of warranty, and has been let into possession; and the long-established rule in Tennessee is that, in the absence of fraud or insolvency, and before eviction, he cannot, in equity, claim rescission, resist payment of purchase money, or have purchase money refunded, on the ground merely of defect of title in the vendor. He must, in such cases, be left to his remedy at law on the covenant of warranty. *Topp v. White*, 12 *Heisk.* 165; *Barnett v. Clark*, 5 *Sneed*, 435. It was so adjudged by this court in the recent cases of *White v. Ewing*, 37 U. S. App. 365, 16 C. C. A. 296, and 69 Fed. 451, and *Jourolmon v. Ewing*, 47 U. S. App. 679, 26 C. C. A. 23, and 80 Fed. 604. This is the general rule, as well as the rule in Tennessee, as was declared in the last case cited. See, also, *Andrus v. Refining Co.*, 130 U. S. 648, 9 Sup. Ct. 645; *Noonan v. Lee*, 2 *Black*, 500; *Patton v. Taylor*, 7 *How.* 133.

This is undoubtedly the general rule in England, as will be seen from the authorities already cited, and particularly from *Joliffe v. Baker*. It is somewhat common in England for vendors to guard against errors and misdescriptions by an express stipulation that they shall not annul or defeat the sale, but that compensation shall be made for the difference in value. This is known as the common condition for compensation. It would happen that such a condition in the executory contract might not be carried into the executed contract of conveyance. The question came before the English courts whether such a condition could be enforced after completion of the sale by deed, in view of the accepted general rule that, after conveyance, the vendee, in the absence of fraud, must rely on the covenants in the deed.

In 2 *Dart, Vend.* p. 904, the law on the subject is thus enunciated:

"A bill filed, after conveyance, simply for compensation in respect of defects in the estate, will be dismissed in the absence of an express condition for compensation, although such defects, accompanied by fraudulent misrepresentation or concealment, may be a ground for rescinding the executed contract. The question of the nature and extent of the common condition for compensation may be considered here, with a view to ascertaining the circumstances

under which this condition may be enforced after completion. The true theory of the operation of this condition appears to be as follows: While the contract is still executory, and rescission upon ordinary equitable grounds is therefore still possible, the condition would appear simply to provide an additional remedy, alternative to that of rescission. But rescission may become impossible, either by the contract having been executed, or by the purchaser having otherwise affirmed the contract. In such cases, it is a question of intention only whether the remedy by way of compensation for the error, misstatement, or omission remains, although the other remedy has become impossible. It is true that where parties enter into a preliminary contract, which is afterwards to be carried out by a deed, the contract becomes extinguished in the deed when it is executed, and can no longer be looked at for any purpose. But the ordinary contract for compensation is not one which, according to the interpretation which the courts have put upon the language of the parties, is intended to be carried out by the deed of conveyance, but continues to exist outside it. It does not merely cover the interval before the formal deed of the conveyance, but continues to exist after it. This must be taken to be finally settled by the authorities. The condition for compensation thus, after conveyance, gives a remedy, *which would not exist in its absence.*"

There is no allegation in this case of insolvency or other ground of equitable interference, nor is there anything in the case which renders it like that of Callis v. Cogbill, 9 Lea, 138. It would seem, therefore, that the only remedy left to the plaintiff is an action at law upon the covenant of warranty. The plaintiff's right of action is against the personal representative of the deceased vendor, the other defendants to this bill being no parties to the deed executed, and their only liability as heirs at law of the deceased vendor being limited to the property which descended to them on the death of the ancestor, and which might be subjected, on proper statutory proceedings, after an unsatisfied recovery against the personal representative.

The plaintiff is the victim of fraud, but in the situation in which the case is now found, yielding, as I must, to the authority of controlling cases, I am unable to bring myself to think that the bill can be sustained in this court for the purpose of administering either the primary or secondary relief; the title and relief sought in the secondary aspect being both legal.

The bill will consequently be dismissed, with costs, without prejudice to an action at law, or such other suit as the plaintiff may be advised can be successfully prosecuted, except a suit for rescission like this.

DINSMORE et al. v. SOUTHERN EXP. CO. et al.

(Circuit Court, S. D. Georgia, N. D. March 7, 1899.)

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A suit to determine the validity of the action of state authorities with reference to a tax imposed by the United States involves a federal question, and a federal court has jurisdiction, without regard to the citizenship of the parties.

2. INTERNAL REVENUE—SUIT TO ENJOIN ACTION BY STATE AUTHORITIES—ISSUES.

A suit by an express company or its stockholders against the railroad commission of a state, to enjoin the enforcement of an order requiring the company to pay the war stamp tax imposed by the United States on its manifests and bills of lading, without any demand on shippers for its payment, does not necessarily involve a construction of the act of congress

imposing the tax, as the defendants have no legal interest in the matter which entitles them to demand such construction.

3. SAME—ENFORCEMENT OF STAMP TAX—JURISDICTION OF STATE AUTHORITIES.

The question whether the war stamp tax imposed by the United States upon the manifests and bills of lading of express companies shall be borne by the companies or by shippers is one not within the control of the administrative officers of a particular state, and an order by a state railroad commission requiring its payment by the express companies is without jurisdiction and void.

4. SAME—POWERS OF RAILROAD COMMISSION UNDER STATE STATUTES.

The statutes of Georgia giving the state railroad commission the power to fix rates for transportation to be charged by express companies, and imposing penalties for violation of their orders, cannot be extended by construction to include authority to order an express company to pay the war stamp tax imposed by the United States, without demanding its payment from shippers, subject to the same penalties for its violation, such tax having no relation to the charge for transportation.

5. JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE OFFICERS.

Where the statutes of a state permit the validity of the action of administrative state officers to be brought in question by a suit against them in the state courts, a citizen of another state, whose property rights are injuriously affected by such action, cannot be confined by such statutes to his remedy in the state courts, but may maintain a like suit against such officers in a federal court; and such suit is not one against the state.

6. EQUITY JURISDICTION—PREVENTING MULTIPLICITY OF SUITS.

Where a failure to obey an order made by a state railroad commission against an express company, which was unauthorized and void, would, under the state statutes, subject the company, in its daily business, to large numbers of individual actions, and to heavy penalties, a court of equity has jurisdiction of a suit to enjoin the enforcement of such order, on the ground that its decree will avoid a multiplicity of suits, and afford a more efficacious remedy than can be had at law.

William B. Dinsmore, C. Gray Dinsmore, and William B. Dinsmore, C. Gray Dinsmore and Dumont Clarke, as executors of and trustees under the will of William B. Dinsmore, deceased, stockholders of the Southern Express Company, filed their bill, with the recitation of facts following:

The Southern Express Company is a Georgia corporation. The plaintiffs are its shareholders, to the amount of \$50,000. They are citizens of New York. The railroad commission of Georgia, by order passed the 2d of August, 1898, directed that the Southern Express Company pay the war stamp tax on its manifests and bills of lading required by the act of congress of the 13th day of June, 1898 (30 Stat. 448). By the same order the Southern Express Company was directed to conform therewith without making any demand on shippers for the payment of the tax, and to notify the commission of its compliance in five days from that date, and in default thereof the penalties of the Georgia statute were threatened. The complainants desired that the express company should refuse to pay the tax, and have the question of its liability settled by the courts, and formally requested the company to take this action. The company, however, declined to comply with this request; giving as the reason therefor that it was advised not to subject itself to the risk of incurring the severe penalties imposed by the state legislation, and which could be enforced by the commission as threatened, and for the further reason that the charter and franchises of the company might be impaired by state action. The bill is filed against the Southern Express Company, the railroad commission of Georgia and its members, and the attorney general of the state. The prayers are that the express company be enjoined from paying the tax, and that the railroad commission and the attorney general of the state be enjoined from proceeding to enforce the penalties of the state statute. The attorney general, representing himself and the railroad commission, demurred to the bill, and the cause was heard upon bill and demurrer.

Other facts essential to an understanding of the case may be gathered from the opinion of the court.

Frank H. Miller and B. W. K. Miller, for complainants.

Fleming G. du Bignon, for defendant Southern Exp. Co.

J. M. Terrell, Atty. Gen. of Georgia, for defendants railroad commission of Georgia, its members, and himself.

SPEER, District Judge (after stating the facts as above). The parties actually contesting in this proceeding are nonresident stockholders of the Southern Express Company, on the one side, and the members of the railroad commission and the attorney general of Georgia, on the other. The Southern Express Company, a Georgia corporation, is also made a party defendant, and injunction is prayed against it. It may with more propriety, however, be regarded as party plaintiff. It was made to take a position as defendant certainly for one reason, and perhaps for another also. It had declined to test in the courts the question whether the war stamp tax on its bills of lading and manifests is payable by the shipper or by itself. This was done because of the enormous penalties, of from \$1,000 to \$5,000 fine in each case, with which it was solemnly threatened by the railroad commission, unless in five days it abandoned its contention that the shipper must pay the tax, accept all shipments, and itself furnish, affix, and cancel the stamps. This is plain from the resolution of its directors, in which they state that "it is deemed expedient to comply with the orders of the railroad commission of Georgia in the premises, in order to avoid penalties under the laws of Georgia, and so clouding the company's title to its corporate franchises and rights as to embarrass its action." It is possible, also, that, being a resident corporation, the jurisdiction of the court here may have been questioned. The matter to be determined, however, involving the imposition of United States taxation by state authorities, we may be justified in concluding that the United States court has jurisdiction concurrent with that of the state courts to hear the parties, whether they are citizens of this or of other states. The Southern Express Company, then, so far as the jurisdiction can be affected, might well have taken its appropriate position as plaintiff. It cannot be said, however, in view of the averments of the bill, and the character of the demurrer, that the express company is in a position embarrassing to the court in the determination of the questions of law presented by the pleadings. Those questions are not so extensive as the demurrer of the commission, and the strong, ingenious argument of the attorney general, would seem to indicate. They do not, for instance, render necessary a construction by the court of the act of congress imposing the war stamp tax, nor any clause of it. Indeed, there are no parties to the record whose demand for the construction of the clause imposing the tax must be regarded. The complainants do not ask it. In the brief filed by their counsel, they expressly suggest that the construction of the revenue act is not involved. It is true, they pray that the express company may be restrained from "voluntarily complying" with the provisions of the order of the railroad commission directing it to furnish the stamps

and to pay the tax, but surely an injunction to this effect would be superfluous. There was and is and will be nothing "voluntary" to be discovered in the action of the express company in this regard. It not only refused to pay the tax, but, when ordered to do so by the commission, complied most reluctantly, and for fear of the more serious impositions the commission had in store for it. Why, then, should the court parade its authority to enjoin the express company not to make payments it would be delighted to escape?

Nor can it be said that the state has the right to ask a construction of the act. It has no pecuniary interest at stake. To adopt the language of the supreme court in a kindred case (*Reagan v. Trust Co.*, 154 U. S. 390, 14 Sup. Ct. 1051), "There is a sense, doubtless, that the state is interested in the question, but only in a governmental sense." States, however, do not enter courts in a governmental sense. They cannot ordinarily be brought into court, but, when they condescend to come, they come as do ordinary litigants; and they are not heard unless they have an ascertainable, definite interest in the litigation. Here, moreover, the state is not before the court. The commission is here, but the commission does not contend, "*L'état c'est moi*," as did Louis le Grande Monarque. We shall presently see that the commission has as little concern with the construction of the revenue law as the state, which is not before the court. It is true, the learned attorney general, in his brief, states that the demurrer presents this question, "Does the act of congress levy the stamp tax upon the shipper or express company, or is it a general or floating tax?" Now, if the attorney general of Georgia was the attorney general of the United States, and was engaged in an effort to enforce the payment of the United States tax by the Southern Express Company, his proposition would probably require judicial determination. The fact, however, that he appears in this case as the attorney general of the state, betrays how untenable is his position. This revenue tax is imposed by the United States. It affects all the people of all the states. It is national in its character, and "admits and requires uniformity of regulation and enforcement in all of the states." It follows that its assessment, collection, and enforcement are not within the administrative control of the authorities of a particular state. The respective spheres of action of the state and United States, to use the apposite illustration of Chief Justice Brown in *Hines v. Rawson*, 40 Ga. 356, are each "as far beyond the reach of the other as if the line between them was traced by landmarks and monuments visible to the eye." Indeed, the action of the railroad commission, as recited in the bill and admitted by the demurrer, is not only an appropriation of functions belonging exclusively to officials of the United States charged with the collection of the tax, but it is an expansion of its own authority, as defined by the law of the state. This is to be found in section 2217 of the Civil Code of Georgia, and provides that all express and telegraph companies doing business in whole or part in this state "shall be under the control of the railroad commission of Georgia, who shall have full power to regulate the prices to be charged * * * for any service performed by any such company

or persons," etc. All of the powers of the commission relative to railroads are extended by this legislation to include telegraph and express companies. Without quoting the voluminous enactments defining the powers of the railroad commission, it will be enough to say that, like the section of the Code quoted above, so far as they are germane to this controversy they relate to the fixation of rates or prices for transportation or conveyance. In so far as they are penal in effect, under the familiar rule they must, of course, be strictly construed. Bearing in mind this cardinal canon of construction with regard to penal legislation, how unprecedented seems that latitudinous interpretation which would make the punishment fixed by the statute apply to the failure of a corporation to pay a disputed stamp tax imposed by the United States upon a written evidence of shipment required by the United States. This revenue exaction is no part of a rate for the shipment of express matter. It is no part of the price for "a service rendered" the shipper. It is a tax for national purposes, and its payment or collection is in no sense directly or indirectly within the sphere "of a state administrative board." Like the tax on distilled spirits, this is an internal revenue tax. Should the express company ship a package of any character in the absence of this stamp on the bill of lading, it would incur a penalty of \$50. If it should accept and knowingly "remove" or ship a package of distilled spirits, unless it also bore the stamp required by the law, it would be guilty of a crime, and its officers punishable, on conviction, by imprisonment in the penitentiary. Now, has the railroad commission control over the shipment of an unstamped cask of liquor? Has it authority to direct that the express company, and not the distiller, shall pay for and attach the stamp? Has it any authority to threaten the imposition of its crushing penalties on the express company, and thus compel it to remove the liquor before the tax due from the distiller has been paid? This will scarcely be maintained. But in either case the duty of the express company must, of necessity, be determined by the construction of the United States law. The courts of the state may construe such laws, and make their construction effective, unless it should be appropriately denied by the courts of the United States, but the commission has no such power; and yet in this case it has gravely construed the act of congress, and issued its mandate accordingly. There can be no doubt that this is a great disadvantage to the express company in this state. It is denied its day in court, and cannot, without assuming unwarrantable hazard, proceed to test by legal proceedings the disputed question of its liability for this tax, as other express companies have done elsewhere. The commission might well have adopted the method of the railroad commission of Missouri relating to the same tax. The Missouri commission were also of the opinion that the tax was payable by the company, but in their order upon the subject they declared:

"The act referred to, however, does not definitely state by whom the required stamp shall be affixed; nor, as the commissioners are informed, does the internal revenue department decide as regards this question. If the stamp must be paid for by the shipper, the aggregate charge to him is increased by

the amount paid for the stamp; and, so far as he is concerned, there is an increase in the rate. But the express companies do not increase their transportation rates, and claim that the stamp required has nothing to do with the service, but is for an entirely separate transaction, which the law requires shall be paid for by some one, as yet undecided, and that after the completion of this separate transaction the transportation service begins, and for which no more than the legal charge is made. The question to be decided is, by whom must the expense of the required stamp be borne? The opinion of the commissioners is as before stated, but their opinion in this case is not law, nor would it be of any effect in deciding the matter. The question is now in the courts for settlement, and, until finally decided, must remain an open one. Should the decision of the courts be adverse to the express companies, and afterwards rates should be increased by them to cover the additional expense incurred by reason of the tax, then the commission would have full jurisdiction, and, after hearing, could, if found proper, restore the old rates. As the matter stands, there is no increase in the rate tariffs of the express companies, and, as regards the question of liability for the cost of the stamp required, commissioners decide they have no jurisdiction."

How clear, conservative, and equitable is this announcement! Neither the shippers nor the company are hindered in their approach to the courts. No fulmination is directed at either. How is it in Georgia? A corporation contributing daily to the comfort and convenience of thousands, and doing much for the advancement of the state, is practically excluded from the courts; or, if it should seek to maintain therein its conceptions of the law even for a single day after the five days' grace accorded by the commission, it is threatened with penalties which, if imposed upon its conduct of business for a half day, would involve it in irretrievable bankruptcy and ruin.

It is insisted, however, by the attorney general, that this court has no jurisdiction to grant any of the plaintiffs' prayers. The argument is that the action of the commission complained of is merely a reduction of rates; whether the reduction is reasonable or not is exclusively to be determined by the state courts; in no case can the court enjoin penalty suits; that the company has an adequate defense at law; that in no case, except in bankruptcy, is an injunction to be granted by a court of the United States to stay proceedings in the state courts; and that this is a suit against the state. Many cases are marshaled in support of these propositions. The fundamental misapprehension which has led the attorney general to this incorrect contention, and misapplication of precedents, seems to proceed from his omission to perceive that the action taken by the commission is not merely unreasonable, but is unauthorized, null, and void. Now, it cannot successfully be disputed that the courts are open to citizens of the state, to protect their property from the unauthorized action of officials; and in many cases the supreme court of the United States has held that:

"Whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts." *Smyth v. Ames*, 169 U. S. 517, 18 Sup. Ct. 422, and authorities cited.

The commission, then, is not above the law in either jurisdiction. *Reagan v. Trust Co.*, 154 U. S. 364, 14 Sup. Ct. 1047 (Texas Com-

mission Case); Turnpike-Road Co. v. Sandford, 164 U. S. 592, 17 Sup. Ct. 198 (Turnpike Case); Smyth v. Ames, 169 U. S. 516, 18 Sup. Ct. 418 (Nebraska Commission Case). It will be found that these cases, and many others cited by the supreme court in its opinions, afford decisive refutation of that reasoning intended to defeat the plaintiffs' application for injunction against the commission. The supreme court holds:

That "the adequacy or inadequacy of the remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of the federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought"; that "the wise policy of the constitution gives him a choice of tribunals"; that "stockholders and incorporations may ask a decree enjoining the illegal action of the commission, upon the ground that it is unreasonable, unauthorized, or is repugnant to the constitution of the United States"; that "the courts of the United States sitting in equity can make a comprehensive decree covering the whole ground of controversy, and thus avoid the multiplicity of suits that would inevitably arise under the statute."

This holding is precisely in point. It is found in the invaluable opinion of Associate Justice Harlan in *Smyth v. Ames*, *supra*. There the company was, as in this case, made liable, not only to individual process for every act, matter, or thing prohibited by the statute, and for every omission to do any act, matter, or thing required to be done, but to a fine of from \$1,000 to \$5,000 for the first offense. It is further held that:

"The transactions with these corporations are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree according to the prayers of the bill would avoid a multiplicity of suits, giving a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency, and determine once for all, and avoid a multiplicity of suits, matters that affect, not simply individuals, but the interests of the entire community."

In the same line of decisions summed up in the case just cited, the argument that the proceeding is against the state, and therefore not maintainable, is also judicially overthrown. The supreme court holds that the suits are not against the state, but against certain individuals charged with the administration of a state enactment, which it is alleged cannot be enforced without violating the constitutional rights of the plaintiff.

In view of these repeated declarations of the supreme court of the United States, it is obligatory upon this court to enjoin the enforcement of the order of the railroad commission, oppressive, as it is, to the Southern Express Company, and injurious to its stockholders. This must be done in order that the management of this business, so important to the public, may be admitted to the judicial tribunals of the state and of the United States upon a footing of equality with other litigants. The averments of the bill, taken with the brief of counsel, as we have said, at present do not call for a construction of the act, or for the final determination of the liability of the defendant com-

pany or of the shipper to pay it. The case, indeed, is not ripe for a final decree. Upon this preliminary hearing the decision will therefore be confined to matters distinctly in issue. The prayer for temporary injunction against the express company will be denied, and the railroad commission will be enjoined conformably to the prayers of the bill. It is not deemed necessary to enjoin the attorney general, for it is presumed that the eminent lawyer who is the official head of the bar of the state will, without such injunction, accord all appropriate respect to the decision of the court.

PARISIAN COMB CO. v. ESCHWEGE et al.

(Circuit Court, S. D. New York. March 31, 1899.)

EQUITY PRACTICE—TAKING TESTIMONY—POWER OF COURT TO LIMIT.

In the taking of proofs in equity in a circuit court, a witness cannot be excused from answering a question because deemed immaterial by the court, as the party is entitled to have the testimony in the record for use on appeal.

On Application to Require a Witness before a Master to Answer a Question.

John R. Bennett, for the motion.

James A. Hudson, opposed.

LACOMBE, Circuit Judge. This is another application to require a witness to answer a question propounded during taking of proofs in equity. As has been so often pointed out, the decision of the supreme court in *Blease v. Garlington*, 92 U. S. 1, seems controlling. It seems as if the information sought to be elicited were not essential to complainant's case, nor, indeed, relevant or material to the issues which, according to practice, will be first argued, viz. validity of patent, construction of claim, and infringement. Nevertheless this court is not the final arbiter as to whether the testimony is or is not immaterial, and, in view of the object intended by the amendment of the sixty-seventh rule, it should obtain and preserve the answers for the benefit of the appellate tribunal. *Blease v. Garlington*, supra. As to order of proof, it is not understood that the trial judge will be without power to enter a final decree assessing damages, if the evidence warrants it, without going through the formality of an interlocutory decree, and reference to a master. The question must be answered.

LAKE ERIE & W. R. CO. v. CITY OF FREMONT, OHIO.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 607.

1. INJUNCTION—RESTRAINING ERECTION OF NUISANCE—SUFFICIENCY OF EVIDENCE.

To entitle a city to an injunction restraining a railroad company from constructing an embankment for its tracks, over its own land, across an island in a river, upon the ground that such embankment will increase

the danger of overflow in times of high water, the probability of such result must be clearly shown. The mere possibility that conditions might be such that the danger would be increased by the embankment is not sufficient to authorize a court of equity to interfere with a use of property which is rightful.

2. EQUITY PRACTICE—EFFECT OF FINDINGS OF MASTER.

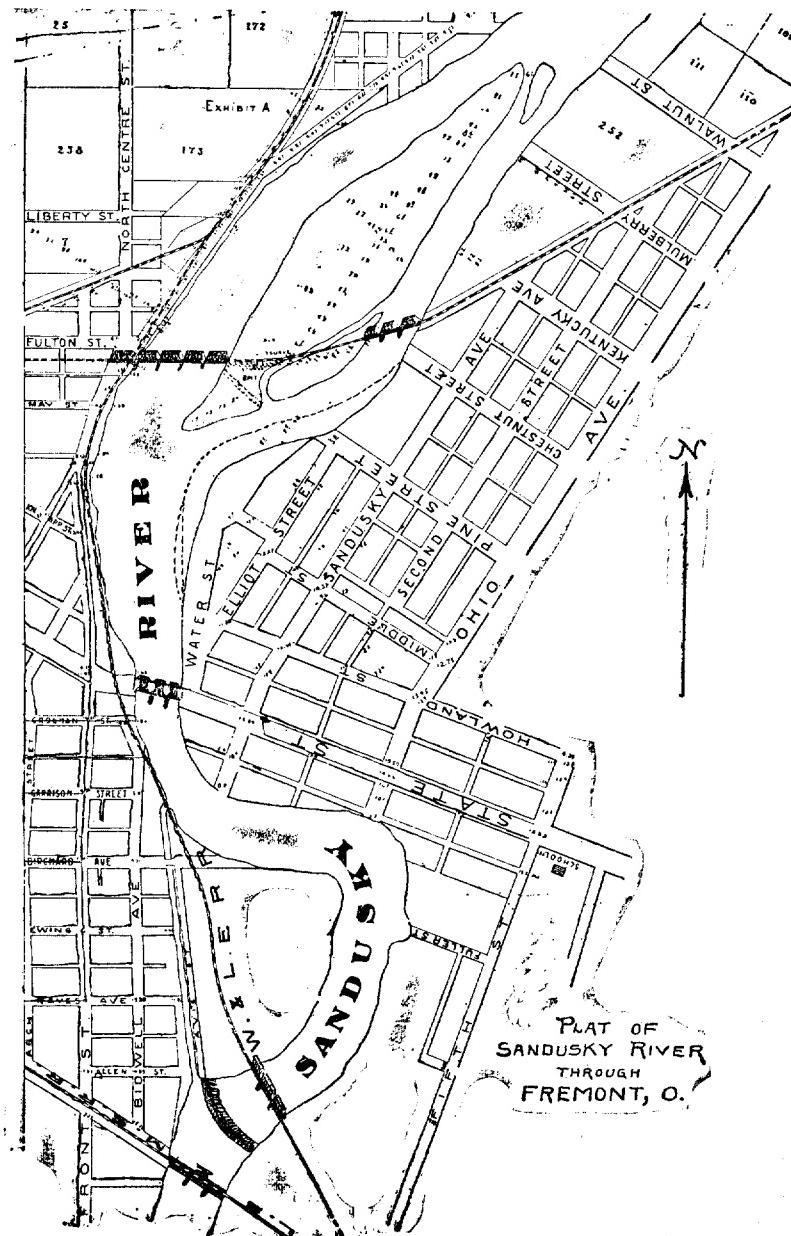
In dealing with exceptions to a master's report, the conclusions of the master, depending upon conflicting testimony, have every reasonable presumption in their favor, and will not be set aside unless error or mistake clearly appears.

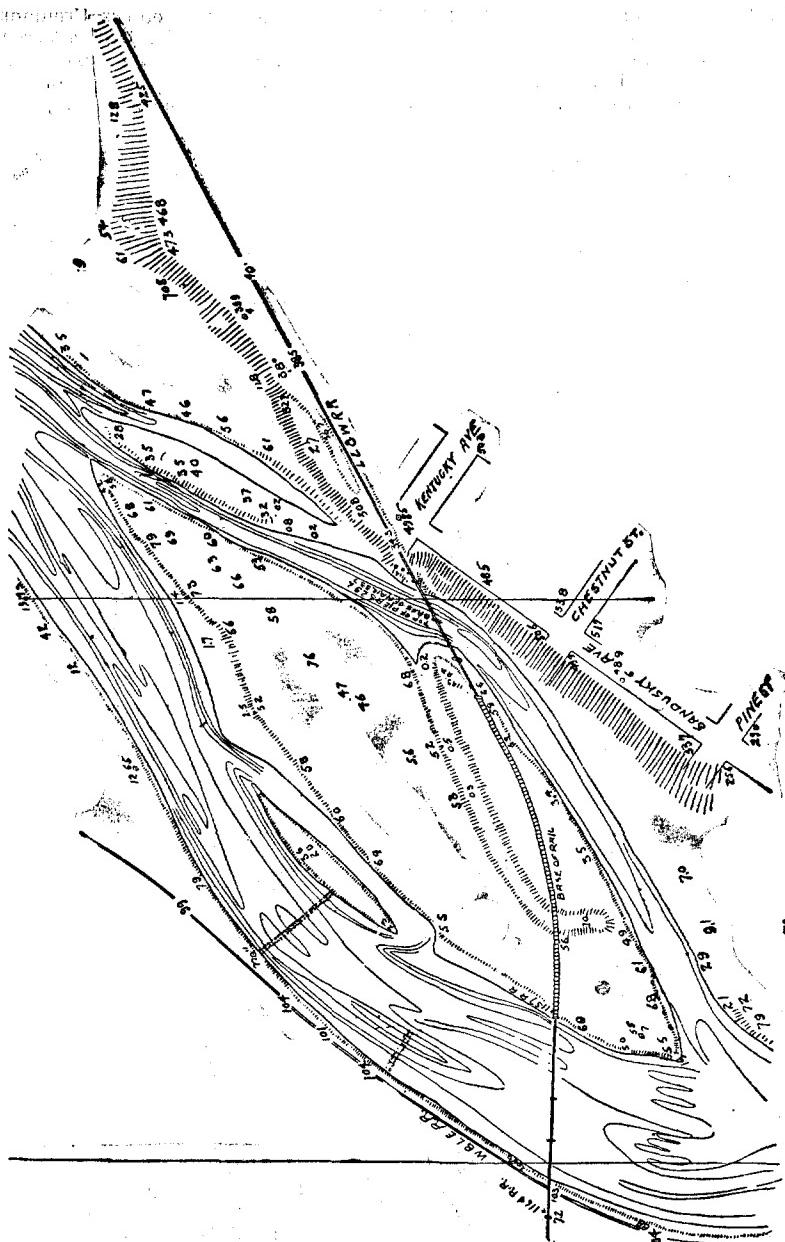
Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

This is an appeal from a decree of the circuit court of the Northern district of Ohio, Western division, perpetually enjoining the Lake Erie & Western Railroad Company from constructing a solid embankment of earth, in place of the trestle upon which its track is now laid, across an island in the Sandusky river, within the corporate limits of the city of Fremont, Ohio. The cause was removed from the common pleas court of Sandusky county to the court below by the Lake Erie & Western Railroad Company, a corporation of the state of Illinois; and in the court below the city of Fremont filed an amended bill, to conform to the practice of the federal courts of equity. The averments in the bill set forth the threatened construction of such an embankment, and stated that its substitution for the present trestle would, in times of ordinary high water, flood the water back upon the streets, alleys, and houses of the city; interrupting public travel, and stopping the escape of the sewage, and exposing the residents of the city to disease and great discomfort. The defendant railroad company answered the bill, and specifically denied that the contemplated embankment would in any degree increase the danger from floods to the inhabitants of the city of Fremont. A replication was duly filed, the issues were made up, and the cause was referred to a master to take evidence, and report upon the question whether the building of the proposed embankment would cause the danger as alleged by the complainant in its bill, and whether, if there was any danger from the embankment, it might be avoided by omitting part of it. The master heard the witnesses upon both sides of this question at great length, and returned, with his conclusions and findings of fact, the evidence reduced to writing by a stenographer, amounting in all to 1,650 printed pages. The master's conclusion was "that the building of the embankment across said island in the Sandusky river will not cause the injuries * * * complained of in the said complainant's bill, or any part thereof. * * * If I had any doubt on the subject, I would recommend the construction of a bridge span 120 feet in the clear, similar to that over Front street, located about the middle of the island. Such a span would carry off all ice, that would not otherwise be deflected and carried off by the training dyke formed by the embankment, much better than the present trestlework, and would meet all emergencies; but, as I have no such doubt, I make no such recommendation."

The Sandusky river is a river 60 miles in length, emptying into the Sandusky Bay, an estuary of Lake Erie. The river drains a watershed of 1,200 square miles. It enters the city of Fremont at about the center of the south corporation line, and, pursuing a course somewhat east of north, leaves the corporate limits at the north corporation line, a short distance from the northeast corner of the city proper. It divides the city, with the more populated portion on the west. Fremont contains about 8,000 inhabitants. The main street running east and west is State street, which crosses the river at a point where the water at its ordinary stage is on the level with that of Sandusky Bay and Lake Erie, and is slack water. Sandusky Bay, following the meandering of the river, is 18 miles from Fremont. For a distance of 400 or 500 feet upstream from the State street bridge, at ordinary stages of the water, there is slack water, and no current. Below the State street bridge the river widens out, and at a distance of 1,000 feet divides into two channels. The main channel is the west channel, the east channel being much narrower. The two channels make the island across which it is proposed to build the

embankment in controversy. The Lake Erie & Western road enters Fremont from the northeast, crosses the narrower of the two channels, just referred to, on the bridge, crosses the island upon a trestlework, crosses the west channel upon a wider iron bridge, and then traverses the western portion of the city. The locus in quo may be better understood from the following maps:





The second map is more accurate, in showing the parallelism of the trestle and the eastern branch of the river, the dimensions of the island, and the length and size of the small bayou on the eastern side of the island, which enters from the north, but does not extend south to the river, as shown in the first map. From a deep dam, $2\frac{1}{2}$ miles upstream, south from the State street bridge, the fall to slack water under the State street bridge is about $22\frac{1}{2}$ feet,

or 9 feet to the mile. After entering the corporate limits, the first obstruction in the stream is the bridge of the Michigan & Lake Shore Railroad Company. A short distance below this is an old city dam, broken and not in use, and a short distance below the dam is the railway bridge of the Wheeling & Lake Erie road. There are no obstructions in the stream between that bridge and the State street bridge. The distance from the Lake Shore bridge to the State street bridge is 2,700 feet. From the Lake Shore bridge to the dam below it is about 400 feet, and from the Lake Shore bridge to the Wheeling & Lake Erie bridge about 700 feet. From the Wheeling & Lake Erie bridge to slack water, a distance of about 1,400 feet, the current is quite rapid. The descent from the surface of the water, at ordinary stage, from the Lake Shore bridge to the State street bridge, is about 5 feet, and from the Wheeling & Lake Erie bridge to the State street bridge about $3\frac{1}{2}$ feet. The Lake Shore bridge has two spans, with $97\frac{1}{2}$ feet for each span, and an opening in the clear of 195 feet. There is, in addition to this, what is called a "toe span" of the same width, under which there is dry ground about 6 feet above the surface of the water, at ordinary stage. The Wheeling & Lake Erie bridge has three spans, of 121 feet each, or an opening of 363 feet. Both these railroad bridges are built upon solid embankments extending across the valley of the stream. The State street bridge has three spans; the end spans being 85 feet in the clear, and the middle span 140 feet, affording a total opening of 310 feet. The bridge of the defendant company, in the west channel, 1,800 feet below, consists of four spans, of 132 feet each, with an opening in the clear of 528 feet. The floor of the bridge is 26 feet above the water at ordinary stage. In addition to the four spans already referred to, there is a fifth span, on the west side, over the Wheeling & Lake Erie Railroad track, which is laid on the top of the west bank of the river. This span is 120 feet in the clear. The bridge across the east channel has three spans of 121 feet each, or a total opening of 363 feet. The bridge across the east branch is placed askew the channel, and the opening for the water at right angles to the current is but 200 feet; making a total opening in the two bridges under which the water passes of 728 feet, at about right angles to the current. The Wheeling & Lake Erie track on the west bank of the river is about 11 feet above the ordinary stage of the water, and about $5\frac{1}{2}$ feet above the average height of the island opposite; so that, when the river is bank full in a flood, with the water up to the rail of the Wheeling & Lake Erie track on its west bank, the water will be about $5\frac{1}{2}$ feet in depth on the island, on an average. There are parts of the Third ward of the city of Fremont on the east side of the river, sparsely populated, which are as low as the island, and some very little above it. The island has an extreme width of about 750 feet, and a length of 2,833 feet. The east pier of the west channel bridge is 500 feet from the extreme southernmost point of the island, while the west pier of the bridge over the east branch is 1,800 feet from the same south point of the island. The length of the trestle from the east side of the bridge over the western channel to the west side of the bridge over the eastern channel is about 1,200 feet. It is built on a curve. Just east of the bridge over the west channel, the trestle continues in the same direction as that bridge for about the length of the bridge, and then curves to the northward in such a way as to make the trestle from that point nearly parallel with the east branch of the stream, and but a short distance therefrom. There are 85 bents in the trestle, which is of wood; each bent being 12 feet wide. A little less than a mile further down the stream, beyond the bridge across the main channel, and about 2,000 feet below the end of the island, after the river has narrowed considerably, it makes an abrupt bend at right angles to the northeast. That is called the "First Boyer's Bend." After running some 2,000 feet, it turns again towards the north, making a second bend between high bluffs. The second bend is called the "Second Boyer's Bend," and is $1\frac{1}{8}$ miles north of Fremont. The river at Second Boyer's bend is about 350 feet in width. When, however, the water is up to the level of the Wheeling & Lake Erie track under the bridge over the west channel of the Lake Erie & Western Railroad, the width of water opening at Boyer's Bend is 450 feet. The surface of the water at ordinary stages is the same under the State street bridge and 600 feet above, under the Lake Erie & Western bridges, and at Second Boyer's bend. As already de-

scribed, at Second Boyer's bend the highland comes down nearly to the water, so as to make a narrow gateway, not exceeding 500 feet in width at any probable height of the water. The area of space afforded by the bridges for the passage of water when the river is bank full at the Lake Erie & Western bridge (assuming, thus, the column of water to be 11 feet above its ordinary stage) is as follows:

Lake Shore & Michigan Southern.....	3,000 feet
Wheeling & Lake Erie.....	4,320 feet
State street bridge.....	3,516 feet
Two bridges of the Lake Erie & Western.....	9,136 feet
Boyer's Bend	5,910 feet

These figures are made to include the actual depth of water to the bottom of the river at each point.

The action of the water in the river can best be understood at the time of floods by the history which the master gives of the various series of floods as brought before him in testimony. He says: "Many witnesses have testified to the number and character of so-called floods or freshets at Fremont from 1840 to 1897, and also as to the condition of the river and the city at such times, and also as to the formation of ice gorges, and the effect of such gorges. The highest floods in the history of the city occurred in 1883. The water began rising on Saturday, February 2d, and was at its highest point on Sunday, about noon, and gradually receded until the following Sunday, when it was within banks. It left the streets and alleys on the east side, and many streets and alleys on the west side, of the river, obstructed with ice and débris. Front street, the principal business street, had two or three feet of water in it; and men went about in boats through the streets, as well as over vacant lots and the submerged flats south and east of the city. One woman was drowned in her house, which was located some distance north of the Lake Erie & Western bridge. One span of the Lake Shore & Michigan Southern Railroad bridge, 20 feet above the bottom of the river, was washed out, and a number of freight cars went down with the bridge. The water ran over the banks at State street and Ohio avenue, and one freight car was lodged at this point, where the water was four feet deep, and others were carried down through the other bridges to the lowlands, and points away north of the city. Mr. Judson has indicated on the tracing map the surface of the territory that would be affected by a flood, the level of which was 13 feet above datum. A good idea can be obtained of the condition of things in 1883 by adding about 5 feet of water on top of that water datum line. The conditions existing at the time of this unprecedented flood were such that there is no probability of its ever occurring again, although there is a possibility. During the winter immediately preceding this flood there was extremely cold weather, so that the ice had frozen to a thickness of 22 to 24 inches where the water was slack; and the ground, too, was frozen to a great depth, so that it was practically impervious to water. Some time during Saturday, on the 2d, the rain fell, but was of such character that it froze upon the surface of the ground as it fell, until it formed a coating of ice half an inch to one inch thick all over the state of Ohio. Following that there was a very heavy rain and warm weather, which precipitated all of the rainfall into the streams, without any portion being absorbed in the earth. The result was that in all streams in the state of Ohio there was sudden and unexpected flooding, and great damage was done. That flood produced the most serious damage to the city of Toledo, in its history, when the water in the Maumee river rose to the height of 20 feet in a few hours. This is a peculiar combination of circumstances, all of which contributed to the causing of the highest water which had ever been known before by any of the witnesses who testified, and the chances of its repetition are very remote. So-called floods, or extremely high waters, have occurred in Fremont at the following times: February 24, 1862; February 24, 1865; February 24, 1866 (and this flood was the next highest and most disastrous to that of 1883, and water came down Front street, and interfered with the business of the city); on February 16, 1867, great flood; March 7, 1868, high water, which the witness Mr. Hedrick would say was a flood; and on February 12, 1881, there was high water. Some of the older inhabitants also mention a considerable flood in 1846, and another in 1849; and numerous witnesses testified to the fact that in

1884 the river rose so that it overflowed the banks on the west side in the vicinity of May street and Knapp street. The older witnesses say that there is no material difference in the frequency or in the height of freshets and high water along prior to 1880, when the Lake Erie & Western Railroad bridge was built, and since that time. Almost every year when the ice breaks in the spring there are gorges formed at various points in the river. The testimony shows that the river is subject to gorges that affect the flow of the water at nearly all points from a distance above the city, above Ballville, above the Lake Shore Railroad bridge, south of the Lake Shore bridge, south of State street bridge, north of the Lake Erie & Western bridge, but more generally north of State street bridge, in the shallow water at the head of the island. There have been many heavy gorges north of the Lake Erie & Western bridge, beginning upon the right side or east side of the river, on a sand bar that extends out at that point, and running diagonally down the river to the west shore; and there have been some very disastrous gorges, which formed at the first bend, where the river abruptly turns to the west, blocking the channel so completely that the water was forced back until it filled the basin from the foothills on the one side to the foothills on the other. The Wheeling & Lake Erie Railroad track, from the point where it crosses State street and runs into Front street down to the point where it diverges from Front street, running northwest, practically constitutes the bank of the west side of the river. The water has probably risen higher than the Wheeling & Lake Erie tracks at these points four or five times since the year 1883. Sometimes the June freshets have risen higher than the banks, and have covered the island, but usually the waters that are highest are accompanied with ice and the gorging of ice. The flood of 1866 caused a gorge above the State street bridge on the territory that is now south of the Wheeling & Lake Erie tracks. That was before the Lake Erie & Western bridges and trestle were built; and, as the water was practically as high north of the Lake Erie & Western bridge as south of it, I find that the Lake Erie & Western bridges and trestles were in no sense the cause of the disasters that accompanied the floods of 1866 or of 1883. On the contrary, I find that, while the very large volume of water that was precipitated in 1883 would have risen higher than ever in its history before, it was made worse by a gorge of heavy ice that formed at the first bend north of the Lake Erie & Western bridge, spoken of above, and which held the water back for several days to some extent."

From the areas of water opening stated above, the master found that the west channel bridge of the Lake Erie & Western road alone would afford passage for all the water, when unaccompanied by ice, which would possibly come down within the channel of the river under the bridges above, and which would pass out, at second Boyer's bend, of the basin, which is made between the hills. The water rises upon the island, not by reason of the wave of downward flow in the river from the south to the north, but it rises gradually on all sides of the island, and especially from low points on the east and west sides north from the bridge by reason of the filling up of the bottoms and the river below, between the island and second Boyer's bend. The master found that in such floods there was practically no current over the island, that a strong current was in the two channels to the east and west of the island, and that the slight current upon the island was sometimes in one direction, and sometimes in another, by reason of an eddy forming at the north end of the island by the confluence of the two channels of the river at that point. The February freshets are usually accompanied by ice. By reason of the slack water under the State street bridge and below, the ice freezes quite thick, and in some of the shoal places freezes to the bottom. As the loose and broken ice is brought down through the narrow and more rapid part of the stream, and strikes the slack-water ice, there is a tendency to form gorges; and the contention of the complainant was and is that these gorges form, and are in the habit of forming, to a great height, at the piers of the bridge over the west channel, and at the piers of the bridge over the east channel of the defendant company; that these gorges make tight dams reaching up above the banks on the west and east side of the river, so that the only escape for the water is through the trestlework upon the island, which a solid embankment would entirely prevent, and thus greatly increase the flood of the water back upon the lower part of

the city. The master found that ice gorges form at the shoal places in the river, that the water under the bridges of the defendant company was deeper than it was above or below, and that the formation of a gorged dam at either bridge was very improbable. The master said: "The testimony is clear that the gorges usually begin to form north of the State street bridge, at the shallow ground above the head of the island; that they then break up and move out as the water rises, pile up higher as the ice accumulates; but that they finally move down the river, sometimes passing out at one channel, sometimes the other. Sometimes the gorge begins when the thick ice below State street breaks in wide cakes, and floats down to the west bank, and swings around against the piers of the west bridge, and thus holds back the ice that follows. Usually such gorges as these pass out before the water rises as high as the island; but the proof is that the gorges that hurt form on the sand bar that puts out from the island on the north side of the bridge, and resting against the thick ice from the dam, with its points of resistance running downstream, laterally to the opposite bank. And at such times that portion north of the bridge fills with field ice, and backs up to the bridge, where the piers fortify the points of resistance; and then the ice is gorged and forced up against the piers upon the banks and on the head of the island, and the accumulating ice floats around to the east channel, and fills it with field or floating ice; and the gorges that do most harm form at or below the docks, and near the point where the river turns at almost right angles to the west. The proof shows that such a gorge formed there in 1866, and in 1883, and that it was so dense and firm that the main body of water passed over Rawson's flats, north of the Port Clinton or Dock road, to Boyer's second bend, the only and direct point of exit." Again the master says: "Now, the fact is that sometimes, when the water rises high enough, the ice accumulates in the space south of the trestle and bridges, and, floating on top of the water, rests against the piers and trestle, and that sometimes it fills this space, but does not extend over the island beyond the north end of it. * * * It is absurd to suppose that ice would pass through the narrow spaces between the bents of the trestle and such openings, further limited by their diagonal position with respect to the course of the supposed current, and where the surface of the island must always be about ten feet higher than the bottom of the river, and that the ice would not pass through the space afforded by four to six spans, when the smooth stone piers are from 132 to 120 feet apart, and where the water would be ten feet deeper than it is on the island. My conclusion is that the building of the embankment would not increase the liability of the formation of the gorges, but would rather diminish such liability. When we consider the construction of the trestle, and see that the bents are composed of five poles or piles, and that these bents are twelve feet wide, and distant from each other only fourteen feet, that the line is almost parallel with the east channel, and that, in the perspective shown by looking along the line of the trestle, the south end of each bent seems to overlap the north end of the bent immediately beyond it, it will be seen that it is especially well formed to retain any ice that may float against it,—much more so than a smooth and solid bank of earth, even if it be rip-rapped with stone,—and that such a solid bank would facilitate the release of any floating ice that may reach it, and deflect it into the deeper channel, where it will be carried away. To refute this argument, reference is made to the evidence of witnesses who say that in the flood of 1883 a continuous gorge formed along the line of the bridges and island trestle, and remained there over Sunday and the greater part of Monday and Tuesday. No doubt, there was some ice resting against the line at some places, but they are mistaken in supposing that there was a continuous gorge. In 1883, at the time when it is said the ice gorges were largest, at 10 or 11 o'clock on Sunday, the 2d of February, parties passed through under the west span of the Lake Erie & Western bridge, in clear water, clear of ice gorges; and they say the western spans were clear, except floating ice. When it was highest, a number of freight cars from the Lake Shore bridge passed under all of the other bridges, and went away down the river, where they lodged. A stereoscopic view (being Exhibit No. 23), which was taken on Monday, when the water had fallen about two feet, shows the entire line of bridge and trestlework clear of ice, except some floating cakes. The confined basin south of the Lake

Erie & Western bridge, no doubt, gets filled up with ice that floats down against the trestle and against the piers, and, being pressed by more ice from above, soon fills this space, and thus presses it up on the sides of the banks, and on the island above the water level; but there is never a time when the greater volume of water does not pass under, over, or through this ice.

* * * The second point relied upon is stated in certain hypothetical questions put to adverse witnesses by complainant's counsel: First. If both the west channel and the east channel are filled with ice, so that no water passes through, would not the island then afford the only outlet for the water and ice? It is erroneous to assume that there is ever a time when there is no water passing through the channels. It either goes under or over the ice below, and, when the water rises to a height that would overflow the banks, the channels are not filled, and the trestlework open."

The learned judge on the circuit sustained the exception to the master's report, as to his conclusion of fact. The court said in the course of the opinion: "In my judgment, a railroad company should not be permitted to build a dam across a stream of water running through a city, unless it is certain beforehand that the structure will not flood the streets and property of the inhabitants of the city. * * * It was conceded by the learned and always frankly-dealing counsel for the defendant in the very beginning of this case, that if the time should ever come when the spaces between the spans of the bridges across the two ordinary channels would become engorged with ice, and there should be a solid embankment across the island, then it would result in a complete dam across the Sandusky river within the town of Fremont, and might occasion an overflow of its streets, alleys, and property; but his contention was and is that the space ways in the bridges on either side of the island are all-sufficient to carry off the water of the Sandusky river at any time, and that there is no reasonable probability that such an engorgement of these space ways by ice will occur to bring about the disastrous results indicated. I think this proof falls far short of sustaining this contention. There seems to have been a disastrous engorgement in the flood of 1883; and, while it must be admitted that a rarely occurring and exceptional flood should not determine the rights of the parties, depending mostly upon average and ordinary conditions, we cannot overlook the circumstance of that extraordinary flood in determining the question we have here, nor what may be a danger of throwing an embankment across the island, when there is only a matter of choosing one form of structure rather than another, and of additional expense in substituting first-class trestles for embankments. The fact that the railroad company has always maintained an open-space trestle across this island is another circumstance that seems to the court to corroborate the contention of the plaintiffs that the closing up of these spaces would endanger the flooding of the town. It is proposed now to make a change in this respect; and it seems to the court that the citizens of the city may well be apprehensive that the change will be detrimental to them, object to it, and insist that the railroad company shall not make the change unless it be certainly shown that there is no danger of unduly obstructing the flood waters. I do not agree with the master that this proof shows such a certainty; nor do I agree with counsel for the defendant that the railroad company has a right to make the change unless the city can show conclusively that the embankment will produce a flood. The danger of a flood is obvious. It is the natural result of damming up the water ways of a stream. It is proposed here to make an embankment, which may become a complete dam by the freezing up and engorgement of the ordinary channels on either side of the island, already partially obstructed by the bridge structures of the defendant company. The physical surroundings and climatic conditions are of a character that indicate danger from ice gorges at the bridge structures and above them. The sluggish, almost dead-water, conditions of the ordinary currents in the Sandusky river thereabouts further indicate that in times of peril by flood every inch of space for carrying off the water is needed. Ordinary prudence demands that as much space shall be left as possible. It is upon the right of the city to insist upon the compliance with the ordinary rules of prudence, and upon its reasonable apprehension of danger from obstruction of the natural flood ways, either around the island or over it, that the maintenance of this injunction depends, rather than any estab-

lished certainty that a flood would occur if this embankment were constructed. Too heavy a burden is sought to be put upon the plaintiff, when it is contended that it must be demonstrated by the proof that the flood will take place. It is only necessary to show that there is reasonable danger of its taking place, to entitle the city to this injunction. It is not the fault of the master that the proof in this case, and his consideration of it, have seemingly drifted upon the supposed necessity of demonstrating the occurrence of a flood if the embankment be allowed. But what has taken place before the master, by its very voluminousness, convinces me that the danger of flooding the town of Fremont, by the proposed embankment, does exist. I do not say that the proof shows that floods will occur, but it certainly does not show that they may not occur; and the danger remains the same, whether the conditions shall ever arise that bring about a flood or not. The possible occurrence of such conditions is sufficient, in my judgment, to maintain the injunction. Having reached this conclusion, I do not deem it necessary to specifically rule upon each of the forty-two exceptions to the master's report. The whole controversy turns upon the ultimate conclusion of the master that the embankment will not cause the injuries apprehended by the plaintiff. But, by whatever process of reasoning upon the proof he has drawn this conclusion, it seems to the court only a matter of his opinion agreeing with the opinion of the witnesses who think as he thinks about the effect, under the laws of hydraulics, of the conditions found in the proof. The master may be right about this, but he also may be wrong; and the danger that he may be wrong is shown abundantly by the testimony of other witnesses, who disagree with those whom the master believed. And so I say again that the very existence of the conflict of opinion demonstrates the danger, and that is sufficient to maintain this injunction."

W. H. H. Miller and James Hunt, for appellant.

B. S. Garver and George Kinney, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge (after stating the facts as above). Were the city to be flooded by reason of the erection of the embankment by the defendant railway company upon the island, the municipal corporation and the private persons injured would have an action against the defendants, which at common law would have been trespass on the case for a private nuisance. In English courts of equity it was, for a long time, laid down as a rule in such cases that until the right of the complainant was definitely established by an action at law the extraordinary remedy of injunction would not be granted by the chancellor. *Carlisle v. Cooper*, 21 N. J. Eq. 576. The strictness of this doctrine has, in modern years, considerably abated, especially in this country; and where the right to object is clear, and the injury threatened is obvious and clearly proven, injunction has been deemed a proper remedy, even without a judgment at law, to prevent an injury which in its nature would be irreparable, and not to be adequately compensated in damages. It is clear, and, indeed, is admitted, in this case, that if the erection of the embankment as proposed will substantially add to the flooding of the waters over the streets, alleys, and houses of the city in times of freshets or flood, the injuries threatened are, within the meaning of the law, irreparable, and not to be adequately compensated in damages. But it is well settled that an injunction does not issue in such cases unless the probability of danger is clearly shown, and the existence of the nuisance clearly made out upon determinate and satisfactory evidence, and that in no case will the chancellor interfere by in-

junction where the nuisance sought to be abated or restrained is eventual or contingent, or where the evidence is conflicting, and the injury to the public, or to the individual complaining, doubtful. *Hahn v. Thornberry*, 7 Bush, 403; *Story, Eq. Jur.* § 924; *Dumesnil v. Dupont*, 18 B. Mon. 800; *Ronayne v. Loranger*, 66 Mich. 373, 33 N. W. 840; *Blatchford v. Dock Co.*, 22 Ill. App. 376; *Hutchinson v. Thompson*, 9 Ohio, 52; *Avery v. Fox*, 2 Fed. Cas. p. 245 (No. 674); *Thornton v. Grant*, 10 R. I. 477; *Railroad v. Ward*, 2 Black, 485; *Spangler v. City of Cleveland*, 43 Ohio St. 526, 3 N. E. 365. No different rule is laid down in *City of Dayton v. Robert*, 8 Ohio Cir. Ct. R. 649, upon which complainant relies, because the case there was heard upon a demurrer to the petition, and did not involve the question of burden of proof. In this case the defendant company is conceded to be the owner of that part of the island upon which its trestlework stands. In ordinary stages of water the trestlework stands upon dry land. The island has upon one side of it a channel varying from 300 to 500 feet in width, and on the other side a channel varying from 200 to 250 feet in width. Before the city can obtain an injunction preventing the railroad company from using its own land as it chooses, we are of opinion that the burden is upon the city to show clearly that the erection of the proposed embankment will probably increase materially the damage which floods in the stream always do to the streets and alleys and some of the houses thereof. An examination of the opinion of the court below in sustaining the exceptions to the master's report seems to show that the court regarded the burden of proof as upon the defendant to show that the erection of the embankment would not injure the city. In this, it seems to us, the court erred. A refusal of a perpetual injunction in this instance does not estop the city, or any of its inhabitants, from bringing an action at law to recover damages and to abate the nuisance, if the erection of the embankment hereafter prove to be injurious. At least, such effect may be avoided by inserting the words in the decree, as the defendant suggests, that the refusal to grant the injunction shall be without prejudice to any action at law which may thereafter be brought in respect of damages arising from the embankment, and to abate the alleged nuisance. The master was several weeks in taking the evidence upon the one point in issue. The evidence was all oral. The witnesses came before the master. He, after frequent examinations of the locus in quo, had a much better opportunity than the court below or this court to judge of the weight to be accorded to the evidence of each witness. It is a settled rule in the federal courts that, in dealing with exceptions to a master's report, the conclusions of the master, depending upon conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Crawford v. Neal*, 144 U. S. 585, 12 Sup. Ct. 759; *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237; *Third Nat. Bank v. National Bank*, 30 C. C. A. 436, 86 Fed. 852; *The Cayuga*, 16 U. S. App. 577, 8 C. C. A. 188, and 59 Fed. 483.

The first issue of fact before the master was whether the erection of the embankment would increase the height of water, during any flood without ice, which was likely to come down the river, so as to throw it back further upon the streets and alleys of the city. He found that the water way under the two bridges was more than three times what it was under the Lake Shore bridge, more than double what it was under the Wheeling & Lake Erie bridge, and considerably more than double what it was under the State street bridge, and that, although the flow of the water under the Lake Shore and Wheeling & Lake Erie bridges would be more rapid than that under the defendant railway company's bridges, the increased head of water below State street would increase the speed of the flow under defendant's bridges, and there would not be the slightest danger that the water would be retarded or its height raised thereby. We have examined all the evidence on this point, and, even if there were no master's finding in the case, we should certainly reach the same conclusion. A most cursory examination of the map, with a knowledge of the conditions which exist as to the rapidity of the current and depth of water, makes this an inevitable conclusion.

The only serious question which arises on the evidence is whether there is any reasonable probability that, in times when the floods are accompanied by ice, the ice will so gorge under the two bridges of the defendant company as to form a dam, from behind which the water can only escape by flowing over the island. The most disastrous flood in the history of the river, except that of 1883, was in 1866, before the bridges of the defendant company were erected. In that case a gorge of ice was made at a point several hundred feet south of the Lake Shore bridge, and the water, overflowing the banks of the river, was thrown into Front street, and flowed thence down into the lower business part of the city, lying along the bank of the river on the west side. Another gorge was formed at the first Boyer's bend, about a half mile below the northernmost point of the island; and the bottoms to the west of the river and to the north of the inhabited part of the city were all covered with water. In the flood of 1883, which was the highest flood in the history of the city, the first gorge was formed a few hundred feet north of the State street bridge. As the ice coming down the river struck the anchor ice, which was frozen to the bottom of the stream, in the shallow and slack water at that point, the gorge was of sufficient height and strength to hold back the water for a short time, so that the level of the water below the gorge was higher than that above it. But as the water came down in greater force the gorge broke away, and was carried under the defendant's bridge down to the First Boyer's bend, where another gorge was formed, of great height and strength. The water rose 5 feet higher than it ever had risen before, to a point 18 feet above the datum, an arbitrary point fixed by the city authorities, being about 1 foot below the surface of the water at ordinary stage under the bridge of the defendant. There is much evidence adduced by the complainant to show that there was a heavy gorge under both of the defendant's bridges, and that this gorge extended across both bridges and across the trestlework, and banked up the water so that it

was a number of feet higher on the south side than on the north side. The master finds that the witnesses to this condition of affairs did not have the opportunities for observation. We have examined the evidence with care upon this point, and we agree with the master that there were no such gorges as are described by the witnesses for the complainant at the two bridges, and at the trestlework, in the flood of 1883. The circumstances which the master cites to show the fact to be otherwise seem to us conclusive upon this point. The evidence of persons who went under the bridge in boats; the fact that freight cars during the high water were carried down the river, and passed between the piers of the west bridge, across the main channel; the fact that the photograph taken the next day after the highest point of the flood discloses no such gorge,—are not to be overcome by the indefinite statements of witnesses, many of them not yet more than 40 years old, as to an event 14 years before, especially when those witnesses are expressly contradicted by older and more experienced observers. It is perfectly clear, and it seems to us that the master demonstrates it, that the flood of 1883 was caused by the fact that the water had such huge volume that it could not escape from the second Boyer's bend into the lake levels beyond in time to prevent the flooding of the bottoms and of part of the city. The master finds that the two bridges of the defendant company had no effect whatever in increasing the height of that flood, and we agree with him. It is altogether probable that a trestlework constructed as lightly as this trestlework was, if it had had an ice gorge against it as the complainant's witnesses testify, with a head of water behind it from three to eight feet above the water on the other side, would have been carried away. We think the weight of the evidence clearly supports the finding of the master that such current as there is upon the island is very much less than the current in the main channels during the floods, and that the island is overflowed first at the low places on both sides of the bridge, and is not overflowed by the wave of the flood as it first comes down. The circumstantial evidence upon this point, the absence of any scouring upon the island, the testimony of the witnesses who own and have cultivated the island, it seems to us, entirely justify the finding of the master. Indeed, there is but a single witness who testifies to the contrary among the complainant's witnesses. The other evidence upon which the complainant relies to show the presence of the current upon the island is the existence of a current a long distance away from the island, in the flats on the west side of the river,—a current the existence of which is entirely consistent with comparative quiet of the water upon the island. The truth is that, judging by the flood of 1883, the island does not form the safety valve from floods, as contended on behalf of complainant. The main body of the water passed under the bridges of the defendant, and not over the island, at all times during the flood of 1883; and while there was, doubtless, ice gathered at the piers and on the banks of the stream, this did not interrupt the flow of the water at either bridge. It is true that the master finds, and there is evidence to show, that there is a tendency of the ice to gorge at a point 600 or 800 feet below the gorge on the shoal

sand bar, which runs out from the island, and that this extends across the river; and has a tendency to throw the water out of the channel of the river onto the bottoms to the north and west of the stream, and that this gorge has been known to extend up nearly or quite to the bridge. It was not the case in 1883; nor does the evidence satisfy us that at any time in the history of the river there was a gorge under both bridges of such a size and strength that the water would be prevented from passing on, and would need the island as a mode of escape. All experts agree that the tendency of ice to gorge is at the shoal places, and the water is deeper immediately beneath the two bridges of defendant than at any point a considerable distance above or below. The evidence of the complainant's expert is that, after making measurements and calculations as to the head of water by a formula, the accuracy of which, in conditions here existing, is by no means established, he finds that if the river were bank full, and both channels were contracted by ice gorges closing up one-third of the waterway, the height of the water would be increased $\frac{84}{100}$ of a foot, or 9 inches, and that, if one-half of the remainder of the channels were closed with ice, the water would be raised $1\frac{15}{100}$ of a foot. He proceeds upon the theory that the current on the island is the same as in the channels, when the water is above the island. This is unsound. The master found that there was no probability that the channels of the river would be blocked up to the extent of one-third or one-half of the water way. As the water increases, the probability that the gorge will withstand the pressure of the water decreases. The reason why the gorge at First Boyer's bend in 1866 and 1883 remained so long was because the water found an easy outlet through the very low bottoms to the second Boyer's bend below. The evidence does not satisfy us that any gorge under the defendant's bridges across the main or east branches of the river has ever reached such a height and such strength as to require the island as a means for the water to escape. The government engineer, who testified on behalf of the defendant, expressed the opinion that the filling of the trestle and making it a solid embankment, would have the effect of a training dike to carry the water and ice down through the east channel, and would facilitate the passing of the ice, rather than retard it. It seems to us that this is a reasonable view. The danger of flooding a small part of the city of Fremont is, of course, one that should be avoided if possible; but the remote additional injury or damage likely to result from an increase, in a flood of the depth varying from 12 to 18 feet, of an additional foot or 18 inches, is not such a danger as to require the court to depart from well-settled rules of law in determining the rights between a municipal corporation and a railway corporation. It is to be borne in mind that the erection of the embankment upon the island is on the land of the defendant railway company, and that it does not become a wrong until it is shown that it will inflict injury. The maxim, "Sic utere tuo ut alienum non laedas," has no application until the actual or threatened injury is proven. This is not a case of res ipsa loquitur. The learned judge at the circuit treated the embankment as a dam. If it were a dam clear across the river, then the flooding

back of the water to the height of the dam from the sides of the stream would be an inevitable physical result. But the error is in the assumption that the embankment is a dam. There are two channels, on each side of the embankment, with greatly more water way than is given by the bridges above, or by the banks of the river at Boyer's bend below; and the only possible way in which the embankment can become a dam is by its continuation through the formation of ice gorges across both channels of the river at the same time to the height from the bottom of the river of at least 12 feet. The evidence does not satisfy us that this is probable, or, indeed, that it has ever happened. The mere possibility that it may happen is a contingency which does not justify the extraordinary remedy of an injunction. It would seem to us to be, if it did happen, so remote a natural cause as to come within the class of contingencies known as "acts of God." The learned judge at the circuit regarded the fact that the railroad company has always maintained an open-space trestle across the island, as conduct signifying its fear that a solid embankment would be productive of injury. A much more satisfactory reason for the present open trestle, it seems to us, is found in the circumstance that the cost of a wooden trestle was at the time of its erection very considerably less than the cost of filling with the necessary masonry and rip-rap work. The basis for the conclusion of the learned judge at the circuit is found in these words from his opinion:

"I do not say that the proof shows that floods will occur, but it certainly does not show that they may not occur; and the danger remains the same, whether the conditions shall ever arise that bring about a flood or not. The possible occurrence of such conditions is sufficient, in my judgment, to maintain the injunction."

We cannot concur in this view of the law. We think the danger must be shown to be probable, and not merely possible, where the remedy by injunction is sought to be enforced. The decree of the court below granting the injunction is reversed, at the costs of the appellant, with instructions to enter a decree dismissing the bill for an injunction, without prejudice to the right of the complainant, should circumstances arise in the future justifying it, to bring an action at law, either for damages, or to abate a nuisance arising from the erection of such embankment.

EAST ST. LOUIS CONNECTING RY. CO. et al. v. JARVIS.

(Circuit Court of Appeals, Seventh Circuit. March 28, 1899.)

No. 377.

1. RAILROAD LEASES—LIABILITY FOR RENT.

A lease to a railroad corporation provided for a fixed annual rental, and a sum equal to a certain per cent. of the annual gross earnings of the corporation, if they exceeded a specified sum. The W. Co. was substantially the owner of all the stock of the lessee corporation. In an action by the lessor for the rent, the bill of complaint alleged that the W. Co., by reason of its ownership of the stock of the lessee, received all the gross earnings of the latter company, of which it kept an account, and that it falsified the account. *Held*, assuming the allegations as true, that the W. Co. is not

- liable for the rent, the lessor having no legal or equitable interest in the gross earnings themselves.

2. RAILROADS—COMPETING AND PARALLEL LINES.

Two belt lines of railway were both intended principally to connect the termini of railroads at East St. Louis with the river transfers to St. Louis, but they were not geographically parallel, and each one did not touch all the places touched by the other. The one road crossed all the lines of railway crossed by the other. They were not competing in respect to certain local industries, because both did not have access to them, but they did compete in the principal business. The two lines cut rates against each other, and finally, to avoid loss, were put under the same management. *Held parallel and competing lines, within Const. Ill. art. 11, § 11, forbidding their consolidation.*

3. SAME—TEN-YEAR LEASE—CONSOLIDATION.

A lease of a parallel and competing railroad for 10 years is a "consolidation," within Const. Ill. art. 11, § 11, so as to be forbidden.

4. SAME—VOID LEASES—ACTIONS.

A lease of a competing and parallel railroad, where prohibited by the constitution, is void ab initio, so that no action can be maintained on a covenant therein, notwithstanding the lessee has had the benefit of the lease, since a void contract cannot be ratified.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

The facts of this case are voluminous, and somewhat involved, but, for an understanding of the grounds upon which the opinion proceeds, may be summarized as follows:

The East St. Louis Connecting Railway was organized under the general railroad law of Illinois, in the year 1877, to construct a railroad from Venice, in Madison county, to the track of the Illinois & St. Louis Railroad & Coal Company, in St. Clair county, a distance of about four miles, with power to connect its track with intersecting railroads, with adjacent industries, and with river transfer tracks and landings. Its railway, as it was constructed on July 1, 1885, the date of the leases hereinafter mentioned, did not reach either of the termini named in its charter. It was a north and south line, constructed on Front street, in East St. Louis, from the head of the island to the north side of Cahokia creek, connecting the Wiggins Ferry Transfer with the several lines of railroad terminating on the river front of the city of East St. Louis. It did not reach Venice on the north, and it had no connection at the south with the railway of the Illinois & St. Louis Railroad & Coal Company, or its river transfer to St. Louis from the dyke south of Cahokia creek. Soon after the date of the leases this southerly connection was completed, and about 1890 the road was extended north to Venice. In the year 1880 the Venice & Carondelet Railroad Company was organized, under the laws of the state of Illinois, to construct a railroad from Venice to the village of East Carondelet, in St. Clair county, and to connect with all railroad lines which terminate at or pass through the city of East St. Louis, and to connect with the bridge of the St. Louis Bridge Company across the Mississippi river, with power to extend its railway to the relay station in East St. Louis. Its railway was constructed on a circuitous route from Venice, on the north, around the northern, eastern, and southern boundaries of East St. Louis, to a junction on the south with the track of the Illinois & St. Louis Railroad & Coal Company, but it did not at that time have any independent connection with the river or river transfers; connecting, however, with the Madison Ferry on the north by means of the Chicago & Alton Railway, and at the south with the ferry at the dyke by means of the railway tracks of the Illinois & St. Louis Railroad & Coal Company.

The situation, then, was this: Prior to the leases the Venice & Carondelet Railway intercepted all railways leading to the river, and was able to transfer traffic from such railways over its tracks to the tracks of the Illinois & St. Louis Railroad & Coal Company, and to its ferry over the Mississippi river

at the south. The East St. Louis Connecting Railway intercepted the lines of railway north of Cahokia creek, and was able to transfer the traffic upon such railways from their termini to the Wiggins Ferry Company, and so effect the transfer to the city of St. Louis. The completion of the southern extension of the St. Louis Connecting Railway to the tracks south of Cahokia creek allowed the transfer of cars across the Mississippi river by means of the ferry of the Illinois & St. Louis Railroad & Coal Company, which was at the dyke. The track of the Venice & Carondelet Railway, in connection with the track of the Illinois & St. Louis Railroad & Coal Company from the junction of the two roads to the river, made a belt around East St. Louis from Venice on the north to the dyke on the south, and this belt crossed and connected with every railroad terminating at East St. Louis, with transfer from the dyke to the city of St. Louis by means of the ferry of the Illinois & St. Louis Railroad & Coal Company. The extension of the East St. Louis Connecting Railway north to Venice, taken in connection with its southerly extension, and with the Venice & Carondelet Railway, made a completed girdle around the city of East St. Louis. The Venice & Carondelet Railway was, in fact, constructed by the Illinois & St. Louis Railroad & Coal Company and in its interest, and was leased to the latter company, which held and operated it.

On July 1, 1885, the Illinois & St. Louis Railroad & Coal Company leased to the East St. Louis Connecting Railway Company for a term of 10 years the Venice & Carondelet Railway, its spur tracks, and the telegraph lines from Venice to the dyke, with the offices, fixtures, and terminal tracks at the dyke to the river incline, and the joint user of the tracks of the Illinois & St. Louis Railroad between its junction with the Venice & Carondelet Railway and the terminal tracks at the dyke. There were also leased three locomotives, and the right to use the lessor's roundhouse at the dyke. The lease provided for rental as follows: "Sixth. The said party of the second part agrees and covenants to pay to the said party of the first part, as consideration for the leasing of all the railroad property, above mentioned, the sum of eight thousand dollars per annum, payable in monthly installments of six hundred and sixty-six $\frac{66}{100}$ dollars at the end of each and every month, at the office of said party of the first part at St. Louis, Missouri. And the said party of the second part shall not be compelled to pay more than said eight thousand dollars per annum for the first three years of the continuance of this lease, but after that time, should the gross earnings of the East St. Louis Connecting Railway Company, from all its business, including the earnings of all lines and privileges hereby leased (but not including the revenue derived by said party of the second part from the river-transfer business this day leased by the party of the first part to the party of the second part), exceed the sum of one hundred and sixty thousand dollars for any one year, then the said party of the second part covenants and agrees to pay to the said party of the first part for such year, in addition to said eight thousand dollars, a sum equal to seven per cent. of such gross earnings, less the sum of eight thousand dollars; and, when the gross earnings of said party of the second part shall exceed the sum of one hundred and seventy thousand dollars for any one year, then the said party of the second part covenants and agrees that it will pay for such year, in addition to said rental of eight thousand dollars per annum, a further sum equal to eight per cent. of its gross revenue from such sources, less the sum of eight thousand dollars; and, when the gross revenue of said party of the second part shall exceed the sum of one hundred and eighty thousand dollars for any one year, then the said party of the second part covenants to pay to the said party of the first part for such year, in addition to said rental of eight thousand dollars per annum, a sum equal to nine per cent. of its gross revenue, less the sum of eight thousand dollars. And at the end of the fourth year from the date of these presents, and at the termination of each and every year thereafter, an account shall be rendered by said party of the second part to said party of the first part of its gross earnings for said year, and the additional rental hereby provided, if any, over and above the sum of eight thousand dollars, shall be ascertained and paid at the end of each year." The lessee, in addition, covenanted to pay all taxes and assessments against the leased property, and an "equitable proportion" of the taxes upon so much of the main line of the lessor's railroad as was made subject to joint use, and to

carry out and perform the agreement made by the lessor with seven railroad companies named, whose lines terminate at the city of East St. Louis, which contracts are not in the record. The lease contained the further clause: "Fifteenth. It is further stipulated and agreed that the party of the first part, its successors or assigns, will, at no time within the term of this agreement, engage in the business of switching cars from any connecting railway for any purpose whatever, nor shall it permit any one operating their road to engage in such switching for any purpose during the term of this agreement. Any breach of this stipulation to operate as a forfeiture of this lease and agreement, if so determined by the party of the second part."

On the same day the parties executed a second lease, by which the lessor leased to the East St. Louis Connecting Railway Company for a period of 10 years, all of its incline, cradle, and equipments used by it in its business in transferring cars across the Mississippi river at St. Louis, with the right to use and operate the same upon the lessor's land, together with certain wharves and wharfage rights in the city of St. Louis, and also a tugboat with two barges, at a rental of \$10,000 per annum and the payment of all taxes. This lease contained the following clause: "(6) And the said party of the first part covenants and agrees with the said party of the second part that for the period of ten years from and after the 1st day of July, 1885, it will not engage in or carry on the business of transferring railroad cars in boats or barges across the Mississippi river to or from any point at St. Louis, Missouri. Any breach of this covenant to work a forfeiture of this lease and contract at the option of the party of the second part." The lease also provided that, upon the termination of the lease upon the happening of any of the events stated therein, the lessee should have the option to terminate the first lease hereinbefore recited. Under these leases the East St. Louis Connecting Railway Company went into possession, and, as is claimed, the leased property and the property of the East St. Louis Connecting Railway Company were, in fact, managed and operated by the Wiggins Ferry Company, which latter company owned substantially all the stock of the former, and kept all accounts connected with the management of the general business. On September 1, 1890, the East St. Louis Connecting Railway Company sublet the Venice & Carondelet Railway to the Electric City & Illinois Railway Company for the remaining term of the original lease and a rental of \$9,600 a year, the sublessee assuming all the obligations imposed in the original contract. On April 24, 1894, the East St. Louis Connecting Railway Company gave notice that it would abandon all the property described in the leases, and that such property would be returned to the lessor on the 30th day of that month. But it is claimed that such surrender was not fully carried out, and that a large portion of the leased premises remained in the possession of the lessee until July 1, 1895. On the 30th of April the East St. Louis Connecting Railway Company formally repudiated the leases, notified its sublessee thereof, and to attorn to the complainants, and received no more rent therefor. It is claimed that the sublessee attorned to the lessor, and paid the \$9,600 per annum until July 1, 1895, and that the lessor accepted such rental.

On May 21, 1889, the Illinois & St. Louis Railroad & Coal Company, the Venice & Carondelet Railway Company, and three other railroad companies were consolidated, under the title of the Louisville, Evansville & St. Louis Consolidated Railroad Company. On January 23, 1894, in a certain suit in the circuit court of the United States for the Southern district of Illinois, James H. Wilson and E. O. Hopkins were appointed receivers of the Louisville, Evansville & St. Louis Consolidated Railroad Company, with the usual powers of receivers in like cases; and on the 17th day of March, 1894, these receivers filed the present bill of complaint against the East St. Louis Connecting Railway Company and the Wiggins Ferry Company, setting out the two leases which have been stated, and the succession of the company of which they were receivers to the lawful ownership of the property described in the leases, and that they were entitled to receive the issues, rent, profits, and benefits of said contract of lease. They aver that the Wiggins Ferry Company had some interest in the East St. Louis Connecting Railway Company by virtue of which it controlled and operated the latter, and had an interest in it, and was bound by the terms of the leases; and they averred that the two companies named

as defendants, the appellants here, intending to defraud the Louisville, Evansville & St. Louis Consolidated Railroad Company and its receivers, particularly in the matter of percentages due upon the gross earnings, had, by a false and fraudulent system of bookkeeping, so manipulated the earnings arising from the operation of the leased premises and property as to make it appear that the actual earnings were less than \$160,000 per annum, and thereby fraudulently withheld from the Consolidated Railroad Company and its receivers an amount exceeding in the aggregate the sum of \$50,000; that the Wiggins Ferry Company caused its agents to fraudulently suppress and reduce the earnings of through traffic, and thereby fraudulently deprived the Consolidated Railroad Company and its receivers of large revenues, and that the accounts that it kept were false and fraudulent, and that each company defendant has refused to make a true account and statement of the earnings. The bill prayed that an account might be taken of the transactions of the defendants in respect to the gross earnings and the rents due by reason thereof; that the same be fully adjusted, and the respective rights of the parties be ascertained; and that the defendants be decreed to pay the complainants what should appear to be due. The defendants in April, 1894, separately demurred to the bill. These demurrers were overruled, and on the 30th of June, 1894, the defendants filed their separate answers, which, denying the general equity of the bill, averred that the Wiggins Ferry Company was in no manner bound by the terms of the leases, and setting up other defenses, not necessary here to be detailed. The East St. Louis Connecting Railway Company upon the same day filed its plea to the bill of complaint, which is to the effect that the Venice & Carondelet Railway and the East St. Louis Connecting Railway were parallel and competing lines, and that, under the constitution of the state of Illinois, the leases were unlawful and void. A replication was filed to this plea, testimony was taken thereon, and on the 25th day of January, 1896, the court found the bill to be true, the answers and the plea to be untrue, and entered an interlocutory decree, referring it to a master to take account of the money that had accrued from the joint operation of the railroad of the defendant the East St. Louis Connecting Railway Company and the defendant the Wiggins Ferry Company, and the leased property and premises described in the contracts of lease arising therefrom on the 1st day of July, 1888, to the expiration of the lease, July 1, 1895, and which had accrued or might have accrued thereunder if the covenants of the lease had been faithfully performed, and requiring that the defendants be compelled to produce before the master all books, papers, and writings in their custody or under their control relating to the matters at issue. On August 5, 1896, the master filed his report, finding that there was due to the complainant receivers the sum of \$93,725.11, which report was duly excepted to. The exceptions were overruled. This amount is made up as follows:

For rent due.....	\$52,321 95
For taxes and penalties.....	12,630 16
For engines	2,000 00
For tracks, inclines, cradles, etc.....	15,000 00
For damage transfer property.....	11,800 00
	<hr/>
	\$93,752 11

It is understood that the rental of \$8,000 per annum was paid to the lessor until April 30, 1894, and thereafter, until the expiration of the term of the lease, July 1, 1895, it received from the sublessee the sum of \$9,600 per annum. On the 26th of September, 1896, George T. Jarvis, who had been appointed receiver in the place of Wilson and Hopkins, was substituted as complainant, and a final decree passed that he, as complainant, recover from the East St. Louis Connecting Railway Company and the Wiggins Ferry Company the sum of \$93,752.11, with interest from the date of the decree; to review which decree this appeal is brought.

Charles W. Thomas, for appellants.

Bluford Wilson and W. L. Taylor, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Upon this record three questions are presented for consideration: First, is the Wiggins Ferry Company shown to be liable for the rental reserved by the lease? second, are the Venice & Carondelet and the East St. Louis Connecting Railways parallel or competing lines of railway? and, third, do the leases amount to a "consolidation," within the meaning of the constitution of the state of Illinois prohibiting the consolidation of the stock, franchises, or property of parallel or competing lines of railway? These questions will be considered in their order.

1. The bill is brought to recover rental claimed to be due upon the lease. The sole averment connecting the Wiggins Ferry Company with the transaction is that it "has some interest in the East St. Louis Connecting Railway Company, by virtue of which it controls and operates the said connecting company, and has an interest in, and is bound by the terms of, the leases above set out, but the precise nature of the relation existing between the said defendant companies is now unknown to these complainants, and in making up the reports of gross earnings required by the lease caused its agents and bookkeepers to fraudulently suppress and reduce the earnings of through traffic passing over the leased premises and the other lines operated by the Wiggins Ferry Company"; by reason whereof "only one-half of the proper earnings from such through traffic appeared in the account from which the annual statement was rendered to the said Louisville, Evansville & St. Louis Consolidated Railroad Company as a basis for fixing the annual rent to become due and payable under the terms of the said contract of lease, * * * and by means whereof it was deprived of large revenues, amounting in the aggregate, for the years mentioned, to about the sum of \$50,000, which these complainants are entitled to have and receive from the said defendant companies or either of them." It is to be observed that this is a suit founded purely upon the lease and to recover the rental thereby reserved. The only ground upon which the equity jurisdiction can be invoked or sustained is to enforce the accounting which the lease required to be kept of the gross earnings of the lines specified in the lease. The lessor company, however, had no equitable lien upon, or any right to, those gross earnings, or any part of them. The account of them which was to be kept had no function except as a measure of the quantum of rental to be paid under the lease. The language of the contract is explicit, and leaves no room for contention in this respect. The lessee is to pay as rental the sum of \$8,000 per annum in equal monthly installments at the end of each and every month. This amount of rental was absolute for the first three years of the lease, but thereafter, should the gross earnings of the East St. Louis Connecting Railway Company from all its business, including the earnings of all lines, exceed the sum of \$160,000 for any one year, then the lessee covenanted and agreed to pay as rental a sum equal to 7 per cent. of such gross earnings; 8 per cent. if the gross earnings should exceed \$170,000 for any one year, and 9 per cent. if it

exceeded \$180,000 in any one year. So that the lessor company had no interest in the gross earnings of the leased road, or any right to their appropriation to any particular purpose. They were the absolute property of the lessee, and which, so far as concerned the lessor, it could dispose of as it saw fit. The lessor company was indeed entitled to know their amount, because the contract of lease required the lessee to furnish a statement of the gross earnings, and this because, and only because, the lessee agreed to pay as rental a sum equal to a certain percentage of the gross earnings. The amount of gross earnings was a mere standard by which to measure the rental which the lessee agreed to pay. The gross earnings were not pledged for the payment of the rental, nor was any right to them, or any part of them, conferred upon the lessor company. The Wiggins Ferry Company, it appears, was substantially the owner of all the stock of the East St. Louis Connecting Railway Company, but that fact does not render the former company liable for the rental. There was neither privity of contract nor privity of estate charged or shown between the lessor company and the Wiggins Ferry Company. The extent of its offending, and the ground upon which liability for this rental is imputed, is this: That by reason of its ownership of the stock of the East St. Louis Connecting Railway Company it received all the gross earnings of the latter company, of which it kept an account, and that it falsified that account with respect to the through traffic, so as to show that the lessor company should receive a less sum as rental than that to which it was entitled. We fail, however, to understand upon what principle these acts of the Wiggins Ferry Company, assuming them to be broadly fraudulent as charged, could render it liable for the rental. If the lessor company had an equitable interest in the gross earnings, and they had been converted by the Wiggins Ferry Company, or had been diverted from the purpose to which they should be applied, there would be possible ground for the contention; but as the lessor company had no interest, legal or equitable, in these gross earnings, and must rely upon the covenants of the lease for the recovery of the rental reserved, it is not perceived that the Wiggins Ferry Company has rendered itself liable upon those covenants entered into by another party, and by which it is not bound, merely because it rendered, or caused to be rendered, to the lessor an untrue statement of the gross earnings, and falsified the standard by which the quantum of rental was to be measured. The decree adjudging the Wiggins Ferry Company liable for the rentals was therefore erroneous.

2. The constitution of the state of Illinois (article 11, § 11) provides: "No railroad corporation shall consolidate its stock, property or franchise with any other railroad corporation owning a parallel or competing line." Were these two railways "parallel or competing lines," within the meaning of this provision? They were both designed as belt lines of railway, intended principally to connect the termini of the many railroads terminating at East St. Louis with the river transfers to the city of St. Louis. There was the Madison Ferry Transfer at the north and at or near Venice, the ferry of the Wiggins Ferry Company between Venice and Cahokia creek, and that of the

Illinois & St. Louis Railroad & Coal Company south of Cahokia creek and at the dyke. The one line was constructed on Front street, in the city of East St. Louis, near the water's edge; the other by a circuitous route to the tracks of the Illinois & St. Louis Railroad & Coal Company, and connected by means of the tracks of the latter company with the ferry transfer at the dyke, and by another line of railway with the Madison Ferry at the north. The two belt lines crossed and tapped all of the various railways north of Cahokia creek, terminating at East St. Louis. The charter of each company made the northerly terminus of the road at Venice, and authorized connection at the south with the road of the Illinois & St. Louis Railroad & Coal Company. We cannot doubt that these lines are "parallel lines," within the meaning and intent of the constitutional provision. The term "parallel" is not employed in the constitution in its merely geographical sense. It does not mean two lines of railway that are equidistant from each other. That would be a narrow construction of the constitutional provision, which would defeat its purpose. It means lines of railway having the same general direction, and therefore likely to come in competition with each other. We also think it clear, upon the evidence and from the charters of the companies, that they were, and were designed to be, competing lines of railway. The Venice & Carondelet Railway crossed all the lines of railway which were crossed by the railway of the East St. Louis Connecting Railway Company. The one company connected with the Madison Ferry Transfer on the north, and with the ferry transfer of the Illinois & St. Louis Railroad & Coal Company on the south. The other company connected with the Wiggins Ferry Company, which latter company owned practically all of its stock. Necessarily they would compete with each other with respect to the transfer to the ferry companies of cars coming to East St. Louis over the lines of any railway which they both crossed. It is true that, with respect to certain local industries, they were not competing, because both had not access to them; but the principal business designed was the transfer of through traffic to the city of St. Louis, and the one company, in connection with the ferry companies with which it connected, was the competitor of the other. We think this plain upon its face, and that no elaboration could strengthen the statement. The evidence of the case also clearly demonstrates the fact. It appears that in the year 1884 these two companies were cutting rates, buying business, and losing money, and upon the advice of a mutual friend, not then connected with either company or with either of the ferry companies, the two companies concluded to put the two properties under the same management, and as a result the leases in question were made. The effect of this transaction was to place these two belt lines under one control, giving connection with all the roads entering East St. Louis and with all the car ferries crossing the river to St. Louis. This, of course, avoided competition and enabled the management to establish rates and avoid the danger of cutting rates. The practical effect was to create a monopoly, stifling competition, and that this was designed is manifest from the terms of the lease. To accomplish it, required not only the

lease of the Venice & Carondelet Railway, which was built in the interest of and leased to the Illinois & St. Louis Railroad & Coal Company, but also a lease of the ferry transfer of the latter company. This placed both the belt railways and the ferry transfers under one control. In the lease of the Venice & Carondelet Railway the lessor agreed that during the term of the lease it would not engage in the business of switching cars from any connecting railway for any purpose whatever, nor permit any one operating its road so to do, and in the lease of the ferry the lessor agreed that during the term of the lease it would not engage in or carry on the business of transferring railroad cars in boats or barges across the Mississippi river to or from any point in St. Louis. It would be difficult to conceive a scheme which could more effectually stifle competition and create monopoly.

3. Is a lease for 10 years a consolidation of the franchises or property, within the constitutional provision? It is contended that the term "consolidation" means a permanent union of the interests, management, and control of two roads, either in the formation of a new company out of the consolidated one, or else by consolidated management of the old ones unitedly while their distinct corporate entities still remained. This distinction is true in the general sense in which one speaks of the "consolidation" of railroads. The term may also mean the act of forming into a more firm or compact mass, body, or system. The constitutional convention, representing the people of the state, sought to provide against monopolies, and to preserve to the public the benefit that would accrue from competition between parallel or competing lines of railway. It sought for practical results. It intended to provide that parallel or competing lines should continue to be competing, and this it aimed to accomplish by prohibiting the consolidation of the stock or the franchises or the property of any such competing lines of railway. The union of such lines was prohibited, in view of the objects sought to be accomplished. The term "consolidate," we think, must be construed to have been used in the sense of "join" or "unite." To permit two such competing lines of railway under a single management and a single control would accomplish the very purpose which the constitution sought to prevent. We must have regard to the spirit and the object of that constitutional provision, and not juggle with the technical meaning of the word. The prohibition goes to the consolidation or uniting of the stock of two competing roads, or of the franchises of two competing roads, or of the property of two competing roads. The doing of either would create the prohibited monopoly, and either is within the intendment and meaning of the constitutional provision. Nor do we think that there is force in the contention that this union or consolidation was by means of a temporary arrangement, if thereby that is accomplished which is prohibited by the constitution. If it be lawful, by means of a lease for 10 years, to consolidate and unite the properties of competing lines of railway, we perceive no reason why a lease for 99 years would not be equally valid. We cannot draw the line in that respect between what is permanent and what is temporary. Whatever produces the prohibited result is obnox-

ious to the spirit and the letter of the constitutional provision, and is illegal. We must deal with the result accomplished, without regard to the means employed. It cannot be permitted that one may effect a prohibited result by indirection which he may not lawfully accomplish by direct means. We must therefore hold that the leases in question practically effected a consolidation of the properties of two competing lines, and are within the inhibition of the constitution. *Morrill v. Railroad Co.*, 55 N. H. 531; *Gulf, C. & S. F. Ry. Co. v. State*, 72 Tex. 404, 10 S. W. 81; *State v. Atchison & N. R. Co.*, 24 Neb. 143, 38 N. W. 43.

These leases being, then, invalid, the constitution imposed upon railroad companies an absolute prohibition to enter into them. They were absolutely void from their inception. It was ultra vires the corporations to enter into them. Being void, the covenants contained in them were of no binding effect, and no recovery can be had upon them. A railroad corporation cannot lease its line of railway without statutory power so to do. It certainly cannot when there is an express constitutional prohibition so to do. These contracts, therefore, being prohibited, are void ab initio, and no suit can be maintained upon them. *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 316, 6 Sup. Ct. 1094; *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478. In the latter case it is said: "The objection to the contract is not merely the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." In *Bank v. Hawkins*, 34 U. S. App. 423, 18 C. C. A. 78, and 71 Fed. 369, we drew a distinction between acts of a corporation without power conferred upon it and those acts done in excess of conferred powers. We held that the latter acts were illegal as to shareholders, but that the corporation was liable therefor to innocent parties. The doctrine of that case, however, is shaken, if not overruled, by the decision of the supreme court in *Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831. But, even under the doctrine as we declared it, we think the contract here in question would be held wholly beyond the authority of the corporation to make or to perform for any purpose; but, whether so or not, it is our duty to conform our judgment to the ruling of the ultimate tribunal. Here the appellee brings his suit upon this prohibited and void lease, and seeks to recover rentals due under it. He invokes the performance of a contract which is prohibited by the fundamental law of the state, and which neither the lessor nor the lessee had power or authority to make. He necessarily relies upon an illegal and void contract, and therefore he cannot recover. *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884; *McCormick v. Bank*, 165 U. S. 538, 17 Sup. Ct. 433; *Bank v. Kennedy*, supra. In *McCormick v. Bank*, supra, there is a suggestion that in such case there may be a recovery for the value of that actually received and enjoyed under the illegal contract. Whether that suggestion can be applied here, and whether jurisdiction

tion in equity can be sustained, are questions which we do not now consider or determine; the bill here containing no apt allegation upon which to decree in that regard. In reversing the judgment, as we must, we are disposed to do so with leave to the appellee, if he be so advised, to move the court below to amend the bill to charge the appellants, or either of them, for the value of the use of that received and enjoyed under the lease; reserving, however, the determination of all questions not herein decided. The decree is reversed, and the cause remanded, with directions to the court below to dismiss the bill upon the merits, unless the appellee shall avail himself of the leave allowed.

Judge SHOWALTER took no part in the decision of this case.

HOLLY v. DOMESTIC & FOREIGN MISSIONARY SOC. OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA et al.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 64.

1. **BILLS AND NOTES—CHECKS—BONA FIDE HOLDER—EQUITIES.**

One who takes a check innocently in payment of an antecedent debt of the drawer is a bona fide holder for value, and acquires a perfect title to the proceeds thereof on collection, which cannot be subordinated to the equity of a third person, claiming that part of the deposit which was used to pay the check was trust funds.

2. **MISAPPROPRIATED TRUST FUNDS—INNOCENT HOLDER—RECOVERY BY OWNER.**

Plaintiff intrusted money to his agent, to be applied to certain purposes, but the agent fraudulently deposited it in a bank, in his own name, with other funds of his own, and afterwards paid out a large portion thereof on a legacy to defendant, who had no notice of the trust. *Held*, that defendant was an innocent holder of the money for value, and that plaintiff was, therefore, not entitled to recover the same from it.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Herbert Barry, for appellants.

Arthur M. Burton and Cephas Brainerd, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a suit brought to recover certain moneys received by the defendant the Domestic & Foreign Missionary Society, etc., through the check of one Thompson, upon the theory that the check was paid by the misappropriation of a trust fund in Thompson's hands belonging to the complainant. The facts are these: The complainant employed Thompson as an attorney and conveyancer about the purchase of certain real estate, and June 19, 1890, delivered to him a check for \$12,000, with instructions to apply the proceeds to the payment of the purchase money. Instead of doing so, Thompson used the check as a credit item in his account with the Union Trust Company, and misappropriated the proceeds by

checks drawn by him on the trust company. Among these checks was one dated June 20, 1890, for \$15,577, payable to the order of the missionary society.

Thompson was one of the executors of the estate of James Saul, under whose will the missionary society was a legatee. A decree of the probate court having jurisdiction in the premises had been entered in November, 1889, settling the accounts of the executors, and ordering payment of the legacy. Thompson's co-executor was a clergyman, and had left the administration of the estate and the control of the funds exclusively to Thompson; and the missionary society was cognizant of the facts. In the spring of 1890 the missionary society became urgent for the payment of the legacy, wrote several letters to Thompson about it, and also wrote to his co-executor. The latter informed the missionary society, in substance, that the delay in paying the legacy was solely attributable to Thompson's dilatory disposition. His patience finally seems to have become exhausted, and he insisted that Thompson should produce the securities of the estate for his examination, and fixed a day for that purpose. On that day, before the time appointed, he received a note from Thompson, stating that he was going to New York to settle with the missionary society. The next day Thompson called at the office of the missionary society, and delivered to its treasurer the check for \$15,577, the amount being the sum due as principal and interest upon the legacy. The missionary society accepted the check in payment, receipted for the amount to the executors, and shortly thereafter collected the check. According to the finding of the court below, this check was, to the extent of \$10,028, paid by the Union Trust Company out of the moneys realized from the check of the complainant. The court below decreed against the missionary society for that amount in favor of the complainant. 85 Fed. 249.

The proofs do not disclose any fact or circumstance tending to show that the missionary society supposed, when it received Thompson's check, that the check was not drawn against his own funds. The circumstance that the payment was made by his individual check, and not by that of the executors, was suggestive of irregularities in his conduct as an executor, but it does not seem to have created any suspicion of his integrity, and was not calculated to do so. There was no impropriety in his paying a debt of the estate with his own funds, if he saw fit to do so. The missionary society undoubtedly received it in entire good faith. Upon these facts we are constrained to conclude that the complainant was not entitled to a decree.

The familiar doctrine that the beneficial owner of trust property which has been misappropriated by his trustee is entitled to follow it in a court of equity through any transmutations in which it can be traced, and reclaim it in its new form, not only as against the trustee, but also against any other person who has no better equitable title, applies to money which has been intrusted by a principal to his agent for a specific use, and which the latter has diverted. In the case of a principal, or of any person who has a legal title, the money is recoverable at law by an action for money had and received

(U. S. v. State Bank, 96 U. S. 35), and the interposition of equity is unnecessary. The old notion that money cannot be thus followed, because it has no earmarks, has been exploded; though in many cases where it has been mingled with other moneys of the wrong-doer, or been converted into other property, the practical difficulty of identifying and following it is insuperable. *Knatchbull v. Hall-lott*, 13 Ch. Div. 696; *McLarren v. Brewer*, 51 Me. 402; *Bresnihan v. Sheehan*, 125 Mass. 11; *Van Alen v. Bank*, 52 N. Y. 1; *National Bank v. Insurance Co.*, 104 U. S. 54. Upon this doctrine, undoubtedly, the complainant was equitably entitled to follow his money into the hands of the Union Trust Company, and reclaim it, until it had been withdrawn by Thompson's check upon that company; and to follow it again through Thompson's hands into the possession of any other person receiving it as a volunteer or with notice of complainant's rights, and reclaim so much of it as could be traced into the check. But the missionary society was not a volunteer. It received the money innocently in discharge of a debt, and good conscience did not require it to restore the money to the complainant on subsequent information of his rights. Neither in equity nor at law in an action for money had and received can he whose trust moneys have been perverted prevail against the title of one who has acquired them bona fide and for value. He who receives money or acquires negotiable paper in payment of a debt is a holder for value, and if he receives the money innocently, or acquires the commercial paper before its maturity, and without notice of any infirmity, has a perfect title, which cannot be subordinated to the equities of any third person.

In the action for money had and received, which is controlled by principles of equity, and in which the general rule is that the plaintiff is entitled to recover money, which, *ex aequo et bono*, the defendant ought to refund, there are many illustrations of the doctrine that a defendant who has received money innocently in payment of a debt is under no obligations to restore it, notwithstanding, as between the plaintiff and the person from whom the defendant received it, it ought to be regarded as the money of the plaintiff. In *Insurance Co. v. Abbott*, 131 Mass. 397, the plaintiff, an insurance company, paid a loss upon the order of one Abbott, the assured, to persons to whom the latter was indebted, and, upon discovering that the loss was fraudulent, brought the action against them to recover back the amount. The court held that the action would not lie, Gray, C. J., saying: "These defendants hold no money which, *ex aequo et bono*, they are bound to return either to Abbott or to the plaintiffs." In *Miller v. Race*, 1 Burrows, 452, Lord Mansfield said: "Money shall never be followed into the hands of a person who bona fide took it in the course of currency, and in the way of his business." In *Mason v. Waite*, 17 Mass. 563, the court said: "It would be mischievous to require of persons who receive money in the way of business, or in the payment of debts, to look into the authority of him from whom they received it." In *Bank v. Plimpton*, 17 Pick. 159, it was held that money of a principal, misappropriated and lent by his agent to a creditor, the agent being indebted to the creditor in a larger sum,

and the creditor receiving the money bona fide, could not be reclaimed by the principal, as in a suit by the principal the creditor could set off the agent's debt. The court said that in respect to money the owner could not follow it, "not only because money has no earmarks, but because a different doctrine would be productive of great mischief." In *Justh v. Bank*, 56 N. Y. 483, the court stated that, if money which had been received in the regular course of business can be followed, "the transaction of business must be stopped, for no security and no precaution can guard the receiver from responsibility." In *Stephens v. Board*, 79 N. Y. 187, the court used the following language:

"It would introduce great confusion into commercial dealings if the creditor who receives money in the payment of a debt is subjected to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from consideration of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him, and receiving it in due course of business, and in good faith, upon a valid consideration. If the consideration is good as between the parties, it is as good as to all the world."

Ever since the case of *Swift v. Tyson*, 16 Pet. 1, it has been the law of the federal courts that the transferee of commercial paper, who receives it in payment or as security for an antecedent debt, is a holder for value. *Railroad Co. v. National Bank*, 102 U. S. 14; *McMurray v. Moran*, 134 U. S. 150, 10 Sup. Ct. 427. It is immaterial, therefore, whether the check received by the missionary society is treated as money or as commercial paper. In either form, as it was taken bona fide, and in payment of a debt, no part of the amount can be reclaimed by the complainant.

The following adjudications may be cited in support of the general proposition: *State Bank v. U. S.*, 114 U. S. 401, 5 Sup. Ct. 888, was a case in which, by the connivance of a clerk of the office of an assistant treasurer of the United States, one Carter unlawfully obtained from that office money belonging to the United States, and to replace it delivered to the clerk money which he obtained by fraud from the plaintiff, the clerk having no knowledge of the fraud. The court held that the United States was not liable to refund the money. In *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316, the defendant, in payment of moneys due from a county treasurer, received a draft wrongfully and fraudulently drawn by him as cashier of the plaintiff upon another bank, the plaintiff's correspondent. In an action to recover the amount of the draft which the plaintiff had been compelled to pay to its correspondent, the court held that, as the defendant had received the draft in good faith, the plaintiff could not recover. The court said: "The interposition of the draft makes no difference in principle after it has been paid. It is then the same as if the money had been originally paid, instead of an order given for its payment." *Hatch v. Bank*, 147 N. Y. 184, 41 N. E. 403, was a case in which a bank in good faith, in the ordinary course of business, and without notice, had received from a customer checks of third parties, obtained by his unlawful pledge of the securities of the plaintiff, and the bank, pursuant to a continuing agreement

with the customer to that effect, applied the checks in payment of an existing indebtedness against him. The court held that the bank was not liable to refund the money due to the owner of the securities. The court said: "If, therefore, Smith had come with the money, and with it had paid his debt over the counter, the amount could not have been recovered by the plaintiff, although admitted to have been actually the proceeds of the stolen certificate," and added by Finch, J.: "I think the situation was not at all changed because the debtor came with Ferris & Kimball's check, which the bank collected."

The case of Swift v. Williams, 68 Md. 236, 11 Atl. 835, is cited by the appellee as an adjudication in his favor, and as sanctioning the proposition that the equitable owner of misappropriated trust funds can follow them into the hands of a creditor who has taken them innocently in payment of a debt. We have been unable to find any other adjudication to this effect, and we regard the decision as a departure from principle and authority.

The decree is reversed, with costs, and with directions to the court below to dismiss the bill.

MALLORY v. MACKAYE et al.

MACKAYE et al. v. MALLORY.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

Nos. 71 and 72.

1. CONTRACT OF EMPLOYMENT—CONSTRUCTION.

A contract provided that defendant, an actor, should give his services to plaintiff for 10 years as an author and inventor, and that the property in his productions, including his time and services, should belong exclusively to plaintiff, in consideration of an annual salary of \$5,000, and a proportion of profits in excess of certain amounts. The contract provided that plaintiff could terminate the same at the end of any one year. Held to constitute a contract of employment, and not one of partnership, though it contemplated a joint association in an adventure, or a series of adventures, in which plaintiff was to contribute the capital, and defendant his time and services.

2. SAME—DIVISIBILITY.

A contract whereby, for a certain number of years, defendant agrees to give his services to plaintiff for a certain specified sum, and for an increase of compensation, under stated conditions, in proportion to the profits of the dramatic adventures in which the parties were to engage, is entire, and not separable; and a breach thereof by defendant as to any material part discharged plaintiff from his obligations.

3. SAME—BREACH BY EMPLOYEE—WAIVER.

Where, under such contract, the defendant became dissatisfied and abandoned the employment, the fact that some time thereafter the plaintiff gave defendant notice of the termination of the contract as provided therein was not a waiver by plaintiff of a previous breach of the contract by defendant, with an assent to the restoration of their previous relations; the notice stating that it was given "without prejudice to any rights I may have arising from any violation by you" of the agreement.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Lewis Cass Ledyard, for complainant.
E. W. Tyler, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. By the decree appealed from, it was adjudged that Mallory, the appellant, was liable to account, and was indebted in a considerable sum, to the administratrix of Mackaye, under the sixth clause of the contract entered into between Mallory and Mackaye July 1, 1879. 86 Fed. 122.

By the contract, which was in writing and under seal, it was covenanted that Mackaye should devote the whole of his time and services, as author, manager, actor, and director, and in any other capacity having any connection with theatrical labor, to the employment of Mallory, and that the entire product of his intellectual and physical labor, together with all copyrights and patents which he might obtain, should belong absolutely to Mallory, and be his exclusive property. In consideration of the foregoing covenants, Mallory covenanted to pay to Mackaye, as full compensation for the services, copyrights, and inventions, an annual salary of \$5,000, payable in equal monthly installments, and further covenanted that if, at any time, the profits resulting from the enterprises in which he should employ Mackaye should equal twice the amount, with interest, expended by Mallory, he would at that time increase the annual salary of Mackaye by a sum which would be equal to one-fourth part of the net profits thereafter.

By the fifth clause of the contract the duration of the agreement was fixed for a period of 10 years from July 1, 1879, and it was provided that Mallory at the termination of any year during the continuance of the contract should have the privilege of terminating it. By the sixth clause Mallory covenanted that if the agreement should be terminated "as herein provided for" after the total earnings from the enterprises should have amounted to a sum equal to the amount of money, with interest, expended in them by said Mallory, and there should be any cash earnings or profits in excess of such expenditures, then Mallory would pay to Mackaye, for the termination of the agreement and the cessation of his salary under it, a sum equal to one-fourth part of the said surplus.

Acting under this contract, Mallory took a lease for the term of five years, with the privilege of another five years, of the Madison Square Theater, expended about \$90,000 in improving and fitting up the building, and equipped and maintained a theatrical company to perform there, and a traveling company to perform in other cities and places; and Mackaye rewrote and copyrighted a play, perfected and patented an invention for a double stage, assigned the copyright and the patent to Mallory, and entered upon the management of the theatrical enterprises which the parties undertook. These theatrical ventures were at the outset unprofitable, and subjected Mallory to a loss of over \$16,000. Then they became remunerative. Mackaye became dissatisfied, however; and in January, 1881, claiming that Mallory refused to exhibit accounts and had violated the contract, abandoned the employment of Mallory,

and, as he alleged in his cross bill, "elected to treat the said contract as rescinded and abandoned, and as no longer obligatory upon him, and he so notified the said Mallory." Thereafter, on July 1, 1881, Mallory served upon Mackaye the following notice:

"Without prejudice to any rights I may have arising from any violation by you of any provision of the agreement hereinafter mentioned, I hereby notify you that I terminate the agreement between us dated July 1, 1879; the termination to take effect at the expiration of this day of the second year of the said agreement."

By the decree of the court below it was adjudged that "Mackaye had no right to rescind or attempt to rescind the contract, and his alleged rescission was without operation or effect as such." The decree also adjudged that by the notice served by Mallory on Mackaye July 1, 1881, the contract was terminated pursuant to its terms, that the rights of the parties thereunder became fixed pursuant to the sixth clause, and that Mackaye became entitled to receive from Mallory one-fourth of the cash earnings of the enterprises above the amount expended therein by Mallory.

The amount adjudged recoverable of Mallory was arrived at by deducting from the receipts of the theatrical enterprises the expenditures of Mallory, and charging him with the value of the theater lease, as an asset in his hands.

As this decree proceeded upon a cross bill, it is of no consequence that the controversy introduced by the cross bill was not of equitable cognizance. The relief prayed by a cross bill must be equitable relief,—such, in point of jurisdiction, as it is competent for chancery to give; but, subject to this rule, a cross bill is merely a dependency of the original bill, and authorizes the court to give affirmative relief, notwithstanding the matters upon which it proceeds would not confer jurisdiction of an original suit. Story, Eq. Pl. § 399. The learned judge who decided the cause was of the opinion that the cross bill authorized the interposition of equity, because an accounting and the following of the profits was the relief sought. And it was upon this theory, and not upon any notion that there were any equitable grounds for dealing with the contract upon considerations different from those that would obtain in a court of law, that the relief was given.

The contract did not create a partnership between the parties to it, although it contemplated a joint association in an adventure, or a series of adventures, in which Mallory was to contribute the capital, and Mackaye his time and services, and in which the relation between the parties was to be of a duration of 10 years, unless Mallory should see fit at the end of any year to terminate it. Its terms carefully excluded any inference of an intention to constitute the parties partners. It created between them the relation of employer and subordinate agent, and fixed the compensation of Mackaye at a specified salary, which under any circumstances was to be paid by Mallory, and which under stated conditions was to be increased in proportion to the profits of their dramatic ventures. Until Mallory should terminate it, it obligated Mackaye to devote his time and talents to the service of Mallory. Such a contract is

essentially a contract for service, in which the rendition of the services during the contract period is the consideration for the compensation promised by the employer. Such contracts are entire, not separable, and are governed by the rule, applicable to all entire contracts, that a breach by the one party as to any material part completely discharges and releases the other party from his obligations. It is hardly necessary to cite authorities on the proposition that such a contract is entire. The cases of *Dugan v. Anderson*, 36 Md. 567, and *Cockley v. Brucker*, 54 Ohio St. 214, 44 N. E. 590, are, however, peculiarly apposite. See, also, *Larkin v. Hecksher*, 51 N. J. Law, 133, 16 Atl. 703; *Rockwell v. Newton*, 44 Conn. 333; and *Hulse v. Machine Co.*, 25 U. S. App. 239, 18 C. C. A. 180, and 65 Fed. 864. Under such a contract, the party guilty of a breach cannot recover on his express contract, because he has not executed it on his part, and the performance is a condition precedent to the payment reserved; and he cannot recover on a quantum meruit, because an express contract always excludes an implied one in relation to the same matter. As is said in *Olmstead v. Beale*, 19 Pick. 528, "The above doctrine of the law of contract prevails in all civilized countries, and is supported by an unbroken chain of decisions in England, our sister states, and our own." A court of equity cannot relieve a party from the consequences of his breach of such a contract, and has no more power to interfere with it than a court of law.

It is apparent that the decree proceeds upon the theory that the breach of the contract by Mackaye was of no effect upon the rights of either party to it. If it was not, of course Mallory remained obligated to perform the covenants on his part; and, notwithstanding by Mackaye's unjustifiable conduct he was thenceforth deprived of the benefit of his services, he continued liable to pay him the contract salary until he should elect to terminate the contract at the end of some year of its life, under the sixth clause. Thus, if Mallory had not served the notice, he would have remained liable for the unexpired term under the contract to pay Mackaye an annual salary of at least \$5,000, and one-fourth of the profits besides, if any arose upon the contract basis. Such a result would be exceedingly unjust. It is true that Mallory derived large returns from his enterprises with Mackaye, but when the contract was made it could not be foretold whether he would not incur an equally large loss. The ventures contemplated were highly speculative ones. Mackaye was satisfied with the consideration secured to him by the contract, and, so far as the proofs disclose, would have realized a fair equivalent for what he contributed, if he had not repudiated the contract. If he had performed it, however, Mallory would not have been accountable to him for any such division of the profits as has been made by the decree. The basis of the division then would have been one-fourth of the returns after Mallory had been reimbursed double the amount of his expenditures. Upon this basis, there were no profits when Mallory gave notice of termination. By the decree he is made accountable as though Mackaye had fulfilled, and he himself had terminated the contract under the sixth clause, and is thereby required to account for a very much larger portion of the returns.

In giving notice of termination of the contract, Mallory did not waive the breach by Mackaye, much less assent to a restoration of their previous relations; and by the terms of the notice he carefully insisted upon his rights. It was a wholly unnecessary act, and amounted to nothing more than signifying to Mackaye that their relations were formally dissolved. We can discover no reason why he should be placed in a worse situation than he was before in consequence of giving it. If Mackaye had observed the contract, he would not have been entitled to any profits at the time, because none had accrued according to the contract basis; but, because Mallory deemed it courteous or expedient to give the notice, he has been adjudged liable for a very considerable sum. Such a view of the rights and obligations of the parties is wholly inadmissible. It imposes a penalty upon the party who has lived up to the contract, and gives a premium for its breach to the party in default.

As there has been no appeal from the decree by the representatives of Mackaye, it must be assumed to be conclusively established that Mackaye's breach of contract was without adequate justification. That being so, it must follow that Mallory was absolved from further performance of the obligations of the contract, and was not liable to account.

The decree, so far as it proceeds upon the cross bill, is accordingly reversed, with costs, and with instructions to the court below to dismiss the cross bill and modify the decree accordingly.

LILIENTHAL v. DRUCKLIEB et al.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 40.

1. CREDITORS' SUIT—DECEASED DEBTOR—NECESSITY OF ADMINISTRATION.

Laws N. Y. 1891, c. 740, authorizing a creditor of a deceased insolvent debtor to bring an equitable action in the nature of a creditors' bill for the benefit of himself and other creditors to recover assets fraudulently conveyed by such debtor, without the previous recovery of a judgment and issuance of an execution, does not depend on the existence of a legal representative of the deceased, or of his refusal to act, but may be brought independent of such representative.

2. FRAUDULENT CONVEYANCES—ACTION TO VACATE—SUBSEQUENT CREDITORS.

Where a voluntary conveyance is made and received with an actual intent to defraud the grantor's existing creditors, and the grantees participated in the fraud, it is immaterial whether creditors attacking it are prior or subsequent creditors.

8. CREDITORS' BILL — ACCOUNTING — CREDIT CLAIMS — MASTER'S DECREE—ALLOWANCE.

Where a fraudulent grantees of an insolvent's assets fails to prove that a credit claim was actually applied to a judgment against his grantor, and there was evidence that the grantees had converted it, a master's report charging him with such sum in an accounting on a creditors' bill against him was correct.

Appeal from the Circuit Court of the United States for the Southern District of New York.

H. B. Twombly, for appellant Chas. A. Drucklieb,
Louis O. Vandoren, for appellant J. C. Drucklieb.

Wm. H. Blymyer, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In the year 1888, and prior thereto, Maurice E. Lilienthal, who was a commission merchant in France, and resided in Paris, had a branch house at 52 Greene street, in the city of New York, which was for a few months prior to August 1, 1888, in the sole charge of an agent or employé, Charles A. Drucklieb, one of the defendants. In the summer of 1888, Lilienthal was carrying on a suit against Willy Wallach and Edgar S. Blackwell, partners by the name of Wallach & Co., in which the defendant set up a counterclaim for damages, amounting to about \$14,000, which amount Lilienthal knew that he was in danger of being compelled to pay, and in which suit judgment for \$14,112, hereinafter called the "Wallach judgment," was entered against him on September 21, 1888. For the purpose of defrauding his creditors and placing his property beyond their reach, Lilienthal agreed with Drucklieb, prior to the date of the judgment, to make a pretended sale to him of all his (Lilienthal's) property at 52 Greene street, and the accounts and dues belonging to his New York business. This nominal sale was without actual consideration, but it pretended to be for \$100 in cash and a release of the wages to be due to Drucklieb on August 1, 1888. The property was worth about \$14,000 or \$15,000. Drucklieb knew that the object of this subterfuge was to defraud Lilienthal's creditors, was privy to the attempt, and took the pretended ownership of the property to carry the fraud into effect. Having learned, on October 3, 1888, of the Wallach judgment, Drucklieb obtained from one Bainbridge, as attorney for Lilienthal, on October 5, 1888, a written bill of sale dated August 1, 1888, of the New York property and assets. Supplementary proceedings were forthwith commenced on the Wallach judgment, a receiver of Lilienthal's property was appointed, and Drucklieb was examined at length. As the immediate result of this examination, he was ordered to deposit, and did deposit, in the registry of the court, \$1,920, collected by him upon a debt due to Lilienthal, and \$7,800, the proceeds of a quantity of Lilienthal's dry goods which he (Drucklieb) sold to Wechsler Bros., or their agent, Dreyfus, in October, 1888. Suits were commenced by Wallach & Co. to recover debts due to Lilienthal in Chicago and Boston. In pursuance of stipulations signed by the attorneys for Wallach & Co., Drucklieb, and the receiver, the moneys in the registry of the court were, by orders of October 3, 1889, withdrawn, were deposited in a bank in Jersey City in the names of Drucklieb and Wallach's attorney, and were divided between Drucklieb and Wallach & Co., the former receiving about \$6,237, and the latter \$3,477.31, who were also allowed to collect the Chicago and Boston accounts due Lilienthal. Subsequently, on January 29, 1890, Lilienthal and Wallach & Co. made an agreement of settlement, by which, upon their receiving \$5,000, they were to discharge him. Apparently, Lilienthal knew nothing of the division of October, 1889. No satisfac-

tion of the judgment has ever been entered. The claim was made both before the circuit court and upon this appeal that the \$3,477.31 delivered to the attorney for Wallach & Co. were paid upon their judgment, but the testimony strongly tends to the conclusion that this division was a private arrangement, in which Lilenthal was to have neither benefit nor protection, and was a dishonest transaction, by which Drucklieb practiced a second fraud. This subject will be more particularly considered hereafter. In February, 1889, Drucklieb went to Paris, and Lilenthal gave him a paper or affidavit by which he confirmed the Bainbridge sale. About this time it is apparent from Drucklieb's letters that he conceived the plan which resulted in his retention of a large part of the avails of this pretended sale, his cutting loose from Lilenthal, and an arrangement with one Herzig, who had been Lilenthal's bookkeeper, by which they began a competing business in New York about May 1, 1889, Herzig being the agent in Paris. This is manifest from the letters of Drucklieb, written in May, June, July, and August, 1889, and needs no confirmation from the inadmissible testimony either in Herzig's letter to him of April, 1889, or in the criminal proceedings in France against Herzig for embezzlement, instituted at the instance of Lilenthal. On May 1, 1889, the other defendant, Julius C. Drucklieb, a brother of Charles A. Drucklieb, became his partner in this New York business. Julius had been a manufacturer in Connecticut, brought some capital to the new firm, went to Paris in July, 1889, partly for the purpose of assisting his brother in the separation from Lilenthal, and became familiar with Herzig. There is no testimony that he was a party to the fraud of August 1, 1888. He knew it subsequently, and has reaped advantage from it, but no specific portion of the avails of Lilenthal's New York property was traced to him. All that appears is that on May 1st he formed a partnership with his brother, to which Charles undoubtedly contributed capital derived from the Lilenthal assets, and they have continued in a profitable business ever since. There is no adequate testimony to show a pecuniary liability of any specific sum against Julius Drucklieb. Lilenthal was married to the complainant July 31, 1865, in Paris, and died August 25, 1894. Prior to the marriage, the future husband and wife entered into a contract in accordance with the then existing Civil Code of France, whereby the complainant contributed as dower certain rentes or securities of the government of France, certain railroad stocks, and certain other securities and property of the value of 161,362.21 francs or \$31,031.19 of the money of the United States, which contract was duly registered in the Sixth bureau in Paris on the 3d day of August of that year. On or about the beginning of the year 1892, the complainant, upon the theory that her husband had disposed of said rentes and said railroad stocks without her knowledge or consent, began a suit against him for a separation of their property, in the civil tribunal of the Seine, on the 3d day of February, 1892. Said tribunal, being a court of competent jurisdiction, according to the laws of France, to entertain suit in the said premises, granted the complainant's prayer, restored to her the right of contracting as a feme sole, and ordered judgment

to be entered in her favor and against the said Lilenthal in the sum of \$31,031.19 in the money of the United States, with interest from the 5th day of February, 1892. Upon this judgment the sum of \$1,914.42 has been collected. Adequate proof was offered of this judgment by a copy proved to be a true copy by a witness who compared it with the original, which was in the custody of the clerk of the proper court, legally having charge of it, and it was also proved to be in the legal and usual form of such judgments in France, and to have been accompanied with the formalities in regard to publicity which the French law prescribes, and to have been in accordance with the provisions of the law by which the wife is enabled to regain from the husband the avails of her estate which he has wrongfully sold, and of which he has received the proceeds. No testimony was offered to show any fraud or collusion between the parties. It is a judgment in a suit between two citizens of France, "rendered by a court having jurisdiction of the cause, and upon regular proceedings and upon due notice" (*Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139), and any criticism made upon its validity rests merely in surmise. Lilenthal continued, until his death, to do to a certain extent a commission business in Paris, having a branch office in New York. The testimony of his daughter in regard to facts within her own knowledge, and not from hearsay, shows sufficiently that after 1892 his business was very small, and that at the time of his death he had no goods, except an old stock of groceries, in his store room. In 1893 he had no old goods of any kind, and but a very small quantity of new goods. Rejecting all testimony from hearsay and from Herzig's letter, the record shows his insolvency prior to his death. This suit was brought by the complainant, Clothilde Lilenthal, to compel the payment to the creditors of her husband of the avails of the property which came into the possession and enjoyment of one or both of the defendants in pursuance of a scheme of fraud on the part of Lilenthal, known to and participated in by them, or one of them, to defraud his creditors. The bill in equity was brought under the provisions of chapter 740 of the statutes of the state of New York of 1894, which went into effect on May 21, 1894, and before the bill was filed, and is as follows:

"That any executor, administrator, receiver, assignee or trustee of an estate, or the property and effect of an insolvent estate, corporation, association, partnership or individual, may for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm, treat as void, and resist all acts done, transfers and agreements made, in fraud of the rights of any creditor, including themselves and others, interested in any estate or property held by or of the right belonging to any such trustee or estate. And any creditor of a deceased insolvent debtor having a claim or demand against the estate of such deceased debtor exceeding in amount the sum of one hundred dollars, may, in like manner, for the benefit of himself and other creditors interested in the estate or property of such deceased debtor, disaffirm, treat as void, and resist all acts done, and conveyances, transfers and agreements made, in fraud of the right of any creditor or creditors, by such deceased debtor, and for that purpose may maintain any necessary action to set aside such acts, conveyances, transfers or agreements; and for the purpose of maintaining such action, it shall not be necessary for such creditor to have obtained a judgment upon his claim or demand, but such claim or demand, if disputed, may be proved and established upon the trial of such action. And the judg-

ment may provide for the sale of the premises or property, when any conveyance or transfer of the same is set aside, and that the proceeds thereof be brought into court or paid into the proper surrogate's court to be administered according to law."

No administrator of Maurice Lilienthal's estate was ever appointed in the state of New York. The circuit court found that the sale to Charles A. Drucklieb was for the purpose of defrauding creditors, and directed a reference to a master to ascertain the amount of money which came into the hands of either of the defendants by reason of the pretended transfer. The master reported that Charles A. Drucklieb had received and retained from such sale a sum which, without interest, amounted to \$8,936.07. The court decreed that the defendants should pay into court that sum, with interest, for the benefit of the creditors of Lilienthal, and pay to the complainant her costs. 84 Fed. 918. From this decree the defendants appealed.

The appellants insist that this action cannot be maintained under the New York statute which has been quoted without joining an administrator of Lilienthal as a party defendant, and without alleging or proving that his representatives failed to do their duty; and divers cases are relied upon, which do not relate to this statute, or which treat of the general rules of courts of equity when their powers had not been enlarged by statute. For example, *Prentiss v. Bowden*, 145 N. Y. 342, 40 N. E. 13, which is apparently relied upon by the appellants, was an action brought by a judgment creditor in his own behalf to set aside a fraudulent conveyance made by his debtor, the unsatisfied execution, which in such case is necessary for the purpose of showing that the creditor had exhausted his remedy at law, having been issued after the death of the debtor, without notice to his representatives or permission of the surrogate. The action was for the purpose of securing payment of the complainant's own debt, without reference to the other creditors. Chapter 740 of the Laws of 1894 was an amendment of chapter 487 of the Laws of 1889, which enabled a creditor of a deceased insolvent debtor, for the benefit of himself and the other creditors, to bring an equitable action in the nature of a creditors' bill without the necessity of a previous judgment, and the issuance of an unsatisfied execution; and the power of the creditor to commence such a suit does not depend upon the existence of a legal representative of the deceased, or his refusal to act. The statute is an enlargement of an old remedy which was provided in chapter 314 of the Laws of 1858. *Bank v. Baker*, 148 N. Y. 581, 42 N. E. 1077.

The appellants also assert that, inasmuch as the complainant became a creditor after the fraudulent sale, she is not in a position to attack the transfer. It is well established that, "when a voluntary conveyance is made and received with an actual intent to defraud the then existing creditors of the grantor, it is not a bona fide conveyance which can protect the grantees against the claims of subsequent creditors" (*King v. Wilcox*, 11 Paige, 589); and, if the grantor's or vendor's actual fraudulent design is participated in by the grantees or vendees, it is immaterial whether the attaching creditors became creditors before or after the conveyance or the sale (*Day v.*

Cooley, 118 Mass. 524; Dewey v. Moyer, 72 N. Y. 76; Kehr v. Smith, 20 Wall. 31; Bassett v. McKenna, 52 Conn. 437; 1 Story, Eq. Jur. § 361).

The appellants object to the nonallowance of \$3,477.31 which was received by Wallach & Co. from the fund in court, upon the ground that it was paid and received upon their judgment. It appears in the testimony of Frank E. Blackwell, a witness introduced by the defendants before the master, that he made, as attorney for Wallach & Co., a written agreement with Drucklieb in regard to this division, which paper the defendants had in their possession at the time of the examination, but which was not placed in evidence. It was within their power to have shown clearly upon what account this payment was made, or to show facts from which an inference could easily be drawn. They did not make an attempt, except by a leading question put to Drucklieb, whose testimony possesses no weight; and Blackwell declined to say that the payment was on account of the judgment. The defendants could have established the character and the object of this payment, if it was actually to be applied upon the judgment, by circumstances which the master would have been quick to appreciate, but they neglected to do so.

As is usual, where testimony in bills of equity is taken under the sixty-seventh rule, irrelevant and unimportant testimony was presented to the examiner. Among the appellants' assignments of error, sundry exceptions to the admissibility of this class of evidence are contained. We have examined all that are mentioned in the appellants' brief, and are of opinion that the testimony referred to in the assignments of error Nos. 26, 27, 28 (so far as it refers to the answer to the eighth cross interrogatory), 29, and 35, the first and second paragraphs of No. 36, and Nos. 38, 39, and 40, was inadmissible or immaterial, but is unimportant, and without influence upon the issues in the case. The exhibits referred to in assignment of error No. 48 are not contained in the record, and no adequate information is furnished in regard to them. As J. C. Drucklieb is found not to be liable, the assignments of error in regard to the admission of testimony against him need not be examined.

The conclusions of the master and the circuit court in regard to the account between C. A. Drucklieb and Maurice Lilenthal are sustained. The decree of the circuit court is directed to be modified, without costs of this court, and the cause is remanded to that court, with directions to dismiss the bill, without costs, as against Julius C. Drucklieb, and to enter the same decree which was previously entered against Charles A. Drucklieb.

CONSOLIDATED WATER CO. et al. v. CITY OF SAN DIEGO et al.

(Circuit Court, S. D. California. March 27, 1899.)

PARTIES — MISJOINDER — RIGHT OF BONDHOLDER TO JOIN WITH MORTGAGE TRUSTEE.

As the holder of bonds of a corporation, secured by a trust deed on its property, is represented, as to such property, by the trustees, and cannot maintain a suit for its protection in his own name, except on a showing that the trustees refuse to bring it, he cannot join with the trustees in such a suit.

On Demurrer to Amended Bill.

Works & Lee and Works, Works & Ingle, for complainants.

H. E. Doolittle, for defendants.

ROSS, Circuit Judge. To the amended bill in this case all of the defendants, except the San Diego Water Company, have filed exceptions to certain portions thereof, a demurrer, and also a motion for leave to file a plea in abatement. The original bill was brought by the Consolidated Water Company as sole complainant. It is a West Virginia corporation, and sues as the owner and holder of certain bonds issued by the San Diego Water Company, secured by a mortgage executed by that company upon the water and water plant with and by which it supplies the city of San Diego and its inhabitants with water for domestic and other purposes. The object of the suit is the annulment of a certain ordinance, enacted by the city of San Diego, establishing the rates at which the San Diego Water Company shall supply such water to its consumers; it being alleged, in effect, that the rates so established are so unreasonably low as to amount to a practical taking of the property of the mortgagor without just compensation. On demurrer to the original bill, this court held that the rule which precludes a stockholder from maintaining in his own name a litigation founded on a right of action existing in the corporation, without showing a refusal on the part of the corporation to bring the suit, does not apply to a mortgagee of such a corporation; that such mortgagee is vested by the mortgage with a separate and independent interest, which the mortgagee has a separate and independent right to protect when unlawfully assailed, taking care, of course, to bring into the suit all necessary parties. But, as the original bill showed that the mortgagee in the present case was not the Consolidated Water Company, but two trustees,—Constantine W. Benson and Henry Livesey Cole,—it was held that the duty of protecting the interest conveyed by the mortgage rested upon them, that they are the proper plaintiffs in a suit of this nature, and that, to entitle a holder of bonds secured by such a mortgage to maintain a separate and independent suit, he must show a request made to the trustee to bring the suit, and a refusal on his part, or some other good reason why the trustee may not represent him in the suit. 89 Fed. 272, 274. The bill was thereupon amended, by joining the trustees with the Consolidated Water Company as complainants; and one of the grounds of the present demurrer is that they are improperly so joined.

I think the point well taken. As heretofore held, the duty of protecting the interest conveyed by the mortgage rests on the trustees. Where they refuse to bring suit, upon request made to them to do so, the beneficiary has his independent action. But here there is not only no averment of any refusal on the part of the trustees to bring the suit, but by the amended bill they are joined as complainants. With proper averments and proper proof they may maintain such an action, which is done for all of the beneficiaries, including the complainant Consolidated Water Company. As the bondholder can only sue in his own name when the trustee refuses to do so, or upon showing some other good reason why the trustee may not represent him in the suit, it follows, I think, that, where the trustee does sue, the beneficiary cannot, without showing that he cannot be properly represented by the trustee. The correctness of this view is well illustrated by the plea in abatement, which the defendants other than the San Diego Water Company ask leave to file; for it is therein alleged, among other things, that the capital stock of the San Diego Water Company is \$1,000,000, divided into 10,000 shares, of the par value of \$100 each, and that all of the stock is owned by the complainant Consolidated Water Company, except 25 shares, of \$100 each, and that the San Diego Water Company, prior to the commencement of the present suit, instituted, through the same attorneys who appear for the complainant herein, a similar suit in the superior court of San Diego county, Cal., for the annulment of the same ordinance of the city of San Diego, and upon similar grounds. If the facts so alleged in the plea be sustainable by proof, and the court should overrule the demurrer, and deny the motion for leave to file the plea, as contended by the complainants should be done, the result would be that the same party could very readily (as the plea sought to be filed alleges has been actually done), by reason of its control through the ownership of practically all of the stock of the mortgagor company, indirectly bring, in the name of the mortgagor, suit in a state court, and then bring in its own name in a federal court a similar suit to test the same question. No means by which such result can be brought about should be sanctioned.

As the demurrer to the amended bill must be sustained on the ground of misjoinder of parties complainant, it is not necessary to rule upon the motion for leave to file the plea in abatement; nor, since the bill is to be further amended, need the exceptions filed to the amended bill be determined. Demurrer to amended bill sustained, with leave to complainants to further amend within the usual time, if they shall be so advised.

BREED v. GLASGOW INV. CO.

(Circuit Court, W. D. Virginia. February 17, 1899.)

1. TRUST DEEDS—CONSTRUCTION—RESERVATIONS.

A trust deed executed by a land company reserved "such lands as may be occupied by, and used in connection with, such hotel as may be built thereon." At that time the company contemplated the erection of an hotel in addition to others already built. One of the latter was after-

wards burned, and another was erected in its stead. The contemplated hotel was never built. *Held*, that the ground occupied by the hotel erected to replace the one burned was not within the reservation.

2. SAME—COVENANT TO REBUILD IN CASE OF FIRE.

A trust deed securing bonds required the grantor to keep the property fully insured for the benefit of the trust, and to preserve the buildings, with the right, however, of changing them, provided that the aggregate value of the improvements should not be diminished. *Held*, that the provision was not a covenant of the grantor to rebuild in case of fire.

3. RECEIVERS—CONTRACTS OF DEBTOR—PERFORMANCE—MECHANICS' LIENS.

Where a receiver is appointed with the usual injunction order pending performance of a contract of the debtor for the erection of a building on his land, the contractor cannot finish the uncompleted part, and obtain a mechanic's lien therefor, in the absence of order of court.

4. SAME—NOTICE OF APPOINTMENT.

All persons having contractual relations with a debtor are bound by an order appointing a receiver of his property, whether or not they have notice thereof.

5. MECHANICS' LIENS—CLAIM—SUFFICIENCY OF ACCOUNT.

Code Va. 1887, § 2476, provides that, to perfect a lien, a contractor must file "an account showing the amount and character of the work done or materials furnished, the prices charged therefor, the payments made, if any, and the balance due." *Held*, that an account for \$12,000, for "labor performed and materials furnished" between certain dates, in the construction of a certain building, "as per contract," was insufficient to create a lien, where the erection of the building was contracted for as an entirety, and the contract price was \$17,945.

A bill was filed by F. W. Breed against the Glasgow Investment Company to foreclose a mortgage. The court appointed J. O. Burdette and S. H. Letcher receivers of the company, and all creditors were called in. Thereafter A. F. Smith, by petition, set up a simple contract claim against the company, and sought payment out of the mortgaged property *pari passu* with the bonds secured by the deed. The court sustained a demurrer to the petition, and dismissed the same. 71 Fed. 903. On appeal, the order sustaining the demurrer was set aside, and the case was remanded for further proceedings. 20 C. C. A. 432, 74 Fed. 332. After the remand of the case, the master was directed to take testimony on the petition of A. F. Smith, and report thereon. The A. T. Withrow Lumber Company also filed a petition presenting a claim for a mechanic's lien against certain property of the corporation defendant. The master found against the claim of A. F. Smith, and in favor of that of the lumber company. The present hearing is on exceptions to the master's report.

M. M. Martin and O. B. Roller & Martz, for A. F. Smith.

Winfield Liggett, William Leigh, and H. C. Riley, for Withrow Lumber Co.

John Selden and G. D. Letcher, for bondholders.

PAUL, District Judge. This cause comes on to be heard on the report of the master in pursuance of a decree entered herein on the 28th of February, 1896, by which the cause was recommitted. The master had made a report, January 28, 1896, to which exceptions had been filed by Henry Strong, a holder of part of the first mortgage bonds of the Glasgow Investment Company, and by others. By a decree of the 13th of June, 1896, the master was directed "to take

testimony upon the matters alleged in the petition of A. F. Smith filed in this cause on the 1st day of March, 1895, and make report thereon, with all other matters which he had heretofore been directed to investigate and inquire into."

The questions arising on the petition of A. F. Smith were before this court at a special term thereof, July 11, 1895. They were presented by a demurrer filed by Henry Strong and others to the petition. On the hearing, this court sustained the demurrer, and dismissed the petition. 71 Fed. 903. From this action of the court, Smith appealed to the circuit court of appeals, Fourth circuit. This court held that the demurrer to the petition put the whole record in issue, and that, admitting all that the petition alleged, it could not be sustained. The court of appeals reversed the decree of this court, and remanded the case for testimony to be taken on the petition. 20 C. C. A. 432, 74 Fed. 332. The master, in pursuance of the reference, took testimony in support of, and in opposition to, the allegations in the petition of said A. F. Smith.

The contention of the petitioner Smith is that the deed of trust executed by the Glasgow Investment Company to S. H. Letcher, trustee, of date June 1, 1891, the purpose of which was to secure to the Natural Bridge Forest Company the payment of the amount due it from the Natural Bridge Park Association, was in violation of section 1149 of the Code of Virginia of 1887. This section provides:

"Sec. 1149 [applying to chartered companies]. And if any such company create any lien or incumbrance on its works or property for the purpose of giving a preference to one or more creditors of the company over any other creditor or creditors, except to secure a debt contracted, or money borrowed, at the time of the creation of the lien or incumbrance, the same shall inure to the benefit, ratably, of all the creditors of the company existing at the time such lien or incumbrance was created."

The master, after carefully reviewing and discussing the testimony before him, says:

"In view of the foregoing findings of fact, and the law applicable thereto, your commissioner is of opinion that the deed of trust from the Glasgow Investment Company to S. H. Letcher, trustee, dated June 1, 1891, is not in violation of the provisions of section 1149 of the Code of Virginia, and that the bonds secured under said deed of trust constitute a lien upon the estate conveyed in said deed of trust superior to the claim of the petitioner A. F. Smith."

The court sustains this finding of the master. It will not discuss the facts and the law upon which it rests. The reasons given by the court for sustaining the demurrer to the petition of A. F. Smith (71 Fed. 903) are applicable in sustaining the conclusion of the master. It is not necessary to repeat them.

The questions which have elicited the most elaborate and earnest argument are those raised by the exceptions taken to the master's report in allowing a mechanic's lien in favor of the Withrow Lumber Company, hereafter styled the "Withrow Company." This claim of a mechanic's lien by the Withrow Company arises as follows: On the 21st of October, 1891, the Forest Inn, situated on the mortgaged premises, was destroyed by fire. On the 15th day of May, 1892, the Glasgow Investment Company entered into a contract with the Withrow Company to erect an hotel building to replace the one

destroyed, and to repair another hotel, known as the "Appledore." The price agreed to be paid for the work was \$17,945.42. The receiver in this cause was appointed June 27, 1892. The Withrow Company commenced work on the building the 15th day of May, 1892, and continued work until the 27th day of August, 1892. It then ceased work, and filed its claim for a mechanic's lien. Following is the statement: "To labor performed and materials furnished in the construction of a new hotel at Natural Bridge, Va., and labor performed and materials furnished in repairing and improving the building known as 'Appledore Hotel,' as per contract, \$12,000."

Section 2475 of the Code of Virginia of 1887 provides:

"Sec. 2475. Lien for Work Done and Materials Furnished by Artizans, Mechanics, Lumber Dealers and Others. All artizans, builders, mechanics, lumber dealers, and other persons performing labor about, or furnishing materials for, the construction, repair, or improvement of any building or structure, permanently annexed to the freehold, whether they be general contractors or subcontractors, shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment of the premises, for the work done and materials furnished. But where the claim is for repairs only, no lien shall attach to the property repaired unless the said repairs were ordered by the owner of the property or his agent."

Section 2476 is as follows:

"Sec. 2476. Perfection of Lien by General Contractor—Mechanic's Lien Record—Notice of Lien. A general contractor, in order to perfect the lien given him by the preceding section, shall at any time after the work done, or materials furnished by him, and before the expiration of thirty days from the time such building or structure is completed, or the work thereon otherwise terminated, file in the clerk's office of the county or corporation court of each county or corporation in which the building or structure, or any part thereof is, or in the clerk's office of the chancery court of the city of Richmond, if the said building or structure is within the corporate limits of the said city, an account showing the amount and character of the work done or materials furnished, the prices charged therefor, the payments made, if any, and the balance due, verified by the oath of the claimant or his agent, with a statement attached declaring his intention to claim the benefit of said lien, and giving a brief description of the property on which he claims the lien. It shall be the duty of the clerk, in whose office such account and statement shall be filed as hereinbefore provided, to record the same in a book to be kept by him for that purpose, called the 'Mechanic's Lien Record,' and to index the same in the name as well of the claimant of the lien as of the owner of the property, and from the time of such filing all persons shall be deemed to have notice thereof."

Section 2477 provides for perfection of lien by subcontractor.

Section 2478 provides:

"Sec. 2478. What Inaccuracies not to Affect Lien. No inaccuracy in the account filed, or in the description of the property to be covered by the lien, shall invalidate the lien, if the property can be reasonably identified by the description given and the account conform substantially to the requirements of the two preceding sections, and is not willfully false."

The statute gives a lien upon the building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment of the premises.

It is not contended that the mechanic's lien claimed by the Withrow Company is a lien on the land embraced in the deed of trust

executed June 1, 1891, by the Glasgow Company to S. H. Letcher, trustee, to secure the holders of the bonds of the Glasgow Company. But it is insisted that there is a reservation clause in that deed which eliminates from its operation the hotel site and so much land as may be necessary for the convenient use and enjoyment of the premises. This contention is based on this reservation in the deed of trust:

"It is furthermore to be understood that there are to be reserved from the operation of this deed all the drives, streets, and alleys on said land now laid off, or that may hereafter be indicated, on any plot, for the improvement of said property, and such lands as may be occupied by, and used in connection with, such hotel as may be built thereon, together with all approaches thereto."

The evidence shows that, at the time the deed of trust was executed, the Glasgow Company contemplated the erection of a new hotel, to cost \$50,000. This was several months before the Forest Inn was destroyed by fire, and to replace which the Withrow Company contracted to erect a new building. To understand the intention of the contracting parties, we must place ourselves in the position they occupied when the deed of trust was executed. It was in contemplation of the grantor, the Glasgow Company, to erect a new hotel on the premises conveyed, and it desired to have under its exclusive control such hotel, and the lands occupied and used in connection therewith, and the approaches thereto. The parties were dealing with the property as it existed at the time of the contract, when the Forest Inn was one of the standing hotels. Men in the ordinary business affairs of everyday life do not contract with reference to unforeseen, unexpected, and unthought of occurrences, which we term "accidents."

In *James v. Insurance Co.*, 4 Cliff. 278, Fed. Cas. No. 7,182, 8 Myers, Fed. Dec. § 828, the court says:

"Parties may make their own contracts, but the courts, in all cases except where the language employed is so explicit and unambiguous that it must be understood that the words express their own interpretation, may give the language a reasonable construction, to effect the intention of the parties as collected from the whole instrument, the subject-matter, and the surrounding circumstances. The province of construction is limited to the language employed, as applied to the subject-matter and the surrounding circumstances contemporaneous with the instrument; but courts are not denied the same light and information the parties enjoyed when the contract was executed, and for that purpose may acquaint themselves with the persons and circumstances that are the subject of the written instrument, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge the meaning of the words and of the correct application of the language to the things described."

"It is a principle recognized and acted upon as a cardinal rule by all courts of justice, in the construction of contracts, that the intention of the parties is to be inquired into, and, if not forbidden by law, is to be effectuated." *Bradley v. Steam-Packet Co.*, 13 Pet. 89.

The clause referred to in the deed of trust reserved from its operation a portion of the land conveyed on condition that a new hotel should be built thereon in addition to the hotels then on the land. The event did not occur, the condition was unfulfilled, and the land

in contemplation of the parties at the time of the conveyance was not eliminated from the operation of the deed of trust, and is subject to the lien of the mortgage bonds.

The deed of trust to secure the bonds contains the further provision that "the Glasgow Company shall keep the buildings and property fully insured for the benefit of the trust to the extent of, at least, \$40,000; * * * shall preserve the buildings, and permit no waste, with the right, however, to change the buildings or the personal property so that the aggregate value of the improvements or the personality on this property shall not be diminished." Counsel for the bondholders contend that this provision in the deed of trust is equivalent to a covenant to rebuild; that the building erected to take the place of the burnt hotel is, under the covenant quoted, for the benefit and security of the bondholders, and is therefore not subject to a mechanic's lien for materials furnished and work done in restoring the burnt building. This provision in the deed of trust is not a covenant to rebuild. If the parties intended it as such, they doubtless would have expressed their intention clearly, by saying the Glasgow Company should rebuild, at its own cost, any building destroyed by fire. The language used is that usually employed in covenants to keep in good repair, and it would be a strained construction to extend it beyond that, in order to make it embrace an obligation to rebuild. The bondholders have, by the terms of the trust deed, protection against loss by fire to the amount of \$40,000. Insurance against loss by fire is generally taken for the purpose of enabling the owner of the property to rebuild in case of loss. In this case, the money is diverted from its usual course, and goes to a partial satisfaction of the bonds secured as a first lien on the property. The bondholders having received the insurance money which the deed of trust guarantied they should have, to require the Glasgow Company to rebuild would be to place upon it a burden not contemplated by the parties when the deed of trust was executed, and not imposed by the terms of the provision in question, and even deprive it of the aid it might receive in rebuilding from the provisions of the mechanic's lien law.

A very material and important question is presented in this case, arising from the fact that on June 27, 1892, a receiver was appointed in this cause to take charge of all the property of the Glasgow Company, and the usual injunction issued. The receiver was appointed pending the execution of the contract between the Glasgow Company and the Withrow Company for building the hotel, which was entered into on the 15th of May, 1892. This presents for consideration the effect of the appointment of a receiver and granting an injunction on existing executory contracts previously entered into by the insolvent corporation. In this case the Withrow Company continued work under its contract with the Glasgow Company, after the appointment of the receiver, without obtaining the consent of the receiver under the approval and direction of the court. The receiver, without the direction of the court, could not have agreed to carry out the contract.

The doctrine on this question is thus stated in Smith, Rec. p. 102, § 35:

"The power to the receiver to carry out contracts existing at the time of his appointment is not, as a rule, granted by the court, except in cases where there is a lien upon the receivership property of some nature operating as a security for the performance of the contract. The reasons for this rule are apparent: (1) If the receiver could be held to the performance of an uncompleted contract, the performance of the contract by him would be equivalent to a payment or satisfaction of the contract indebtedness, and, in the absence of adequate funds for the purpose, the court will not require him to do so. The functions of the receiver are to marshal the assets and distribute the same to the creditors, as directed by the court, according to their respective rights and interests."

That the receiver in this case, without direction of the court, could take no steps to carry out the contract between the Glasgow Company and the Withrow Company, is a question too well settled to require discussion. The receiver did nothing to make the contract his own, and made no effort to carry it out. The Withrow Company made no application to the court to require the receiver to specifically perform the contract. The doctrine on this subject is thus stated by Brewer, J., in *Olyphant v. Steel Co.*, 28 Fed. 729:

"The court takes possession of the property for the benefit of all concerned, and should so manage it with that purpose in view, making, even if it has the power, no other changes in the several relations of creditors to each other and to the common debtor than are absolutely necessary for the accomplishment of the main purpose. The interests of all parties oftentimes will be promoted by going on with contracts partially completed."

The authorities sustaining this statement of the law are numerous. *Southern Exp. Co. v. Western N. C. R. Co.*, 99 U. S. 191; *Oil Co. v. Wilson*, 142 U. S. 323, 324, 12 Sup. Ct. 235; *Glenney v. Langdon*, 98 U. S. 20. See *Peoria & P. U. Ry. Co. v. Chicago, P. & S. W. R. Co.*, 127 U. S. 200, 8 Sup. Ct. 1125.

The receiver having no power to execute the contract of the insolvent Glasgow Company with the Withrow Company without the order and direction of the court, we are led to inquire by what authority the Withrow Company proceeded with the execution of the contract after the appointment of a receiver. On what principle can we say the contractor, the Withrow Company, had a right to proceed with the execution of the contract after the appointment of the receiver? The contract between the Glasgow Company and the Withrow Company created no lien on the property. "This lien is a creation of the statute, and was not recognized at common law." *Van Stone v. Manufacturing Co.*, 142 U. S. 128, 12 Sup. Ct. 181.

The court further says:

"It may be defined to be a claim created by law, for the purpose of insuring a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon. Now, it is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the material man and laborer his lien under the statute. The lien is brought into operation by virtue of the statute, and the contract for building is entered into presumably in view of, or with reference to, the statute."

As the contract gave no lien on the building contracted for, and as the lien can only be acquired by reason of the materials furnished and work and labor done, there must be some point in the progress of the work where, in a case like this, there is a limitation on the time within which the materials must be furnished and work done, and on the amount for which a lien can be asserted. That limitation must be fixed as of the 27th of June, 1892, the date of the appointment of the receiver and entering the injunction order. After that time the contractor had no right, without the order of the court, to go on in the execution of the contract, and perhaps burden with a heavy lien the property which the court had taken in custody and placed in the hands of its receiver for the purpose of securing equity among the creditors of the insolvent corporation. If it had wished to continue the work, it might have applied to the court for an order allowing it to complete the contract, and, if the court could have seen that it was for the benefit of the estate in its custody, it would have made such an order. The argument that the Withrow Company had no notice of the appointment of a receiver, and it is therefore not bound by the order appointing a receiver and granting an injunction, is without merit. The appointment of a receiver of the property of an insolvent corporation is legal notice to all persons having contractual relations with it. Their rights are not affected by notice or the want of it, but by the operation of the law which the court has put in motion.

Able oral arguments have been made, and elaborate and well-considered briefs filed, on the exception to the master's report, which raises the question as to the sufficiency of the account filed by the Withrow Company, in the clerk's office of the county court of Rockbridge county, as the basis of the mechanic's lien claimed.

The statute (section 2476, Code Va. 1887) provides:

"A general contractor, in order to perfect the lien given him by the preceding section, shall at any time after the work done or materials furnished by him, and before the expiration of thirty days from the time such building or structure is completed, or the work thereon otherwise terminated, file in the clerk's office of the county or corporation court, of such county or corporation, in which the building or structure or any part thereof is * * *, an account showing the amount and character of the work done or materials furnished, the prices charged therefor, the payments made if any, and the balance due, verified by the oath of the claimant or his agent, with a statement attached declaring his intention to claim the benefit of said lien, and giving a brief description of the property on which he claims the lien."

Following is the account filed by the Withrow Company:

Millboro Depot, Va., August 25, 1892.

Glasgow Investment Company, to the A. F. Withrow Lumber Co., Contractors and Wholesale Lumber Dealers.

Terms: —.

From May 15th,
1892, to date,

To labor performed and materials furnished in the construction of a new hotel building at Natural Bridge, Va., and labor performed and materials furnished in repairing and improving the building known as "Appledore Hotel," as per contract	\$12,000 00
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It is contended for the Withrow Company that the objection to the sufficiency of the account filed is covered by the case of *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888. In that case the account filed was as follows:

1891.	
May 22.	To stonework done on Mr. Wirt E. Taylor's residence, on Grace street, between Shafer and Harrison streets, in the city of Richmond, and materials furnished, as per agreement with John F. Bell, general contractor for said work
Extras:	26 ft. 7 in. curbing, at 90 cts.....
	21½ ft. tile, at \$1.00.....
	<hr/> \$2,350 00
	23 92
	21 50
	<hr/> \$2,395 42
Credit by cash.....	1,175 00
	<hr/> \$1,220 42
Balance due	

Of this account the court said: "Where the work is contracted for as an entirety for a specific amount, and this is so set out in the account filed, all the information is given that is needed or can be reasonably required." Applying the doctrine thus stated to the account filed by the Withrow Company, the court cannot see how it sustains that account. The building of the hotel was contracted for as an entirety, and the specific amount to be paid therefor was \$17,945.42. The account filed is for \$12,000, which cannot, in any sense, be claimed as the specific amount agreed to be paid for building the hotel, or for work to be done thereon. It claims this amount (\$12,000) due as per contract. As no such contract was made, and as the account filed does not show the amount and character of the work done or materials furnished, the prices charged therefor, the payments made, if any, and the balance due, it does not conform to the requirements of the statute. Further, as the court has stated, the contract terminated, by the appointment of a receiver, the 27th day of June, 1892. The account to secure a mechanic's lien was not filed within 30 days from that date.

In *Gilman v. Ryan*, 95 Va. 494, 28 S. E. 875, the court, after stating that the Code requires a general contractor, in order to obtain a lien for work done and materials furnished, to file, within the time prescribed, in the clerk's office designated, "an account showing the amount and character of the work done or materials furnished, the prices charged therefor, the payments made, if any, and the balance due," italicizing the quotations, says:

"The filing of the account is the initial, and one of the most important, steps in the establishment of a mechanic's lien. A substantial compliance with this provision of the statute has always been regarded as essential to the creation of the lien, and as necessary for the protection of owners, purchasers, and other lien creditors."

Any account filed under the statute to secure a mechanic's lien could scarcely impart less information to an examiner of the record than that filed in this cause, as to the amount and character of work done or materials furnished, the prices charged therefor, the payments made, if any, and the balance due.

Analogous to the mechanic's lien law in Virginia is the labor lien law (sections 2485, 2486), in the same chapter as the mechanic's lien

law. The question as to the sufficiency of the memorandum entered in the clerk's office of the amount and consideration of the labor claim was passed upon by the circuit court of appeals of this circuit in *Liberty Perpetual Building & Loan Co. v. M. A. Furbush & Son Mach. Co.*, 26 C. C. A. 38, 80 Fed. 631. The court held, Goff, J., delivering the opinion, that the memorandum of the claim filed in that case was insufficient, in not complying with the requirements of the statute, and, as to the duty of the party seeking to establish such lien, the court says:

"A party desiring to comply with the requirements of the sections of the Virginia Code that we have been considering can easily do it, as the information called for is peculiarly within the knowledge of him who is seeking thereby to create a lien on the property of another, and, if he fails to do so, it is likely for the reason that the full statement of the facts would injure his claim, or because of either ignorance or inadvertence, neither of which will be received as an excuse, especially in cases where the rights of others are affected. The suggestion that the record, as it was made in the clerk's office, was sufficient to put any one who examined it on his guard, and that it was such notice as would induce a prudent business man to make full inquiry, is, we think, without force. No one is required to go outside of the clerk's office for the information he is told by the law he can find therein, nor expected to control his conduct by the conflicting statements made by the parties to the record; the one asserting, and the other denying, as their respective interests may suggest. The only question in such cases is, has the party claiming the lien observed the commands of the law and been obedient to its requirements?"

It is unnecessary to cite further authorities to show the insufficiency of the account filed by the Withrow Company on which to base a mechanic's lien. This disposes of all the material questions raised by the exceptions. A decree will be prepared in accordance with the views of the court.

McCONNELL v. PROVIDENT SAVINGS LIFE ASSUR. SOC. OF NEW YORK.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 656.

1. REFORMATION OF INSTRUMENTS—CHANGING DATE OF INSURANCE POLICY.

A policy of life insurance was dated as of the day when the application therefor was first made, and on which a part of the written application was filled out, and forwarded to the company. Another part of the application was filled out, signed, and dated on a subsequent day, and the policy did not take effect by delivery and the payment of the first premium until some time thereafter. By the terms of the policy, the times for the payment of subsequent premiums were fixed with reference to the date it bore. There was no evidence of any special agreement as to when the policy should be dated, and it was accepted and retained without objection by the insured, who also received notice of the date on which the second premium payment would be due. Held, that such facts did not establish either fraud or mistake which would authorize a court of equity, after the death of the insured, to reform the policy by changing its date to that on which the application was completed, or on which the policy was delivered.

2. LIFE INSURANCE—FORFEITURE FOR NONPAYMENT OF PREMIUM—NEW YORK STATUTE.

The requirements of the New York statute, providing that no insurance policy shall be declared forfeited or lapsed for nonpayment of a premium when due, unless a notice, as therein prescribed, shall have been duly addressed and mailed to the person whose life is insured, are fully com-

plied with by the proper addressing and mailing of such notice; and the fact that it is not received by the insured is immaterial.

3. SAME—WAIVER OF FORFEITURE OF POLICY.

Where a premium on a policy of life insurance was paid by a friend of the insured, to a local bank holding the receipt therefor for delivery, on the day after it was due, and the day on which the insured died, a delay of three months before tendering the payment back will not estop the company from insisting on the forfeiture of the policy by reason of the default, where it appears that such delay was no longer than necessary to give it a reasonable time to investigate after being informed of the circumstances under which the payment was received.

4. SAME—CONSTRUCTION OF POLICY—TERM OF INSURANCE.

A life policy insuring the holder during the term of one year in consideration of a stipulated annual premium, but which also provides that such premium may be paid in quarterly installments, and that the insurance shall terminate on a failure to promptly pay any such installment, is a contract which binds neither party beyond the quarter for which payment has been made, except at the option of the insured; nor is such construction changed by a further provision that, in case of the death of the insured within the year, the installments of the annual premium remaining at the time unpaid shall be deducted from the amount of the policy.

Appeal from the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

For opinion on former appeal, see 69 Fed. 113.

This was a bill in equity to correct the date of an insurance policy issued by the defendant upon the life of R. A. McConnell in favor of Mary F. McConnell, his wife, as the beneficiary. The policy was dated April 27, 1893. The policy reads as follows:

"The Provident Savings Life Assurance Society of New York, in consideration of the 'stipulation and agreements' in the application therefor and upon the next page of this policy, all of which are a part of this contract, and in consideration also of the payment of seventy-six dollars and twenty-five cents, being the premium hereon for the first year, promises to pay to Mary F. McConnell, wife of Robert A. McConnell, or to her legal representatives or assigns, the sum of five thousand dollars (less any indebtedness on account of this policy) within sixty days after the acceptance, at the office of the society in the city of New York, of satisfactory proofs of the death of R. A. McConnell, of Knoxville, Tennessee (the insured under this policy), provided such death shall occur on or before the 27th day of April, A. D. 1894."

Following this, and under the head of "Stipulations and Agreements" on the second page, are contained the following clauses, in the order given:

"(1) This policy does not go into effect until the first premium has been actually paid during the lifetime and good health of the within-named insured.

"(2) Failure to pay any premium or semiannual or quarterly installment thereof, when due, thereupon will terminate this policy.

"(3) Any unpaid quarterly or semiannual installments of the current year's premium, or any other indebtedness to the society, will be deducted in any settlement of this policy; and,

"(4) The annual premium on this policy may be paid by quarterly installments, as hereinafter stated, on or before the 27th day of April, July, October, and January in each year."

R. A. McConnell paid one quarterly dividend of \$20.65 on the 9th day of May, 1893, and received the policy. The next quarterly payment was due on the 27th of July, 1893. It was not made on that date. On the evening of that day McConnell suffered a severe injury in a railroad accident, from which he died on the following day, July 28th. It appears that McConnell visited the office of the local agent of the defendant company in Knoxville on the 27th day of April, and applied for insurance upon that day; that, in accordance with his application, he was then subjected to a medical examination. The questions in it were answered in the handwriting of the physician. These questions and answers were marked as the second part of the application papers,

and were forwarded immediately by direct mail to the medical director of the company at New York. That part of the application which included questions to be answered by the insured, McConnell took home with him, in order to be accurate as to certain facts in family history, which he was required to give. He did not return the paper until the 29th of April, and dated it as of that day. The application having been accepted by the insurance company, the policy was forwarded to the general agents of the company at Cincinnati, bearing the date of that part of the application which had been forwarded by the medical examiner, and not that of the first part of the application, containing the answers by the applicant himself. The policy did not reach Knoxville before May 9th, and was then delivered to the insured. He took the policy without complaint of the fact that it was dated upon the 27th of April, and the subsequent payments required under its terms were to be made on the 27th of July, the 27th of October, and the 27th of January. It is now contended, and this is the gravamen of the bill, that the policy should have been dated when it was actually issued by the company, and the times for subsequent payments should have been fixed with reference to that date, and not with reference to the date of the medical examination. It is argued that, because there was no insurance upon the life of McConnell until the 9th or 10th of May, when the policy was delivered to him, he was made to pay \$20 for two months' insurance, instead of three months, in accordance with the contract, and that the dating back of the policy was merely nugatory and illusory, for it could have no effect by relation. The ground of the bill is that the policy was dated April 27th by mutual mistake, each intending to make the date later at least by two days, which was the date of McConnell's application.

Jerome Templeton, for appellant.

Frank Spurlock, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). The action of the circuit court in dismissing the bill was right. The policy could not be reformed except on the ground either of fraud or a common mistake of the parties. There is not the slightest evidence of fraud on the part of the insurance company. The reason why the date of the policy was made April 27th is palpable from an examination of the medical examiner's report. That was taken to be the date of the application, as, indeed, it was. The fact that the part of the application signed by the applicant was dated upon the 29th of April is not material, because all the circumstances show that the application was in fact made when McConnell visited the local agent's office, and submitted himself to a medical examination. Such an examination involves expense to the company, and is, of course, never had before an application for insurance is made. Now, it is quite true that the applicant, upon examining his policy, and finding it dated the 27th of April, when he did not receive it until the 9th of May, might have objected to the date, and might have requested that the dates be changed. In such a case the company could either have declined the insurance, or acquiesced in the suggestion. But until the policy was delivered, and the money paid, the contract of insurance was not entered into by the parties. We can only gather the intention of the parties from the face of the contract itself and the surrounding circumstances. The slightest examination of the policy by the insured would have shown him that the quarterly payments fell due on quarters calculated from the 27th of April. If he did not

consent to this, he should then have objected. He made no objection. The evidence shows that he received notice that his premium was due on the 27th of July. Indeed, it shows that two notices were sent, and that he certainly received one. No objection was made on his part to the date at that time. Equity will reform written contracts when it is made clearly to appear that a different contract from that which was written was actually agreed to by the parties, and that by a common mistake a writing was signed which did not embody the agreement actually made, but a different one. The contract in this case was made up of the application and the policy. Of the application, part is dated the 27th of April and part the 29th of April. The policy is dated the 27th of April. There is nothing on the face of the application to show when the applicant desired the policy to be dated. We only know that the insurance company did date the policy upon the 27th of April, fixing the subsequent times of payment with reference to that; and we know the insured received the policy without objection, and received notice to pay subsequent payments without objection. There is, therefore, not the slightest evidence to show that the dates of the policy for payment were in any respect different from that which the parties intended them to be. That being true, there is no ground for a reformation of the contract. This is in accord with the conclusion reached by the circuit court of appeals for the Eighth circuit in the case of *Insurance Co. v. McMaster*, 30 C. C. A. 532, 87 Fed. 63.

It is said that the failure on the part of the insured to pay his premium on the 27th of July cannot work a forfeiture, because, under the law of New York, by which this policy, in accordance with its terms, is to be construed, no policy of insurance can be declared forfeited or lapsed by reason of nonpayment, when due, of any premium unless a written or printed notice, stating the amount of such premium due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured; and no such notice, it is said, was sent in this case. The New York statute provides that the affidavit of an officer, or any one authorized to mail such notice, that the same has been placed in the mail, shall be presumptive evidence that such notice has been duly given. The written and oral evidence that the notice in this case, properly addressed to McConnell, was duly sent, more than 35 days before the date upon which the premium was required to be paid upon the policy, from New York, was complete. It also appears that what was called a "courtesy notice" of the same character was sent by the general agents from the Cincinnati office some three weeks before the 27th of July. It is said that the sending of the New York notice is not satisfactorily shown, because the stenographer of the insured testified that she never saw a notice from New York City, but only one from Cincinnati, and because a thorough search among the papers of the deceased does not show the presence among them of the New York notice. This is immaterial, except as a circumstance having some tendency to show that it was never mailed; and in this case the evidence of its having been mailed is quite satisfactory. The statute only requires that the notice shall be mailed to

the right address. Its failure to reach the insured is a risk which the statute evidently intends the insured shall run. The duty of the company is fully complied with, and the forfeiture imposed by the terms of the policy not affected, if the required notice is duly mailed.

Again, it is contended that the second installment of the premium was paid to the agent of the defendant on July 28th, and that the defendant ratified the same. It appears that on the day after the date when the premium fell due, a friend of McConnell, learning of his accident, went to the bank, which was the collecting agent for the insurance company, and tendered the amount due upon the installment, a signed receipt for which the bank held. The cashier of the bank then gave the receipt, dating it back one day, to the 27th of July, and received the money. There was a considerable delay in the forwarding of the money by the agent to the company at New York, so that it was not received in New York until the 19th of August, and its payment was not explained until the 27th of September, 1893, by the president of the bank which issued the receipt and took the money. The proofs of death were not received in New York until the 29th of September. On the 24th of October, 1893, the general secretary of the company took the money to Knoxville from New York, and paid it back to the national bank, whose cashier, together with the secretary of the defendant company, went to the friend of McConnell who had paid the money, and returned it to him. He had agreed to hold the receipt, and return it to the bank, should the delivery of the receipt be found not to be proper; but when the money was paid him it appeared that he had turned the receipt over to the administrator of the insured. We find nothing in this circumstance to justify the contention that the company is now estopped to rely on the forfeiture by a failure to repay immediately the money which was paid under the circumstances above detailed. To say the least of it, the antedating of the receipt was a very peculiar proceeding, and while the fact that the receipt was antedated was subsequently brought to the attention of the company, delay incident to a proper investigation would certainly not work an estoppel in favor of the beneficiary, who at that time had not herself paid the money.

Finally, it is contended that this policy is to be construed as a policy for a year, upon which a quarter of the premium has been paid, and three-quarters remains due as a credit to the company. The case cannot be distinguished in this regard from *Insurance Co. v. Sheridan*, 8 H. L. Cas. 745, where the policy was in all substantial respects similar to the one under consideration. It is an annual policy, but it is an annual policy on which the premium is payable by quarterly installments, leaving the insured at liberty to drop it at any quarter, and imposing no liability on the part of the company unless the quarterly payment is made at the end of the quarter. If, however, the insured die at the end of the first quarter of the current year, the insurance company receives only one-quarter of the annual premium, instead of the whole. It has insured the deceased for a year, subject to his voluntary default. He has died, and the policy is earned. He should pay the whole year's premium therefor, but has only paid one quarter's premium. To meet this injustice, the proviso is introduced

that, if the insured should happen to die before the whole of said quarterly payments shall become due, then the company shall be entitled to deduct premiums for all the subsequent quarters of that current year from the amount of the policy. That proviso is not meant to apply to the case of a defaulted payment, but only to a case where the payments are regularly made as they become due, and where all the installments have not become due on the death of the insured. In this case there was a failure to pay a quarterly installment on the day fixed. As a consequence, the policy became forfeited, and all liability thereon ceased. The decree of the circuit court is affirmed.

GORHAM MFG. CO. v. EMERY-BIRD-THAYER DRY-GOODS CO. et. al.

(Circuit Court, W. D. Missouri, W. D. February 13, 1899.)

No. 2,078.

1. UNFAIR COMPETITION—EVIDENCE PROCURED BY DECEIT.

An agent of complainant, which was a manufacturer, purchased an article from a saleswoman in defendant's store, being distinctly told that it was not of complainant's manufacture; but after the purchase, by a false statement to the clerk, he induced her, for the purpose of obliging him, to mark the duplicate sale bill delivered to him with the purchase to indicate that the article was of complainant's make. *Held*, that complainant could not avail itself of such fact as evidence in support of a claim that defendant sold other goods as those of complainant.

2. SAME—FRAUDULENT INTENT—NOTICE TO DEFENDANT.

A fraudulent intent is of the essence of unfair competition in trade; and, where a manufacturer believes a dealer to be selling the goods of another as his, he should give the dealer notice, and an opportunity to desist, before bringing suit.

3. SAME—SELLING GOODS AS THOSE OF ANOTHER MAKER.

Complainant, in its bill, charged defendant with unfair competition, in selling goods of other makers as those of complainant. The sole evidence of any such sales was the testimony of agents of complainant, sent for the purpose of procuring evidence, which was not very satisfactory, and failed to show a single sale to a bona fide purchaser, or any motive therefor, or that defendant knew of the sales so made; but, on the contrary, showed that it did not know of them, and that the representations made by its clerks were contrary to its orders and rules. It was further shown that no notice of any claim of such conduct was given to defendant until suit was brought; and the evidence tended to show that the real purpose of the suit was to prevent the defendant from selling complainant's goods, because it sold them at a lower price than competing dealers, and than complainant regarded as for its best interests. *Held*, that such evidence was wholly insufficient to establish a right to relief.

4. SAME—RIGHT OF MANUFACTURER TO CONTROL PRICE OF GOODS—PURCHASE IN OPEN MARKET.

When a manufacturer parts with his goods, and they go upon the market, any third person has the right to purchase and sell them as he pleases; and the courts will not aid the manufacturer in suppressing their sale by a purchaser at prices which do not meet his approval by permitting him, in litigation brought under the guise of protecting his trade-mark or to suppress unfair competition, to examine the defendant or his witnesses to discover where the goods were purchased.

5. TEMPORARY INJUNCTION—PERVERSION OF USE—CONTEMPT OF COURT.

The publication in a newspaper, by a party to whom a temporary injunction has been granted, of a perverted construction of the purpose and effect of the injunction, before a full hearing on the merits, is a misuse of the injunction, which constitutes a common-law contempt of court.

This was a suit in equity by the Gorham Manufacturing Company against the Emery-Bird-Thayer Dry-Goods Company and others for unlawful competition in trade.

Brown, Chapman & Brown and Rufus J. Delano, for complainant.
John L. Peak and Robert E. Ball, for defendants.

PHILIPS, District Judge. This is a bill in equity to enjoin the defendants from unfair competition with the business of complainant. The complainant is a nonresident corporation, engaged in manufacturing and selling silverware known generally in the trade as "Gorham Silverware." The defendant Emery-Bird-Thayer Dry-Goods Company is a domestic business corporation, engaged in general merchandise, conducting what is popularly known as a "department store." The other defendants are its directors and managing officers. The question as to any invasion of complainant's trade-mark is eliminated from the discussion, for the reason that there is no evidence that the defendants have in any way attempted any imitation thereof. The only real controversy presented by the evidence is whether or not the defendants have been guilty of unfair competition, by attempting to palm off on the purchasers of silverware, as of the manufacture of complainant, that which in fact was of a different manufacture.

A substantial recitation of the facts which led to the institution of this suit will be a sufficient defense thereto:

For two or three years prior to October, 1895, the concern doing business under the firm name of Emery, Bird, Thayer & Co., up to the time of the act of incorporation,—the latter part of October, 1895,—had bought and sold silverware of the manufacture of the complainant, as also silverware of other manufactures, and at the times in controversy had on hand a lot of complainant's product. In the month of October, 1895, among its many advertisements in the newspapers of Kansas City, it advertised for sale silverware of the Gorham pattern at reduced rates,—below those of establishments in Kansas City engaged especially in the jewelry business. Upon discovering this, the complainant—whether of its own motion, or at the instigation of another jewelry merchant in Kansas City, need not be determined—caused to be inserted in the Kansas City Star, on November 2, 1895, the following notice:

"Where to Buy Gorham Silver. Don't look for it among the silvery silver of the dry-goods stores, offered at half the price of bullion. Suspicion instantly attaches to all such wares, no matter what they are stamped, or by whom they are sold. On the contrary, the proprietor of any first-class jewelry store in the United States will stake his personal reputation upon the sterling quality of Gorham silver. Too good for dry-goods stores; jewelers only."

This advertisement of the complainant was the only one of a like character it had ever published in any newspaper at Kansas City. It was so evidently directed against the defendant company, that among its advertisements in the Kansas City Times of November 4, 1895, it inserted the following:

"Sterling Silver. Gorham Silver. We are now selling Gorham Sterling Silverware, made by the Gorham Manufacturing Co. of New York City, at from

20 to 40 per cent. below the exclusive jewelers. In a recent advertisement of the Gorham Co., they said their ware was "too good for dry-goods stores; jewelers only." A rather peculiar announcement for them to make, when we now have quantities of their ware in our store, and have been selling it for some years. Yes, if you want Gorham's ware, you can get it here, and the price will be from 20 to 40 per cent. below that of the exclusive jewelers. But the patterns of the Gorham Co. are not as pretty and original as those made by another big silversmith, and of which we sell a great deal more than of the Gorham ware. We are showing these patterns to-day alongside of the Gorham patterns, and the customers nearly invariably select the patterns not made by Gorham. It is simply this: The patterns of the Gorham Co. are too much like stamped plated ware. They are not up to date. Come to the store and compare these two kinds. You can have Gorham's ware, if you want it. We think you'll select the prettier, however."

On the 9th day of November, 1895, the complainant made the following publication in the Kansas City Journal:

"If it is Gorham, it is genuine. Of course, that goes without saying; but is it Gorham? Is it stamped with the lion, anchor, and the letter 'G' (trade-mark)? Don't buy so much as a teaspoon for solid silver, unless it bears this doubt-dispelling mark. Too good for dry-goods stores; jewelers only."

Thereafter one Meyer, a jeweler of Kansas City, in the interest of the complainant and himself, sent one of his female clerks to the defendant's store, with the evident purpose of obtaining, if possible, evidence to show that the defendant company was not in fact selling Gorham silverware; and naturally enough she found, as she supposed, what she went for. Her testimony in chief is to the effect that she asked for a Gorham spoon, and was shown by one of defendant's lady clerks a spoon represented to be of the Gorham manufacture, which she claims was of a different pattern. She did not buy the spoon, as she did not go there for the purpose of making a purchase. She could not give the name of the clerk with whom she talked, nor could she identify the person so as to enable the defendant to call her in contradiction. This witness was nearsighted, and on her cross-examination showed an unfamiliarity even with the Gorham trade-mark, or that of the spoon which she claims was exhibited to her; leaving the identification of the goods claimed to have been offered her in a very unsatisfactory condition. This was followed up by this same man, Meyer, procuring two other women, friends of his, to visit the defendant's store "to spy out the land." One of them claims to have bought for Meyer some spoons represented by the saleswoman to be of the Gorham pattern, which were not. The sale ticket for these goods did not express on its face the name of the manufacturer. They delivered the spoons to Meyer, one of which was marked the next day for identification, which was afterwards put in evidence by the witness Meyer. The lady clerk who made this sale is of good reputation, and experienced as a saleswoman. She testified that, while she could not recall the circumstances of the particular transaction, she was satisfied it was not possible for her to have sold the spoon exhibited by Meyer as of the Gorham pattern; that there was Gorham ware, such as spoons, in the case, the trade-mark of which she was familiar with; that she had never made any such misrepresentation to any purchaser, and could have had no occasion so to do. The readiness with which those two women lent

themselves to Mr. Meyer to perform the ungracious office of amateur detectives, does not commend itself to the favorable consideration of this court. A superserviceable detective is very apt to discover, in his eagerness to illustrate his fidelity to a self-imposed master, what he seeks. The persistent conduct of the complainant in sending spies upon the unsuspecting clerks of this house is calculated to excite some incredulity as to the virtue of this class of testimony. The evidence shows that next came an agent of the complainant, representing its business in the Western territory, who also entered this store under the guise of a purchaser, and applied to this same lady clerk for the purchase of a spoon. She distinctly told him that the spoon he bought was not of the Gorham pattern. Still determined to find some evidence, if possible, against the defendant company, he represented to her that he wanted the spoon to give to a friend out in Kansas who had a preference for the Gorham pattern, and persuaded her to write upon the duplicate sale ticket given him therefor the word "Gorham." This is verified by the fact that the duplicate sale bill which went to the defendant's accounting office did not contain the word "Gorham," which was written on the duplicate taken by said agent after it was returned from the accounting office to the clerk to be given to the purchaser. The clerk's evidence is that she reluctantly yielded to the agent's insistence, merely to oblige him, which act on her part, however reprehensible from a business point of view, certainly cannot be taken advantage of by the party who procured it. As the crowning performance along this line, the complainant's chief counsel came to Kansas City, and presented himself, incognito, at the counter of defendant's store, and bought a spoon from a young clerk named Sheldon, who, when inquired of by this assumed purchaser whether it was a Gorham spoon, answered that it was. The said lady clerk of the defendant, who was standing near, overheard a part of this conversation, and when she perceived that the young man had represented the spoon as of the Gorham pattern, which it was not, she confronted him with his misconduct, whereupon he went out to find this purchaser, to recall the sale; but the purchaser suddenly disappeared, and presumably went direct to Mr. Meyer's store to report his achievement. This lady clerk at once reported to her immediate superior what young Sheldon had done, and the matter was then carried before Mr. Peters, who had charge of the employment of the clerks for the house, who, according to the custom of the house, after allowing him to remain and receive pay for one day, discharged him for his misconduct. Whether or not this young man was really ignorant of the pattern of the spoon is in some doubt, but, for the purposes of this case, the doubt may be resolved against him. The evidence shows, without contradiction, that it was the well-known rule of this house that no goods were to be represented by the employés to customers to be other than what they were, and that all customers buying goods of the house which proved to be dissatisfactory had the right to return them within a reasonable time and receive back the purchase money. The evidence on the part of the complainant not only fails to show that any bona fide purchaser had ever been deceived in the matter of purchasing something else for

Gorham goods sold by this house, but, on the contrary, the evidence on behalf of the defendant shows that no such complaint had ever been made to the defendant; and, with the exception of the sale made by young Sheldon, the first intimation ever received by the agents or managing officers of the defendant company of any false sale of the Gorham goods was on the filing of this suit.

The whole history of the controversy enforces the conclusion that it had its inception in the fact that the defendant company was offering the Gorham ware on this market at a lower price than that sought to be maintained by the exclusive jewelry establishments, and that the real incentive of the complainant's interposition was to maintain the higher price for its wares in this market. If the sole purpose of the complainant was to protect its trade-mark and to suppress unfair competition, within the spirit of the law, in the honest belief that the defendant company was palming off on the community spurious wares, or other wares, as those of the complainant, both conventional usage and equity, founded in fair play, demanded that the complainant should have gone to the defendant company and advised it of its grievance, and thus afforded the defendant the opportunity to correct the wrong without a hasty resort to court. The character and reputation of the defendant company, so well known to the community and the country, are such as to have invited this course. The supreme court, in *McLean v. Fleming*, 96 U. S. 254, declared the law to be that it is not necessary, "in order to give the right to an injunction, that a specific trade-mark should be infringed; but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant, and he persists in so doing after being requested to desist,"—citing *Wool-lam v. Ratcliff*, 1 Hem. & M. 259, in which the chancellor said:

"It further appears that Eaton had given this information to the plaintiff so long ago as December last, and the plaintiff ought, therefore, to have done one of two things: Either he should have communicated at once with Ratcliff, and obtained from him the information which he has given here; or else, if he had determined on applying to this court in the first instance, he should have taken care to show that some one else had been deceived."

Furthermore, as said by *Brown on Trade-Marks* (2d Ed., § 43):

"Unfair competition implies a fraudulent intention, while, on the contrary, an enjoinal infringement of a technical trade-mark may be the result of accident or misrepresentation, without actual fraud being an element."

This principle of law is aptly stated in *Simmons Med. Co. v. Mansfield Drug Co.*, 23 S. W. 175, 93 Tenn. 84:

"Fraudulent intention is not necessary, in a trade-mark, while in unfair competition fraud is of the essence."

So, in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537-549, 11 Sup. Ct. 396, the court said:

"In cases of unfair competition, fraudulent intent upon the part of the defendant must be proven."

In *Hilson Co. v. Foster*, 80 Fed. 897, Judge Coxe said:

"The action is based upon deception, unfairness, and fraud, and when these are established the court should not hesitate to act. Fraud should be generally proved. It should not be inferred from remote and trivial similarities. Ju-

dicial paternalism should be avoided. There should be no officious meddling by the court with the petty details of trade, but, on the other hand, its process should be promptly used to prevent an honest business from being destroyed or invaded by dishonest means."

Nobody was deceived or defrauded into the sales claimed to have been made to the detectives sent to the defendant's store to get evidence. They knew exactly what they were getting. The conduct of complainant's agent, who, by deceit and falsehood, induced the saleswoman to mark on the sale ticket the word "Gorham," shows that the scheme and purpose were to procure a wrongful act, to make it the basis of a lawsuit. A man who procures another to slander him cannot make it the basis of an action for damages. *Sutton v. Smith*, 13 Mo. 120. This is based upon the fundamental principle that "no person has the right to entrap another, by false and fraudulent appearances, in order to induce an act on which to base a claim for damages in a court of justice." How much more should this rule apply in a court of equity, which, in its search after justice, looks into the very heart, to divine the motive.

As confirmatory proof of the underlying purpose of this suit to prevent the defendant company from selling the complainant's manufactured article at prices which might affect the larger profits of the manufacturer, and suppress the competition of other merchants with the exclusive jewelry establishments, the complainant, both in the interrogatories propounded in the bill, and persistently throughout the cross-examination of the directors, managers, and officers of the defendant company, sought to ascertain from whom they purchased the goods manufactured by the complainant, the evident object of which was to enable it to refuse to sell to defendant's vendors after ascertaining their names. During the taking of the depositions, on the refusal of one of the witnesses to make answer to such inquiries, the respective counsel laid the matter before this court for direction as to whether or not such question should be answered; and the court answered in the negative, for the obvious reason that that was a trade secret, and the development of the fact was not essential to the proper maintenance of the complainant's suit. When a manufacturer parts with his goods, and they go upon the market, any third person has the right to purchase and sell them as he pleases, without the consent of the manufacturer; and the courts will not aid the manufacturer, under the guise of protecting his trade-mark or the suppression of unfair competition, by permitting him in such litigation to discover the sources from which an objectionable merchant—to him—obtains his supply.

This complainant has been guilty of an act which entitles it to less consideration from this court. After it had been conceded a temporary injunction in this case, it published in one of the leading newspapers of this city a perverted construction of the purpose and effect of the temporary injunction. This publication, in effect, represented the court as having decided, in granting said injunction, that the court was of opinion that the defendant company had obtained its goods "through second hands, and surreptitiously. * * * Consequently the injunction was granted, and is in active force to-day."

Such perverted use of a temporary injunction granted by a court before the final hearing upon the full evidence is, in its essence, a common-law contempt of court. *Tichborne v. Tichborne*, 39 Law J. Ch. 403, 404; *Roach v. Garvan*, 2 Dick. 794; *Kitkat v. Sharp*, 52 Law J. Ch. 134. The court is unable to perceive the existence of any real purpose on the part of the defendant company to impose upon the public by fraudulently putting upon the market other goods under the guise of the complainant's manufacture, or any purpose on its part, prior to the complainant's attack upon it through the newspapers, to give any preference to other wares sold by it over those of the complainant. The very utmost the evidence warrants the court in saying against the defendant company, assuming the evidence of complainant's witnesses to have been honestly related, is that some of the minor clerks of the house may, through inadvertence or indifference, have disposed of to Meyer and complainant's agents a few spoons of other patterns as of the make of the complainant. The evidence, taken in its entirety, persuades the court that this was without the knowledge or consent of the defendant company, and was contrary to its declared method of doing business, and, further, that no conceivable reason is found to exist at the time of the sales in question why the defendant company should have sold other goods as those of the complainant, when alongside of those sold were those of the complainant, subject to the same discount, and when, according to the defendant's testimony, it did not regard those of other manufacturers less valuable than those of the complainant. There is a lack of persuasive evidence of the existence of any fraudulent purpose on the part of the defendant company; and the failure of this complainant to have afforded the defendant an opportunity, before bringing this suit, to rectify any misconduct on the part of its employés, compels the court, in the interest of fair play, to dismiss this bill, and dissolve the temporary injunction granted herein. Decree accordingly.

CHASE v. DRIVER et al.

(Circuit Court of Appeals, Eighth Circuit, February 27, 1899.)

No. 1,083.

1. APPEAL—FINAL DECREE—DECREES ORDERING AND CONFIRMING SALES OF PROPERTY.

A decree which orders a judicial sale of specific property, under which the title may pass beyond the control of the court, is final, and it cannot be reviewed, unless it is challenged by a direct appeal from it, although it contains a provision referring the case to a master to state the account between the parties preparatory to the application of the proceeds and the adjudication of the costs; and an order which absolutely confirms such sale is equally final, and reviewable only by a direct appeal from it.

2. SAME.

Complainant, who was the owner of the equity of redemption in property which had been sold under deeds of trust, filed a bill alleging the irregularity of such sales, and praying for a resale, that the purchaser be held a mortgagee in possession, that an account be taken of the amount due on the mortgages, and that the surplus proceeds be paid to complainant. He did not offer to redeem, nor question the validity of the mortgage debt. A decree was entered ordering a resale, and referring the case to

a master to state an account between the parties, conditioned on the filing of a bond by complainant for the payment of the costs and expenses in case sufficient was not realized on the sale. Complainant filed the bond, the property was resold, and an order made confirming the sale. Subsequently the master filed his report, which was confirmed, and from such order of confirmation complainant appealed. *Held* that, as the main object of the bill was to procure a resale of the property, the decree ordering the sale, and the order confirming the same, were final, and not interlocutory, and neither could be reviewed on the appeal from the subsequent order, which was taken more than six months after the sale was confirmed.

3. EQUITY PRACTICE—SUIT TO OBTAIN RESALE UNDER MORTGAGE — REQUIRING BOND FOR COSTS.

Where the owner of the equity of redemption in property which has been sold under a mortgage files a bill to obtain a resale, without offering to redeem, but merely in the hope that a surplus will be realized from such sale, it is within the power of the court, on ordering such resale, to require the complainant, as a condition, to file a bond for the payment of the costs and expenses of such proceeding in case a sufficient surplus is not realized from the sale.

4. APPEAL—ESTOPPEL.

One who accepts the benefits of a decree or judgment is thereby estopped from reviewing it or from escaping from its burdens.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

William M. Randolph (George Randolph, on the brief), for appellant.

Jacob Trieber, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree made on December 1, 1897, which settled the account between the owner of the equity of redemption in certain lands, and the mortgagee thereof, after the lands had been sold to satisfy the mortgage debt, under a decree rendered in the same case on April 9, 1896, at the suit of the owner of the equity, and after that sale had been confirmed, on December 28, 1896. Ike A. Chase was the complainant in the suit. He was the owner of the equity of redemption in the lands. He has appealed from the decree settling the account; but it was at his suit that the decree of sale was made, and he took no appeal from that decree. He filed no exceptions to the report of sale under it, and he did not appeal from the order of confirmation of that report. Nevertheless, by his assignment of errors on the appeal from the decree of December 1, 1897, filed after that decree was made, he attempts to challenge the provisions of the decree of sale, and of the order confirming the sale under that decree. We are met, therefore, at the threshold of our investigation of this case, with the question whether the decree of sale and order of confirmation were mere interlocutory decrees, and thus reviewable upon an appeal from the decree on the accounting, or were so far final that they could be questioned only by direct appeals from them, taken within six months after their respective entries. 26 Stat. c. 517, § 6; 1 Supp. Rev. St. (2d Ed.) p. 903. A brief statement of the course of the litigation, of the facts which gave rise to it, and of the provi-

sions of these various decrees, is indispensable to a clear understanding of this question.

On December 1, 1888, one Warner owned the land over which this controversy arose, and on that day he conveyed it, by a trust deed, to Abner Driver, to secure a loan of \$8,000, which he then made of James D. Driver. After a default had been made in the conditions of the trust deed, Abner Driver, the trustee, sold the land therein to satisfy the debt; and James D. Driver, who will hereafter be called the "mortgagee," purchased it at the sales. These sales were made on December 8, 1891, and on December 10, 1892. Trust deeds evidencing them were made in 1893 and 1894. On November 24, 1891, Warner conveyed his equity of redemption in the lands to the appellant, Chase; and on March 8, 1892, Chase also obtained a sheriff's deed of Warner's interest, upon a sale made under a judgment against him. In December, 1892, the mortgagee took possession of the lands under the trustee's sales. On June 29, 1895, Chase exhibited his bill in this suit. In that bill he set forth the facts we have recited, admitted the original existence of the debt of \$8,000 and interest, and conceded the validity of the trust deed made to secure it, but alleged that since November 24, 1891, he had been entitled to the possession of the lands; that the sales and trust deeds were irregular and void; that James D. Driver was only a mortgagee in possession; that proper credits for the amounts which had been, or should have been, paid on the debt ought to be allowed, and a proper account of the rents and profits of the lands ought to be rendered; and that they should be sold again for something near their actual value. He did not offer to pay the mortgage debt, or to redeem the lands from it, but the prayer of his bill was that the trustee's deeds, and the sales upon which they were based, might be set aside; that the trust deed might be reinstated, so far as in equity it ought to be; that an account between Warner and Chase, upon the one side, and the trustee and the mortgagee, upon the other, might be taken; that the true amount owing be found; and that, if it was determined that Warner was justly indebted to the mortgagee in any amount, the lands should be sold again, and the proceeds of the sale applied to the payment of the costs of the suit and of the debt to the mortgagee; and that the balance, if any, be paid to the appellant, Chase. The trustee and mortgagee filed answers, which denied the equities of this bill. Replications followed, testimony was taken in the usual course, and on April 9, 1896, the case came on for final hearing. After that hearing, and on that day, the court rendered a decree that if the appellant would within 10 days give a bond, with proper securities, in the penal sum of \$1,000, conditioned that if, at the proposed sale of the mortgaged premises, there should not be a sufficient sum realized to pay the costs of the sale and of the proposed reference to the master, in addition to the amount that should be found due to the mortgagee, he would pay such costs and expenses, then the trustee's sales and deeds should be set aside, and the land should be sold on May 28, 1896, by a commissioner named in the decree; that, if the appellant did not make and file such a bond within the time fixed, his bill should be dismissed; that, if such bond was filed, John I.

Moore, as special master, should state the account between the parties; that in the statement of this account he should credit the mortgagee with the amount due him on the loan, with interest until December 1, 1896, with all taxes on the land which the mortgagee had paid, and with all money which the mortgagee had expended for permanent, beneficial, and necessary improvements thereon, and should charge him with the amount paid upon the debt of Warner, and with all the rents of the lands which he had collected, or which he should have collected, between January 1, 1893, and December 31, 1896; that the appellant should pay the costs of the sale and reference, if the lands did not realize an amount sufficient to pay the balance found due the mortgagee upon this accounting and these costs; and that the question regarding the costs which had accrued prior to this decree was reserved. The bond was filed. The lands were sold under the decree on May 28, 1896. The commissioner filed his report of sale on September 1, 1896; no exceptions were filed to it; and on December 8, 1896, the court ordered that the sale be confirmed; that the commissioner execute a deed to the purchaser, who was the mortgagee; that the purchase price be credited on the amount due him; and that the appellant pay the commissioner a fee of \$100, and the expenses of the sale. At this sale the land brought \$10,400. On November 28, 1896, the special master filed his report upon the accounting, by which he found the amount due to the mortgagee, under the decree, to be \$11,372.23; so that the land failed to realize an amount sufficient to pay the debt, by \$972.23. Chase filed exceptions to the report of the master, by the terms of which he challenged each provision of the decree of April 9, 1896, and of the order of confirmation of December 1, 1896, as well as the findings set down in the report of the master. On December 1, 1897, after a hearing upon these exceptions, the court below entered a decree that they were overruled; that the land did not bring an amount sufficient to pay the amount due to the mortgagee; that the appellees pay all the costs which had accrued in the suit prior to the rendition of the decree of April 9, 1896; that the master be allowed a fee of \$250 for his services; that the appellant and the surety on his bond pay the costs which accrued subsequent to the date of the decree of sale; and that the appellees have execution therefor. It is from this last decree, of December 1, 1897, that the appeal before us was taken. When this appeal was allowed, it was many months too late to take an appeal from the decree of sale, or from the order confirming it. So that we cannot consider or review that decree or order, unless they were interlocutory, and thus reviewable by reason of the appeal from the decree for an accounting. Rev. St. § 692; 26 Stat. c. 517, § 6; 1 Supp. Rev. St. (2d Ed.) p. 903; *Fourniquet v. Perkins*, 16 How. 82, 84.

It is often a vexatious and doubtful question what decrees and decisions are final, and what are interlocutory, within the meaning of these acts of congress. One who carefully examines the decisions of the supreme court upon this question cannot fail to be impressed with the truth of the remark made by Mr. Justice Brown in delivering the opinion of that court in *McGourkey v. Railway Co.*, 146 U.

S. 536, 545, 13 Sup. Ct. 172, when he said, "The cases, it must be conceded, are not altogether harmonious." Many of the decisions of that court are cited, and some of them are reviewed, in that opinion; and, while an examination of them discloses the fact that there are some decrees so close to the line of demarkation that it is difficult to place them, as in *Iron Co. v. Meeker*, 109 U. S. 183, 3 Sup. Ct. 111, and *Beebe v. Russell*, 19 How. 283, 286, yet there are many about which there can be little doubt. If the main purpose of the bill is to obtain an account between the parties, and a recovery of the balance that shall be found due, a decree that the complainant is entitled to the accounting, and that the case be referred to a master to state the account, is not final. *Latta v. Kilbourn*, 150 U. S. 524, 539, 14 Sup. Ct. 201. Decrees which establish the validity of mortgages, and direct the cases to stand over without ordering a sale, are interlocutory. *Railway Co. v. Simmons*, 123 U. S. 52, 8 Sup. Ct. 58; *Parsons v. Robinson*, 122 U. S. 112, 7 Sup. Ct. 1153. A decree of foreclosure and sale, which leaves the property to be sold unidentified, and the amount due undetermined, and refers the case to a master to point out the property and to fix the amount, is not a final decree. *Railroad Co. v. Swasey*, 23 Wall. 405, 410. The decisions of the supreme court in *Forgay v. Conrad*, 6 How. 204; *Thomson v. Dean*, 7 Wall. 342, 346; *Iron Co. v. Meeker*, 109 U. S. 183, 3 Sup. Ct. 111; and *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 Sup. Ct. 736,—upon the question whether or not a decree which sets aside conveyances, or directs defendants to convey and surrender property, or determines that the complainants are the owners of certain interests in property, and then refers the case to a master to state and report the accounts between the parties to the suit respecting the use of the property,—are difficult to reconcile with its decisions in *Perkins v. Fourniquet*, 6 How. 206, 208; *Craighead v. Wilson*, 18 How. 199; *Beebe v. Russell*, 19 How. 283, 286; and *McGourkey v. Railway Co.*, 146 U. S. 536, 550, 13 Sup. Ct. 170,—upon the same question. But a decree which orders a judicial sale of specific property, under which the title may pass beyond the control of the court, is final; and it cannot be reviewed, unless it is challenged by a direct appeal from it, although it contains a provision referring the case to a master to state the account between the parties preparatory to the application of the proceeds of the sale, and to the adjudication of the costs. *Ray v. Law*, 3 Cranch, 179; *Whiting v. Bank*, 13 Pet. 6; *Bronson v. Railroad Co.*, 2 Black, 524; *Michoud v. Girod*, 4 How. 502; *Sage v. Railroad Co.*, 96 U. S. 712, 714; *Bank v. Shedd*, 121 U. S. 74, 84, 85, 7 Sup. Ct. 807. And an order which absolutely confirms a sale under such a decree is equally final, and subject to review by a direct appeal from it. *Sage v. Railroad Co.*, 96 U. S. 712, 714; *Blossom v. Railroad Co.*, 1 Wall. 655; *Butterfield v. Usher*, 91 U. S. 246.

The rule announced by the decisions last cited is so indispensable to the protection of the rights of litigants, and of the purchasers at judicial sales, and to a wise and just administration of the law, that it ought not to be questioned. If decrees of sale and orders of confirmation were subject to review until the last decrees upon all the

accountings were entered, the uncertainty of the title to be obtained at the sales would deter parties from buying, so that fair prices could not be obtained until the final reports upon the last accounts were confirmed; and the courts would be compelled to sacrifice the property, or to withhold the decrees of sale until all the questions presented at the accountings were determined. The latter course would be impracticable and intolerable. It is often of paramount importance to the litigants that the property in controversy be converted into money, and that a perfect title to it be conveyed, years before the necessary accounting between the contestants is completed. This is almost invariably the case in the foreclosure of a mortgage upon a great railroad, and in the disposition of valuable property involved in litigation among numerous claimants. In *Bank v. Shedd*, 121 U. S. 74, 84, 85, 7 Sup. Ct. 807, the trustees under two mortgages, and some of the bondholders secured by one of them, were contesting the priority of their respective liens, and the amounts due on the mortgages were undetermined. The court entered a decree of foreclosure and sale, in which it reserved for future disposition all disputes and controversies between the trustees in the two mortgages and the bondholders as to the priority and amounts of their respective liens; and the supreme court held this to be a final decree. In view of this rule, and the authorities to which we have adverted, there seems to be little doubt as to the finality of the decree of April 9, 1896, and of the order of confirmation of December 1st in that year, in the case at bar. If the first decree had merely set aside the trust deeds, and referred the disputes to a master to state the accounts, it might have been merely interlocutory; but, when it went further,—directed a sale of the land on May 28, 1896, fixed the liabilities of the parties on the accounting, and referred the case to the master to state the account, in accordance with the decision, in case the bond should be filed, and dismissed the bill if it should not be filed within 10 days,—it fell under the unbroken line of decisions, and within the reason of the rule, that a decree of sale of specific property in a case in which such a sale is the main purpose of the suit is final, and reviewable only by an appeal which directly challenges it within the time fixed by the statute.

There are other considerations which lead to the same conclusion. A decree is final which terminates the litigation between the parties on the merits of the case, fixes their rights and liabilities, and leaves nothing to be done but to execute it, although the case may be referred to a master to state an account, or to determine questions incidental to its execution. *St. Louis, I. M. & S. Ry. Co. v. Southern Exp. Co.*, 108 U. S. 24, 29, 2 Sup. Ct. 6; *Bank v. Shedd*, 121 U. S. 74, 84, 85, 7 Sup. Ct. 807; *Hill v. Railroad Co.*, 140 U. S. 52, 54, 11 Sup. Ct. 690. This was a speculative bill, and the relief it prayed was that the court would try an experiment. The complainant admitted that the mortgagee was in possession of the property, and that the debt due him was just and unpaid. On well-settled principles, he had no right to the possession of the property until he redeemed it from the mortgage by paying the debt upon it. *Brobst*

v. Brock, 10 Wall. 519; Bryan v. Kales, 162 U. S. 411, 16 Sup. Ct. 802; Bryan v. Brasius, 162 U. S. 416, 16 Sup. Ct. 803. He made no offer to do this, but prayed that the court would set aside the trustee's deeds, and order another sale, to see if the property would not bring enough to pay the debt and give him a surplus. The pleadings raised no question concerning the basis of the accounting. The sole issue they presented was whether or not the deeds should be set aside, and the experiment of another sale should be tried. This issue was determined, a sale was ordered, and the basis of the accounting was fixed by the decree of April 9, 1896. It is true that the court did not determine the amount due on the debt before the sale, but it is also true that there was no occasion to determine it at that time. The mortgagee was not seeking the collection of his debt, or a sale to satisfy it. The owner of the equity of redemption was not seeking to pay it, or offering to redeem the lands from it. He sought the sale, and he sought it for the sole purpose of obtaining the surplus above the debt which he hoped the property might yield. The determination of the amount of the debt was only important to determine the amount of the surplus or of the deficiency; and that could not be determined until after the sale was made and confirmed, and the amount realized from it was found. The accounting referred to the master, therefore, was, in effect, the usual accounting, after a decree of foreclosure and sale, to determine the deficiency, if any; and it is common knowledge that a decree of sale is not reviewable upon an appeal from the subsequent judgment for a deficiency. This accounting was merely incidental to the decision upon the merits, and necessary to the execution of the decree. The decree of sale determined every issue raised by the pleadings, and granted the relief prayed by the bill. Moreover, this decree of April 9, 1896, was obtained, not at the suit of the appellees, but at that of the appellant. He it was who prayed for the decree, and who, when it was made, put it into execution. It was at his request, and for his benefit, against the protest of the appellees, that the decree and the sale were made. When the decree was entered, he had the option to refrain from filing his bond, and to appeal to this court for its reversal or modification, or to file his bond and accept the terms of the decree. He chose the latter alternative. He took the benefit of the sale offered him under the decree which he had sought, and it is too late for him now to escape from the terms prescribed or the burdens imposed thereby. One who accepts the benefits of a decree or judgment is thereby estopped from reviewing it, or from escaping from its burdens. Albright v. Oyster, 60 Fed. 644, 9 C. C. A. 173, 19 U. S. App. 651. "Parties to suits must act consistently. They will not be heard to complain of errors which they have themselves committed, or have induced the trial court to commit. Long v. Fox, 100 Ill. 43, 50; Nitche v. Earle, 117 Ind. 270, 275, 19 N. E. 749; Dunning v. West, 66 Ill. 366, 367; Noble v. Blount, 77 Mo. 235; Holmes v. Braidwood, 82 Mo. 610, 617; Price v. Town of Breckenridge, 92 Mo. 378, 387, 5 S. W. 20; Fairbanks v. Long, 91 Mo. 628, 633, 4 S. W. 499." Walton v. Railway Co., 56 Fed. 1006, 6 C. C. A. 223, and 12 U. S. App. 511, 513.

Our conclusion is that the decree of April 9, 1896, and the order of confirmation of December 1, 1896, were final decrees, and that they cannot be reviewed upon an appeal from the subsequent decree confirming the master's report upon the accounting, and adjudging the costs, because they direct and confirm a judicial sale of specific property upon a bill, the main purpose of which was to obtain such a sale, because the decree of April 9, 1896, terminated the litigation of the issues presented by the pleadings upon the merits, and referred nothing but the accounting to determine the surplus or deficiency resulting from the sale, which was merely incidental to the execution of the decree, and because the appellant procured, enforced, and took the benefit of, that decree, and is thereby estopped from challenging it. The result is that we are precluded from considering the errors assigned in the decree of sale and in the order of confirmation, and we proceed to a consideration of those alleged to exist in the decree upon the accounting.

It is contended that the mortgagee committed waste while he was in the possession of the property, and that some amount should have been charged against him on this account. There is testimony that some wood and timber were cut from the land, and that some dilapidated and uninhabitable cabins rotted down, burned, or were removed during the years 1893, 1894, 1895, and 1896; but the record contains no evidence sufficient to warrant a conclusion that the mortgagee or his tenants were guilty of committing waste. No more wood or timber seems to have been used than was necessary to construct and repair the necessary buildings, build fences, and furnish the firewood for the tenants upon the lands. The cabins which disappeared were not of sufficient value to warrant their preservation or repair.

When the mortgagee took possession of the land he leased it to one McGavock for a term of five years from January 1, 1893, for \$600 per annum, and on McGavock's covenant that he would put a substantial fence around the plantation, and that he would repair four old houses, and erect five new houses, on the premises. The mortgagee agreed to furnish the flooring for these houses. The evidence is that he did buy and furnish lumber for this purpose, at an expense of \$40. In the accounting the master charged the mortgagee with the rent collected under this lease, and credited him with this \$40. The decree of April 9, 1896, directed the master to charge the mortgagee with all the rents which he had collected, or should have collected, from, and to credit him with all money which he had expended for permanent, beneficial, and necessary improvements upon, the property prior to October 31, 1896. The master found that improvements of the value of \$2,500 had been made by McGavock under his lease, but that the mortgagee had expended only the \$40 which he paid for the lumber. He therefore declined to credit him with more than \$40 on account of the improvements, or to charge him with more than \$600 per annum on account of the rents. It is contended that the land could have been leased for \$1,250 per annum, and that the mortgagee should have been charged with \$6,250, instead of \$2,400, on account of these rents, and that he should not

have received credit for the \$40 he paid for the lumber. The credit of the \$40 was so clearly within the express terms of the decree that the objection to it is not worthy of consideration. The testimony upon the question of the rents the mortgagee could have collected from the land is voluminous and conflicting. Twenty witnesses testified upon this subject, and, as is usual in such cases, their estimates of the fair rental value of the property exhibited much variance. The mortgaged premises consisted of 400 acres of land. At the time the lease was made, 275 acres were cleared, and during the term of the lease McGavock cleared about 80 acres more. There was testimony that the use of some of this cleared land, when leased in tracts of from 5 to 40 acres, was worth \$5 per acre per annum, and that the mortgagee should have obtained at least \$4 per acre in each year for all the cleared land. On the other hand, several witnesses testified that the annual rental value of small tracts of farm land was from \$1 to \$2 per acre higher than that of farms comprising 200 or 300 acres, and that \$600 per annum, on the terms of the lease to McGavock, was a fair rental for these lands. When the lease was made, the fences and buildings were poor, and the improvements required by the lease were necessary to the rental or use of the property. Upon a consideration of all the testimony in the light of this fact, we have been forced to the conclusion that its preponderance is in favor of the finding of the master that Driver obtained all the rents the property was worth by his lease to McGavock. If this preponderance was doubtful, the lease itself, and the fact that the mortgagee made it in his own interest and for his own benefit, without fraud or fault, when he undoubtedly believed that he was the owner of the property, would be sufficient to turn the scales. There was no error, therefore, in the refusal of the master to charge the mortgagee with more than he actually collected on account of the rents of the mortgaged premises.

It is assigned as error that the fee of \$250 allowed the master who examined the case and stated the account was excessive, but a careful reading and consideration of the evidence and arguments of counsel upon the questions which were presented to him in the first instance have convinced us that this assignment is without merit.

Finally, it is insisted that the costs of the sale and of the retainer should not have been charged against the appellant, and that the decree that he and his surety on the bond shall pay them is erroneous. In support of this contention, it is urged that the court had no authority to require the bond as a condition for its decree, and that it is for that reason without force or effect. It was, however, the decree of April 9, 1896, which adjudged that the appellant should pay these costs; and the propriety of that adjudication is not here for review, for the reasons stated in the earlier part of this opinion. Whether or not the court below had the lawful authority to require the bond for these costs to be given is not now material, because, under the earlier decree, the appellant was required, and is bound, to pay them, regardless of the bond; and his surety, who is the only party upon whom an additional burden is laid by the decree of December 1, 1897, has neither appealed nor complained. For

these reasons, we shall not here enter upon a discussion of the authority of a court of equity to impose upon one who prays its aid such just and reasonable conditions as will require him who seeks equity to do equity. We cannot forbear to add, however, lest our silence should appear to indicate doubt, that in our opinion its jurisdiction and power to impose such conditions cannot be successfully questioned, and that, if the court below made any mistake in this case, it was not that it required the appellant to give bond to secure the costs of his experiment, but that it did not require him to secure the payment of the entire debt of the mortgagee, as well as the costs, before it exercised its power to direct the sale. The decree below is affirmed, with costs.

COMMERCIAL BANK OF LYNCHBURG v. RUFÉ et al.

(Circuit Court, W. D. Virginia. March 16, 1899.)

1. EQUITABLE ASSIGNMENTS—PRIORITY.

After the recovery of a judgment by a debtor he executed an irrevocable power of attorney, authorizing the grantee to collect the judgment and apply the proceeds in payment of the grantor's indebtedness to plaintiff bank, in pursuance of a previous oral agreement which he had made with the bank's officers. Prior to the execution of the power, and pending the suit, he, being also indebted to defendant, wrote numerous letters to him, in which he expressed his willingness to transfer the claim on which judgment was recovered to him, but no transfer was ever made, and defendant thereafter sued the debtor, and attached the claim in suit, making no claim of assignment. *Held*, that the letters, in the absence of evidence that defendant assented and acted on them, did not constitute an equitable assignment of the claim, and that plaintiff was entitled to the fund.

2. SAME—AGREEMENT BETWEEN ATTORNEYS.

An agreement between attorneys for a debtor prosecuting a suit in his favor and the attorney for the debtor's creditor, that any recovery should be for the creditor's benefit, does not constitute an assignment of the recovery to such creditor as against a prior assignee of the recovery from the debtor, who had no knowledge thereof, and was not a party to the agreement.

3. SAME—EFFECT.

An irrevocable power of attorney authorizing the grantee to collect a judgment, and apply its proceeds to the payment of the debt of the holder, and stipulating that it shall in no wise affect the conduct of the suit by the grantor's attorneys, vests an interest in the creditor in the funds ultimately to be recovered from the judgment, which is not impaired by the vacation thereof in a subsequent suit, but which at once attaches to another judgment in the debtor's favor subsequently recovered on such claim.

Harrison & Long, for plaintiff.

F. S. Kirkpatrick and B. T. Crump, for defendants.

PAUL, District Judge. This is a controversy between the plaintiff and the defendant Rufe over the disposition of the sum of \$4,000, unpaid balance of a judgment in favor of F. M. Threadgill against the United States Express Company. The record shows that in April, 1895, said F. M. Threadgill recovered in an action at law against the United States Express Company, in this court, at Lynchburg, a judgment for \$54,371. It further shows that this judgment was, in a chancery suit brought by said United States Express Com-

pany against F. M. Threadgill, set aside and annulled, on the ground of misconduct of the jury which rendered the verdict in said action at law, on which said judgment was entered, and that a new trial was ordered in said action at law; that, after a jury had been impaneled in said new trial, and after considerable testimony had been taken, a compromise verdict was agreed upon by the parties, and a judgment entered thereon for the sum of \$6,000 in favor of the plaintiff. Of this sum \$2,000 was paid by said express company to the counsel of Threadgill in satisfaction of their fee in the case. It further appears that said Threadgill, at the time said judgment was entered on said consent verdict, was, and had been for several years, certainly as far back as February 9, 1893, indebted to the defendant Rufe in a large amount—about \$30,000—for cigars purchased, the greater part of which had by Threadgill been shipped, through the United States Express Company, to numerous parties, in many localities in the United States, and which contract of shipment gave rise to the suit at law between Threadgill and the express company. At the time the compromise verdict was agreed upon and judgment entered thereon for \$6,000, said Threadgill was indebted to the plaintiff, the Commercial Bank of Lynchburg, in the sum of \$8,259. The evidence does not show when this indebtedness originated, but shows that April 1, 1895, the amount due the bank by Threadgill was \$7,420. On the 22d day of January, 1897, said F. M. Threadgill executed, at the request of the attorney for the plaintiff, the following power of attorney:

"Know all men by these presents that the undersigned, F. M. Threadgill, hereby constitutes and appoints Charles M. Blackford his attorney in fact as well as in law, to collect from the United States Express Company the amount of a judgment in his favor obtained at the April term, 1895, of the circuit court of the United States for the Western district of Virginia, in a suit wherein he was plaintiff and Thos. C. Platt, etc., was defendant, and the amount of which judgment is \$54,371, with interest from the 27th day of April, 1894. This power of attorney shall be irrevocable. It shall be the duty of the said Chas. M. Blackford, upon collecting the said judgment, or so much thereof as may be collectible, after paying the late firm of Kirkpatrick and Blackford their fee, as per written contract with said Threadgill under date January 8, 1896, to pay to the Commercial Bank of Lynchburg the sum of \$8,259, with interest thereon from the 9th day of February, 1897, and also to pay to the said bank any sum which the said bank may at the time of such payment have paid out by way of premium on sundry policies of insurance upon the life of the said Threadgill, held by the said bank under an assignment made by him and wife to the said bank on the 18th day of May, 1896, with any interest that may have accrued thereon. But it is distinctly understood that this assignment shall in no wise control or affect the judgment of the said Kirkpatrick and Blackford in the management of the said cause, and they shall have the same power to compromise the same which they had before this assignment was made. Given under my hand and seal this 22d day of January, 1897.

F. M. Threadgill. [Seal.]

"State of Virginia, City of Lynchburg, to wit: I, R. C. Blackford, a notary public in and for the city and state aforesaid, do certify that F. M. Threadgill, whose name is signed to the writing above, bearing date the 22d day of January, 1897, personally appeared before me in my city aforesaid, in the state of Virginia, and acknowledged the same to be his act. Given under my hand this 22d day of January, 1897.

R. C. Blackford, Notary Public."

Both parties to this controversy assert they are assignees of Threadgill of so much of his claim against the United States Ex-

press Company as may be necessary for the satisfaction of their respective debts. There not being enough in the recovery of \$6,000, after payment of attorney's fees, to satisfy both or either of the claims, the question to be determined on the evidence is, which has an assignment covering the said sum of \$4,000 in controversy, and, if both have assignments covering this fund, which has priority in point of time? The discussion of this question must be confined to the period anterior to and including the date of the power of attorney of January 22, 1897, executed by Threadgill in favor of the plaintiff. Some evidence has been taken, and considerable discussion had, as to what occurred in the court room between an attorney present in Rufe's interest and the counsel for Threadgill, at the time the compromise verdict was rendered, as to the terms of the compromise. Counsel for Rufe insists that it was understood between the attorney then present and representing Rufe and the attorneys for Threadgill that whatever was realized on the compromise after paying the attorney's fee should go to Rufe on his claim against Threadgill. Whatever this understanding was is of no importance in the decision of this cause, unless it were based on an agreement made before the execution of the power of attorney from Threadgill to Blackford. This requires an examination of the evidence on which the plaintiff and the defendant, respectively, base their contracts of assignment.

In addition to the power of attorney from Threadgill to Blackford, the plaintiff has taken the testimony of several witnesses to prove that, several years before the execution of said power of attorney, Threadgill, by a verbal agreement, assigned to the plaintiff an interest in his claim against the express company for the payment of his debt due the bank, and that the execution of the power of attorney to Blackford on the 22d of January, 1897, was for the purpose of carrying into effect the previous verbal contract. On this point the court will quote from the depositions of several witnesses introduced by the plaintiff.

William A. O'Brien, a director of the bank, and for four or five years chairman of its finance committee, testifies:

"Q. 2. It appears from a paper writing executed by F. M. Threadgill, dated January 22, 1897, that he was indebted to the Commercial Bank, as of that date, in the sum of \$8,259. Please state whether or not it comes within your knowledge that any agreement or contract was made between said Threadgill and the Commercial Bank prior to the 22d of January, 1897, under or by virtue of which the said bank acquired an interest in the claim which the said Threadgill was asserting against the United States Express Company, to the extent of his indebtedness to the bank. If so, state fully what it was, and the circumstances connected with it. A. I knew of his indebtedness all along, before Mr. Withers became cashier. He had borrowed a portion of that money from Mr. Jas. F. Kinnier, the former cashier (in fact, all of it was borrowed before Mr. Withers became cashier). During the litigation in that case, Mr. Kinnier, in consideration of Mr. Threadgill's agreeing to pay him all of that money, advanced more money, in order that he might carry on that suit against the express company. Q. 3. Did you or not, as the chairman of the finance committee of the bank, have any interviews with Mr. Threadgill in relation to that subject? If so, state how frequently, and what was said. My question now relates to the time prior to January 22, 1897. A. I could not say how many interviews. I had various conversations with him; half a dozen, possibly, or more; and he agreed in all these conversations that,

after the counsel were paid, we should have our money out of the money from the express company, and the paper that he signed was simply carrying out the contract that we already had with him, and it was so regarded."

Samuel T. Withers, who became cashier of the Commercial Bank in January, 1895, testifies:

"Q. 4. Please state whether it comes within your knowledge, as an official of the Commercial Bank, that prior to January 22, 1897, any agreement existed between F. M. Threadgill and the bank for the payment of Threadgill's indebtedness to the bank out of any recovery he might make on his claim against the United States Express Company, after the payment of fees to Threadgill's counsel. If so, state what it was, and the circumstances connected therewith. A. There was a distinct understanding with Mr. Threadgill, in regard to his indebtedness to the bank, that the bank should have an interest in any money recovered from the express company after his counsel's fees were paid; that we should have the first money after the counsel's fees were paid. I had repeated conversations with Mr. Threadgill on that point, and he assured me on his word as a Christian gentleman that nothing could prevent the bank from getting that money, if any part of it was recovered from the express company. I so stated these facts to the board, and Mr. Threadgill stated this proposition in the presence of a part of the finance committee,—Mr. O'Brien, the chairman of that committee,—that the bank's interest in any money should be to the full extent of the bank's debt against Mr. Threadgill. Q. 5. It appears that a paper writing was signed by Mr. Threadgill, dated the 22d January, 1897. Did you have any interviews with Mr. Threadgill in reference to his signing that paper, and, if so, in whose presence, and what was said? A. I had several interviews with Mr. Threadgill in regard to his signing this paper. He had repeatedly agreed to do it, carrying out his verbal contract with the bank, and this paper was signed, or rather read and agreed to, in the presence of Maj. Kirkpatrick and Mr. Sydnor Kirkpatrick, in their office. Threadgill and myself were present, and I think Mr. Edmunds was also present. During this conversation Maj. Kirkpatrick did everything he could to prevent Mr. Threadgill from signing this paper writing, urged him not to do it, and was very indignant when Mr. Threadgill announced in their presence that he had pledged his word as a Christian gentleman to carry out his verbal contract with the bank when called on to do so, and that, whether it ruined Mr. Rufe or himself, or the express company, or anybody else, he was going to carry out his pledge to the bank; and he did sign the paper in the adjoining office, before R. C. Blackford, a notary public, in my presence. * * * After I became cashier, Mr. Threadgill, I suppose at least fifty times, promised and pledged, and repeatedly did so, that he would give the bank an interest in this claim; he considered they had an interest in it; that they had helped him to carry on his business by not taking judgment, and helped him to carry on this suit, and he said that he appreciated this fully, and intended the bank not to lose a cent if he ever recovered anything from this express company, and said he would issue this paper to that effect, carrying out his verbal contract, whenever I called on him to do so; and before I severed my connection with the bank I called on him to do so."

James E. Edmunds, attorney for the plaintiff bank, and one of its directors, says:

"Q. 3. Please state whether you have any knowledge of a contract or agreement between F. M. Threadgill and the Commercial Bank, prior to January 22, 1897, in relation to securing a debt due by Threadgill to the Commercial Bank; and, if so, state what it was, and the circumstances connected with it. A. F. M. Threadgill was indebted to the Commercial Bank in a large sum of money, which fact was frequently discussed before our board of directors. Threadgill represented to the bank that it could not lose anything by him, because of all of his property it should have the first advantage; that he felt under the deepest obligations to the bank for the kindness which it had extended to him, and that the bank could have a deed to any or all of his property when it wished it. He stated that the bank had been carrying him for a long time,

which had enabled him to carry on his business, and his family to live, and for that reason his first obligation was to it."

To sustain the contention of the defendant Rufe that he is the assignee of Threadgill of an interest in the claim of the latter against the express company, which gives his debt priority over that of the plaintiff, and establishes his right to the fund of \$4,000 in controversy, a number of letters from Threadgill and his counsel to Rufe are filed as evidence. The material and relevant parts of these letters are quoted in the brief of counsel for the defendant, and it is chiefly these extracts that are relied upon as constituting the contract of assignment between Threadgill and Rufe, and as establishing the fact that such assignment was prior to that from Threadgill to the plaintiff. The first of these extracts is from a letter of Threadgill to Rufe, February 9, 1893:

"My account against the two companies amounts to over \$62,000. I have worked hard for the past five years, as you know, and I feel confident I will in time succeed; but I would to-day give it all for a receipt in full of what I owe you. No one can appreciate more than myself your kindness and confidence."

June 1, 1893, Threadgill wrote to Rufe:

"On account of my indebtedness to you, I have borne with them [the express companies], and tried to prevail on them to do, until patience has ceased to be a virtue. I have filed account against the U. S. Express Co. for \$54,480.50 for goods now held by them."

March 21, 1894, Threadgill writes to Rufe:

"And I would be glad if you would come down, and understand matters fully. Your doing so would greatly relieve my mind, and, I trust, increase your faith in getting your money, with interest, by continued patience. But for the fact that I owe you, the suit would not trouble me near so much. I can't express to you my appreciation of your patience, and I trust you may never have cause to regret it."

May 12, 1894, one of the attorneys for Threadgill wrote to Rufe:

"From the beginning, Mr. Threadgill has informed us that whatever was recovered in these cases was for your benefit, and we feel that we may say with great certainty that it will be so applied. * * * As far as we know, Mr. Threadgill owes nothing in Lynchburg, and, we presume, owes nothing to any one but you; and we believe your debt will be paid even should we fail in recovering anything from these suits, which we deem impossible, as he is now industriously and successfully engaged in business, and all his energy is put out, in our judgment, solely for the purpose of paying your debt, which seems to prey upon him to an extent which is refreshingly honest."

July 4, 1894, Threadgill writes to Rufe, and it appears from this letter that Rufe had threatened to commence legal proceedings to enforce his claim, which letter, Threadgill writes to Rufe, is a surprise, and says:

"I believe that I will collect my money, though it may be one year or two, I can't say; but with it all I have tried to live right up to my agreement with you, and only wish it was so I could pay you in full. * * * I am willing to transfer claims against Express Co. to you, or do anything in my power to settle with you in full."

August 1, 1894, Threadgill writes to Rufe:

"And I will give you written order to my attorneys to pay over to you, on receipt of same, any and all money received from either of the Express Cos.

against which I now have suits pending, until sufficient amount has been paid you to pay all that I owe you."

The last letter from Threadgill to Rufe, on which counsel for the defendant rely as showing an assignment to Rufe, was written April 18, 1895. In this letter Threadgill says:

"It would not take long to come to terms. If they [referring to the express company] will pay your paper, and ten thousand dollars in addition to my indebtedness to you, I think now I would accept it. You have been so patient and kind, I feel that I would be willing to make any sacrifice in reason to pay you."

September 23, 1896, during the pendency of the chancery suit to set aside the judgment recovered by Threadgill April, 1895, against the United States Express Company, and pending the appeal from that judgment in the supreme court, Mr. Kirkpatrick, one of Threadgill's attorneys, wrote to Stevens & Stevens, attorneys for Rufe, as follows:

"So that, as matters now stand, Mr. Rufe, whose chief security rests upon the realization of Threadgill's claim, stands in danger of losing fully two-thirds of his claim, and the one-third that may certainly or reasonably be looked for will be postponed for a long time to come. Under these circumstances we think he should, by some means or other, secure a settlement by compromise between the express company and Threadgill."

The foregoing extracts from the letters of Threadgill and his attorneys to Rufe and his attorneys, it is contended by counsel for the defendant, establish an equitable assignment by Threadgill to Rufe of an interest in Threadgill's claim against the express company. It is further insisted that this assignment is prior in time to that of Threadgill to the plaintiff. If the propositions made in these letters from Threadgill to Rufe had been accepted by the latter, and acted upon by him, the contract of assignment would have been concluded. But the proposals of Threadgill to Rufe to transfer claims against the express companies, or to do anything in his power to settle with Rufe, and to give a written order on his attorneys to pay over to Rufe any and all money received from either of the express companies against which he had suits pending, until sufficient had been paid to Rufe to satisfy his claim against Threadgill, were not accepted. So far from either of these offers being accepted by Rufe, the evidence shows that he had, prior to the time of the compromise verdict rendered for \$6,000, instituted attachment proceedings in the state of New York to recover his debt against Threadgill, and served process of attachment on the United States Express Company. Threadgill, in his answer filed in this cause, does not claim that there was a contract of assignment between himself and Rufe. He confines the agreement to assign to Rufe to what occurred at the trial in which the compromise verdict was rendered for \$6,000. He asks that his agreement with Rufe's counsel that, after payment of fees of Threadgill's attorneys, the balance of the sum of \$6,000 should go to Rufe in full satisfaction of Threadgill's indebtedness to Rufe, be enforced. The plaintiff was not a party to this agreement, and cannot be affected by the understanding between counsel for Threadgill and the attorney looking after the interest of Rufe. Rufe, in his answer to the bill, claims that the action of Threadgill against

the United States Express Company was for his use and benefit, and that this is shown by the written communications of Threadgill and his counsel. Extracts from these letters have been quoted. There is no evidence to sustain the claim that the action was for the benefit of Rufe. It is shown that counsel for Threadgill did not represent Rufe. The evidence fails to show that he contributed in any way to the costs of conducting the suit, by employing counsel or otherwise. Neither the deposition of Rufe nor that of Threadgill has been taken in the cause. If such contract of assignment as is now contended for was made between Threadgill and Rufe prior to the assignment to the plaintiff by the power of attorney of January 22, 1897, an effort, at least, it seems to the court, would have been made to establish it by the testimony of the parties to such agreement, both of whom are competent witnesses.

The court is asked to decide that a proposition by a debtor to his creditor to assign him a claim or an interest therein, asserted against a third party, constitutes an equitable assignment from the debtor to the creditor, without the assent or concurrence of the latter. This proposition cannot be sustained. No authority is cited in support of it, nor does the court think any can be found to uphold it. An assignment does not differ in its essential elements from any other contract. There must be persons competent to contract, a valuable consideration, a legal subject-matter, and mutual assent of the contracting parties. No contract is raised by a mere overture or offer to enter into an agreement not definitely and expressly assented to by both parties. Chit. Cont. (10th Ed.) 8. The doctrine is thus stated in 1 Poth. Obl. pt. 1, c. 1, § 1, art. 2:

"Now, as I cannot, by the mere act of my own mind, transfer to another a right in my goods without a concurrent intention on his part to accept them, neither can I, by my promise, confer a right against my person until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right."

As we have seen, Rufe bases his claim of an equitable assignment from Threadgill on the extracts from the letters as quoted, while Threadgill bases it on the agreement of compromise made between Threadgill's counsel and the counsel for the express company, to which, it is claimed, Rufe, by his attorney, was a party. The mere statement of these distinct contentions shows the absence of any contract or agreement that can amount to an equitable assignment. It shows that Threadgill never, in his correspondence with Rufe, abandoned his control of his claim against the express company. Mr. Blackford (Threadgill's counsel) on September 21, 1897, wrote to Rufe's counsel:

"He [Threadgill] still seems unwilling to give any assignment which will give Mr. Rufe any priority should the claim be collected, or any part thereof."

In *Christmas v. Russell*, 14 Wall. 69, the supreme court says:

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. A covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund,—any au-

thority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor."

Clearly, Rufe was not invested by an equitable assignment with such an interest in the claim of Threadgill as would have enabled him in his own right to enforce payment of the same to himself by the express company, though the company had been forbidden to do so by Threadgill. It is not so claimed by counsel for Rufe.

A further defense asserted to the right of the plaintiff to a lien on the fund of \$4,000 is that the power of attorney authorizes Blackford to collect and pay over to the Commercial Bank the sum of \$8,259 out of a judgment for \$54,371 recovered by Threadgill against the express company. It is claimed that this confers authority on Blackford to collect money out of a judgment, and that, when the judgment was set aside, there was nothing out of which the money could be collected; that it was not an assignment of the cause of action or right of action, or of the claim on which the judgment was based, but of a fund to be collected out of a judgment. The following provision of the power of attorney to Blackford is relied on to sustain this contention:

"But it is distinctly understood that this assignment shall in no wise control or affect the judgment of said Kirkpatrick and Blackford in the management of the said cause, and they shall have the same power to compromise the same which they had before this assignment was made."

The evidence shows that the judgment against the express company was then in jeopardy, and the necessity of a compromise was being discussed. There is nothing in the evidence to justify the court in saying that this provision in the contract authorized the counsel for Threadgill to defeat by a compromise the interest of the Commercial Bank in the fund represented by the judgment, and transfer that interest to Rufe. The power of attorney given to Blackford vested an interest in the plaintiff in the fund due from the express company to Threadgill, and is, by its terms, irrevocable.

In 2 Black, Judgm. § 947, it is said:

"Where a plaintiff in a judgment gives to a creditor an order on his attorney to pay him the money collected by the attorney on the judgment, which order the creditor delivers to the attorney, it creates an equitable assignment of, and lien on, the proceeds of the judgment, and the attorney holds the same in trust for the creditor, and such assignment cannot be revoked by the judgment plaintiff."

That this is an assignment of a part only of a judgment does not change the principle. Insurance Co. v. Glover, 9 Fed. 529. The position of counsel for Rufe that, when the judgment was set aside, there was nothing out of which the plaintiff could collect its money, or that could pass by the assignment, is not sustained by the authorities. The doctrine is stated as follows in 2 Black, Judgm. § 948:

"At common law the assignment of a judgment does not vest the legal title in the assignee. That remains in the judgment creditor, subject to the equitable rights of the assignee. But the cases generally agree that the assignment carries with it the debt or claim on which the judgment was based, and the right to stand in the creditor's place as regards the means of its col-

lection and enforcement, together with any incidental rights or advantages existing at the time, such as the benefit of an appeal bond. And the assignee's rights are not affected by the fact that the consideration was less than the face of the judgment."

In *George v. Tate*, 102 U. S. 564, the supreme court held that the assignment of a judgment carried with it the assignment of the bond on which the judgment was founded.

In *Freem. Judgm.* (Ed. 1886) § 431, the doctrine is thus stated:

"The assignment of a judgment which was void because in excess of the jurisdiction of the court has been held to transfer the debt for which the judgment was entered. And it seems that the assignment of a judgment necessarily carries with it the cause of action on which it was based, together with all the beneficial interest of the assignor in the judgment, and all its incidents."

The effect of the assignment of a judgment on the debt or claim on which it was based was considered in *Pattison v. Hull*, 9 Cow. 747. The court says:

"The assignment of a judgment necessarily carries the debt. Nor is it possible to separate them. The judgment would be barren. Nor can we conceive of its existence without the debt. I must, therefore, hold the debt to be directly assigned in this case; and all the effects must follow which the law attaches to an assignment of that character."

In *Bolen v. Crosby*, 49 N. Y. 183, the court thus states the doctrine:

"The assignment of the judgment carried with it the claim and debt upon which it was founded, and all claims against others as collateral and incident to it. By whatever terms the assignment was made, the debt, as the principal thing, passed, and with it all rights and remedies for its recovery and collection. The capacity of the plaintiff to sue, and his right to all the remedies which his assignor could have had, are perfect. The right to the debt as evidenced by the judgment against an insolvent corporation and the right to recover the same debt from the defendants upon their personal liability cannot exist in the hands of different persons. The assignment of the judgment necessarily carries the debt. They are inseparable."

In *Bank v. Loomis (Iowa)* 69 N. W. 444, a well-considered case, the court said:

"It is the general rule that the assignment of a judgment necessarily carries with it the cause of action on which it is based, together with all the beneficial interest of the assignor in the judgment, and all its incidents."

The court holds that there was no contract between Threadgill and Rufe of an equitable assignment of the whole or of a part of the claim of Threadgill against the express company prior to the 22d of January, 1897; that the power of attorney of that date from Threadgill to Blackford was an assignment from said Threadgill to the plaintiff of said Threadgill's claim against said express company for the sum of \$8,259; and as the recovery of said Threadgill against the said express company, after deducting the fee of the attorneys of said Threadgill, was for the sum of \$4,000, the plaintiff is entitled to that sum, being the amount in controversy. A decree will be entered accordingly.

RICHARDS v. HALIDAY et al.

(Circuit Court, D. New Jersey. March 6, 1899.)

1. CORPORATIONS—INSOLVENCY—FRAUDULENT CONVEYANCE.

Where a corporation was a going concern at the time it executed a conveyance to secure certain creditors, evidence that at that time it had not sufficient cash to meet its matured obligations is not sufficient to show that it was insolvent, so as to render the conveyance fraudulent as to creditors.

2. SAME—DIRECTORS—TRUSTEES FOR CREDITORS.

Directors of an insolvent corporation are trustees for its general creditors, and hence a mortgage by a corporation to directors by which a preference would be created in their favor over general creditors is invalid.

3. SAME—MORTGAGE TO DIRECTOR—RECEIVER'S SALE—EFFECT.

Where a receiver of an insolvent corporation took no steps to have a mortgage of its assets to a director declared void as an illegal preference, but sold such assets subject thereto, the lien of the mortgage is not divested by the sale.

4. SAME—PURCHASER'S RIGHT TO VACATE.

Where, by a receiver's sale of a corporation's assets subject to a mortgage in favor of a director, general creditors of the corporation were deprived of their right to receive any part of the fund which would follow the invalidating of such mortgage as a preferential conveyance in fraud of creditors, the purchaser at a sale who was also an officer of the corporation has no standing in equity to maintain a suit to set it aside.

5. SAME—JUDGMENT CREDITORS—SUBROGATION.

Where judgment creditors of a corporation permit a receiver's sale of its assets subject to a mortgage to a director, creating fraudulent preferences, to be confirmed without objection, they have no rights, as against the mortgagee, to which the purchaser at the sale could be subrogated under an assignment of their claims.

Joseph D. Gallagher, for complainant.

Frederick W. Ward, for defendants.

KIRKPATRICK, District Judge. In April, 1893, the National Time-Stamp Company was, under proceedings begun in the court of chancery of New Jersey, declared to be insolvent, and Chauncey G. Parker, Esq., was appointed receiver. He duly qualified, and entered upon the duties of his office. By a decree of the said court of chancery, the said receiver sold, at public sale, all of the assets of the said company, "subject to all chattel mortgages, judgments, and other liens thereon, subject to confirmation by the chancellor." At such sale, Willard Richards, the complainant herein, was the purchaser, for the sum of \$1,000. The sale was reported to the chancellor, and by him confirmed. It appears, from the agreed state of the case, that the said Richards, at and before the time of said sale, had actual notice of the existence of the mortgage given by said company to Frank H. Haliday, recorded in the office of the register of the county of Essex on October 22, 1892, and that said mortgage was claimed to be a lien on said property, and that, at the time of its execution, Haliday was an officer and director in the company. It also appears, from the record, that in August, 1892, the National Time-Stamp Company made its certain promissory notes, which were indorsed by the complainant, Richards, and discounted by certain banks, for the purpose of raising funds with which to pay creditors of the corporation, and among them the complainant, Richards, who was then the pres-

ident of the corporation, and the defendant Haliday, its treasurer. When these notes matured, they were paid by the complainant, Richards, and afterwards suit was brought against the company in the name of the banks by whom they had been discounted, and judgment entered thereon. To these suits the complainant was not a party. The sale of the company's property by the receiver was made expressly subject to the lien of these judgments, as has been stated. The bill of complaint in this cause is now filed by Willard Richards, the purchaser at the receiver's sale, to set aside, upon the grounds that, at the time of its execution, the corporation was insolvent; that it was given to Haliday, who was a director in the company, for the purpose of securing an antecedent debt. The questions for the determination of the court are whether, under the circumstances, as shown by the record, the complainant, Richards, either as the purchaser at the receiver's sale or as the indorser of the company's notes, upon which judgment has been obtained by the banks, is entitled to have the Haliday mortgage declared void as against him, and Haliday and his assigns enjoined from taking possession of the goods described therein, or interfering with Richards' possession of same on account of said mortgage. The evidence in the case fails to satisfy me that, at the time of the authorization and execution of the mortgage, the company was insolvent; that its assets were not equal in value to the amount of its debts. True, it had not in hand sufficient cash to meet its matured obligations, but that by no means demonstrates that, to a going concern, its assets would not have been worth much more than its debts. The witness on the part of the complainant who testifies to the insolvency of the corporation as of November 14, 1892, admits that he took no account of the value of the machinery belonging to the company, nor of its tools, fixtures, stock on hand and in process of manufacture, nor of its book accounts or patents. All of these were entitled to be considered in determining the solvency of the corporation. *Atlantic Trust Co. v. Consolidated Electric Storage Co.*, 49 N. J. Eq. 402, 23 Atl. 934. The book accounts alone amounted to upward of \$3,000. That nothing was collected from them by the receiver months afterwards, when the company was known to have suspended business, is no index of their value to a going concern. It may, however, be admitted that the company was insolvent, and that the purpose of the directors in authorizing the execution of the Haliday mortgage was to prefer the claim of Haliday,—one of themselves; but it does not necessarily follow that the effect of such intent was to render the mortgage void. *Savage v. Miller*, 56 N. J. Eq. 432, 39 Atl. 665. As between the director who took, and the company which gave, it, the mortgage was undoubtedly void. *Jones, Mortg.* § 630. It is well settled that directors of a corporation are trustees for the general creditors, in cases of insolvency, and may not prefer one above another, nor be permitted to make any disposition of the company's property by which a preference would be created in their own favor or for their own benefit, as against the general creditors. A court of equity will not suffer them to take advantage of their positions as trustees, to so manage the corporate property as to secure for them-

selves a personal advantage, to the damage of the general creditors, but will see to it that the assets shall be distributed ratably among them all. This right of all the creditors to an equal distribution of the corporate assets is the underlying principle actuating the courts in setting aside preferences obtained by those whose position of trust required that they should not "convert their powers of management, and their intimate knowledge of corporate affairs, into means of self-protection, to the harm of the other creditors." Equal distribution of assets among all the creditors is the result sought to be accomplished in all the cases, whether it be *Rickerson Rolling-Mill Co. v. Farrell Foundry & Mach. Co.*, 23 C. C. A. 302, 75 Fed. 554, where the right of the directors to prefer their own debt is recognized, but where, under the circumstances of the case, the deed was set aside for fraud, or whether it be *Consolidated Tank-Line Co. v. Kansas City Varnish Co.*, 45 Fed. 7, where the right to give preference was denied, and in which, on a bill filed in behalf of all the creditors, the decree directed that a deed of trust, which had been executed for the benefit of creditors who had been acting in a fiduciary capacity, be set aside, and the proceeds of the property paid a receiver, in order that they might be distributed ratably among all creditors. The case at bar does not embody this principle of equal distribution among all the creditors. The bill is filed for the benefit of the complainant alone, and not on behalf of the general creditors of the company. They can derive no benefit therefrom. All of the corporate property covered by defendants' mortgage has been sold by the receiver, and the proceeds distributed. The receiver took title subject to all the equities which rested upon the property in the hands of the debtor (*Kane v. Lodor* [N. J. Ch.] 38 Atl. 966), and sold only the interest he had in it (Beach, Rec. § 783); and while, as the representative of the general creditors, he might have applied to a court of equity to declare the Haliday mortgage invalid as against those whom he represented, he did not do so, and the lien of the mortgage was not devested by the receiver's sale. By this sale, made expressly subject to the Haliday mortgage, the general creditors of the corporation, for whose benefit alone the courts could be called upon to interfere, were deprived of their right to receive that equal distribution of the property of the corporation which would follow the setting aside of the preferential mortgage. The value of the property offered for sale, expressly subject to the lien of the mortgage, was depreciated by the amount of the same. Intending purchasers were deterred from bidding at the sale, and, in consequence, the property realized a less sum to the receiver. Then, too, the purchaser, the complainant herein, bought expressly subject to the defendants' mortgage. He acquired no better title to the property than the corporation itself possessed, and is therefore no more entitled to set aside the mortgage than the company itself would be. In buying subject to the mortgage, the complainant got the property for so much less that he would have been obliged to pay had it been sold freed from the incumbrance; and, for the same reason, the receiver of the corporation obtained a smaller sum for distribution among the creditors. If this mortgage be now

set aside, it is obvious that the purchaser will be allowed to violate one of the accepted conditions of the sale, in order that he may retain money which does not of right belong to him, and for which he has given no consideration. In my opinion, such an unfair position cannot be successfully maintained in a court of equity. It is urged, on behalf of the complainant, that he is entitled to be subrogated to the rights of the banks who obtained, as has been stated, judgments against the corporation. This may well be doubted, under the circumstances; but, if so, what rights against Haliday, have the plaintiffs in such suits at this time? What advantage can accrue to them by setting aside the Haliday mortgage? Before the sale of the company's assets, they might have interposed, for their own benefit, and that of all the creditors of the company, to have declared invalid the preference given to Haliday. This, however, they did not do. They stood idly by, and permitted the sale to be made expressly subject to the mortgage lien, whereby the price was greatly lessened. There is now nothing to be done by them to remedy this error, and enhance the value of the assets for the benefit either of themselves or the general creditor. To set aside, at this time, the defendants' mortgage, would not add one penny to the company's distributable assets, nor to that extent advantage a single one of the company's creditors. On the contrary, it would but swell the amount of unsecured claims, and render smaller the dividend which each creditor would be entitled to get from the receiver. The rights of these judgment creditors have been allowed to slip away, and none remain to which the complainant, for the purposes of this suit, can be subrogated. Neither as purchaser at the receiver's sale, nor as successor to the rights of a portion of the judgment creditors, is the complainant entitled to the relief for which he prays. Having come to the conclusion that the complainant has no equitable ground of relief against the defendant Haliday, it follows, of course, that he can have none against Haliday's assignees. The bill will be dismissed, with costs.

**COLUMBIA AVE. SAVING-FUND, SAFE-DEPOSIT, TITLE & TRUST CO.
OF PHILADELPHIA v. PRISON COMMISSION OF GEORGIA et al.**

(Circuit Court, W. D. Georgia. February 28, 1899.)

1. NUISANCE— POLLUTION OF WATERS OF A STREAM—RIGHT TO INJUNCTION.

To entitle a water company, using water from a stream to supply the inhabitants of a city, to an injunction to restrain another riparian owner above from a contemplated use of his property, otherwise legitimate, on the ground that it will create a nuisance, by pollution of the waters of the stream, it must be made to appear with practical certainty that such result will follow, and will cause substantial injury to the plaintiff, or detriment to the public using the water.

2. SAME—EVIDENCE CONSIDERED—ENJOINING ERECTION OF PUBLIC BUILDINGS.

Defendants, the prison commissioners of the state of Georgia, contemplated the erection of prison buildings and a hospital for state prisoners on a farm situated on Fishing creek, from which stream, lower down, the complainant obtained the water which it supplied to the inhabitants of the city of Milledgeville. None of the contemplated buildings were to be nearer to the stream than one-eighth of a mile, and the intervening land

was to be cultivated. No sewer or stream was to be conducted from the buildings to the creek. *Held*, that such facts did not authorize a court of equity to enjoin the contemplated use of the property on the ground that the water supply of the complainant would be thereby contaminated; it not appearing that such contamination would necessarily result, and the presumption being that the defendants, as public officers, would take all necessary or proper measures to prevent it.

This was a suit in equity by the Columbia Avenue Saving-Fund, Safe-Deposit, Title & Trust Company of Philadelphia against the prison commission of Georgia, the city of Milledgeville, and others, for an injunction against a threatened public nuisance.

Hall & Wimberly and Marion Erwin Roberts, for plaintiff.

Jos. M. Terrell, Atty. Gen. of Georgia, and J. T. Allen, City Atty. of Milledgeville, for defendants.

SPEER, District Judge. To entitle the plaintiff to the relief it seeks against the prison commission of Georgia, it must demonstrate by a preponderance of evidence that the structures proposed by the state, and the uses for which they are intended, will pollute the stream from which the water supply of Milledgeville is obtained. The burden of proof is upon the plaintiff in this, as in all cases. If the evidence indicates that a polluting stream, or infectious matter, would assuredly be commingled with the waters of Fishing creek above the intake of the plaintiff's works, in view of the expert testimony and the scientific authorities quoted the plaintiff would have made a *prima facie* demonstration, supporting its right to the injunction. In that event the defendant, the prison commission, would be under the necessity of producing evidence to satisfy the court that no injury would ensue to the plaintiff or to the public from such contamination. In other words, some actual or practically certain invasion of the rights of the riparian proprietor or user of the water must appear, before the court will be justified in denying to an adjacent landowner the use, otherwise legitimate, of his property. The citations of authority, accumulated by the assiduity of the plaintiff's solicitors, were perhaps not needed to inform the court that the distinct and continuous pollution of water by a riparian proprietor is a private, and may be a public, nuisance, which equity may enjoin. That nuisance was early defined. The riparian proprietor may not erect upon the banks of the stream any works which render the water unwholesome or offensive. A glover, we find from the Year Books, was in the time of Henry II. inhibited from constructing a lime pit for calf or sheep skins so near the water as to corrupt it. A tan yard so situated has been thus judicially denounced when it had the effect of rendering the water unwholesome, whether the riparian proprietor below used it for distillation, or culinary or domestic purposes. *Howell v. McCoy*, 3 Rawle, 256; opinion of Justice Story in *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312, and of Lord Ellenborough in *Bealey v. Shaw*, 6 East, 208; *Ang. Water Courses* (3d Ed.) p. 20.

We may well adopt the language of Justice Story in *Tyler v. Wilkinson*, *supra*:

"The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow

strictness, subversive of common use, nor into extravagant looseness, which would destroy private rights."

In the precedents brought to the attention of the court by the learned counsel for the plaintiff, it will be generally found that the injunction has been granted only when the water of the plaintiff has been actually invaded by the contaminating agency. Thus, in the Case of Indianapolis Water Co. v. American Strawboard Co., cited from 57 Fed. 1000, decision by District Judge Baker, the defendant daily discharged into the stream "large quantities of refuse and decomposable matter, which corrupted its waters so as to discolor the same, and render them unfit for domestic use, and destructive of the fish of the river." So, in the Kentucky case of *Herr v. Asylum*, 30 S. W. 971, the authorities of this institution, by means of their sewers, discharged into a branch running through the plaintiff's grounds all manner of slops, offal, and garbage. The court of appeals of Kentucky enjoined the lunatic asylum. In *Barrett v. Association* (Ill. Sup.) 42 N. E. 891, a large cemetery was drained directly into a stream from which the plaintiff conducted the operations of his dairy, and also had been in the habit of harvesting ice for sale in Chicago. Nothing could be more injurious to the character of the water, as testified to by experts, or more repulsive to the imagination. What, therefore, would be more objectionable as contamination to the water supply? In the case of *Village of Dwight v. Hayes* (Ill. Sup.) 37 N. E. 218, the defendant was emptying into the creek, a few rods above the plaintiff's land, the sewage from a village of 1,500 inhabitants. In the case of *Kinnaird v. Oil Co.* (Ky.) 12 S. W. 938, the oil of the defendant leaked from the casks, saturated the ground, penetrated to the base of water, and contaminated the spring. In view of the well-known character of kerosene oil, its presence in the spring was doubtless easily perceptible.

Indeed, it has been very clearly stated in Gould on Waters (section 220, p. 390):

"Proprietors upon streams may cast sewage and waste material therein, if they do not thereby cause material injury to public or private rights. The natural right of one proprietor to have the stream descend to him in its pure state must yield in a reasonable degree to the equal right of the upper proprietors, whose use of the stream for mill and manufacturing purposes, for irrigation, and domestic purposes will tend to make the water more or less impure, especially when the population becomes dense. So, it is of public importance that the proprietors of useful manufactories should be held responsible only for appreciable injury caused by their works, and not for slight inconveniences or occasional annoyances. When an injunction is sought to stop large and expensive works which cause a stream to be polluted, it must clearly appear that the legal remedy is inadequate, and that the plaintiff will suffer irreparable injury from the continuance of the pollution."

If that is true with regard to private institutions, a *fortiori* is it true with regard to a great institution of the state, necessary for the well-being of the community, essential to the exercise of the police power, and at the same time for the humane treatment of convicts. The reason for the distinction thus made by the courts seems to be as practical as just. A disease germ, or a cluster of such germs, may possibly find lodgment in the water supply of a city from ordinary farm work on the stream above. For this reason, is the owner up the stream to be

denied the right to cultivate or to fertilize his lands? Must he exclude from his acres the cattle yard, the pasture, or the sheepfold? Disease, often resulting in death, originates at human habitations. For this reason, will cottages, villages, or towns be forever excluded from the area of water supply of downstream communities? The exigencies of modern civilization, and the increasing density of population, forbid this. It would doubtless be well for all of our municipalities if they could be supplied with streams as pure as those which flow through granitic aqueducts constructed by Pisistratus 2,500 years ago, and which yet bear refreshment from Pentelicus and Hymettus to classic Athens, or such as flow down to the "Eternal City" from the springs of Cœruleus and Curtius, and from Lake Sabatinus, over marvelous structures built in the time of Claudius, Caligula, and Trajan, or which come down from the Balkans, replenish the fountains of the Seraglio, and revive the sinking subjects of Abdul at Constantinople, after they have swept through curving aqueducts designed by the genius of Justinian's architects, or those which flow to Glasgow, along channels cut through the adamant from the romantic shores of Loch Katrine, made immortal by the "Lady of the Lake." We can no longer, however, attain the ideal in the purity of our water supply, and courts must be guided by contemporary conditions.

Now, how can it be said, in a practical and legal sense, that the contemplated action of the prison commission will invade the rights of the plaintiff, and pollute the water supply of Milledgeville? No sewer, no stream, from the prison edifice, will be conducted into this water supply. A portion of the surface water may find its way there in those torrential downpours which in past ages have worn the country around that historic city until its lofty summits resemble, to some extent, the "mountains round about Jerusalem." In such event, the surface flow would pass the intake with such rapidity that, if it contained a germ, the chances are infinitesimal but that the noxious microbe would be swept past the intake, into the Oconee, and out to sea, where it would miserably perish. The building for males is 1,320 feet,—440 yards from the stream. It is more than an eighth of a mile from the female building to the stream. The land will be cultivated, and loose earth and its powers of oxidation are powerful disinfectants. The luxuriant crops will take up and modify the evasive bacillus. But it is objected that bathtubs will be furnished the convicts, and at times it is anticipated that they will bathe. This innovation seems startling to counsel, and may be bad for the bacilli; but it is not plain how it will be injurious to the plaintiff. Nor can the further fact, dwelt upon, that at intervals clothing will be washed, and floors scoured, affect the issue. Cleanliness will be conservative of health, and thus the danger of infection and disease will be diminished. The prison commissioners are public officers. Surely, then, we may invoke, as to them, the ancient maxim, "*Omnia presumuntur rite et solemniter esse acta donec probetur in contrarium.*" It is to be presumed, even if their assurances under oath to this effect were absent, that the commissioners will do their whole duty to the public, and to the convicts in their charge. This requires the prevention of contamination of this water, from which the prison itself will

be supplied. Nothing more could be required of them. This presumption has the effect of evidence demonstrative of the fact that they will do everything which the teachings of modern sanitary science may dictate to preserve this water from pollution. Indeed, so far as the court has been able to gather from the intelligent and candid testimony of the chairman of the prison commissioners, and the voluntary amendment to their answer, by which they offer to change the site of the hospital, and consent to select new sites for the male building and for the female building, to conform to the wishes of the board of health of Milledgeville, they have already evinced much solicitude to protect the purity of this water.

As not uncommon in such cases, scientific experts differ as to the probability that this water may be contaminated because of the prison, and, as also common in such cases, the court must form its own independent judgment. I am very clearly of the opinion that the water supply of Milledgeville, drained in part from this extended watershed now to be under the careful inspection of the state officials, will be under a larger and a more careful scrutiny and guardianship than ever before. Indeed, the removal of the numerous settlements of careless and thrifless tenants, with their pigsties, mule pens, manure heaps, disregard of cleanliness, their washing places with tubs of foul water on the branches and at the springs, all familiar to every one acquainted with the methods of nomadic tenants, will be a positive benefaction to the people using the waters of Fishing creek. Indeed, from the evidence it appears that heretofore the banks of this creek have been to some extent used as a dumping ground for the remains of those hapless beasts of burden whose maltreatment and premature death is, in my opinion, the greatest cause for the poverty of the farmers of this section of the South. Then, too, we must consider the great benefaction to the state and the people involved in the construction of this prison. We must regard the greatest good to the greatest number. We must bear in mind that the treatment of children and infirm convicts at certain previous periods of the history of our state has been a reproach to the people, and that all the impulses which actuated the creation of this farm were benevolent. This being true, it is improper for the court to stand in the way of its completion. As to the state, the injunction will be denied. No injunction is asked at this time against the city of Milledgeville; but, in view of the somewhat equivocal conduct of the mayor and council of that municipality, the bill will be retained in court, so that at any time, if, in violation of what seem to be the equities existing in behalf of the water company, they proceed to inflict any illegal injury upon the latter, by violation of their contract, it will be competent for the court to exercise its powers to protect the interests of the parties.

DUGGAN et al. v. SLOCUM.

(Circuit Court of Appeals, Second Circuit. January 25, 1899.)

No. 41.

1. CHARITIES—FAVORABLE CONSTRUCTION OF CHARITABLE TRUSTS.

Trusts for public charitable purposes are favored in equity, and will be upheld where, under the same circumstances, private trusts would fail.

2. SAME—VALIDITY OF TRUST—RULE AGAINST PERPETUITIES.

A provision of a will creating a trust for public charities, which directed the trustees to invest the fund, and permit the income to accumulate for a term of 10 years, or more, in their discretion, is not void as in violation of the rule against perpetuities, where the entire fund is an absolute and unconditional gift to charity, and there is no gift meanwhile to or for the benefit of a private person, as any unreasonable exercise of the discretion given the trustees would be corrected by the courts.

3. SAME—DEFINITENESS AS TO PURPOSE AND BENEFICIARIES.

A bequest in trust for the establishment of a public library in a town and a Roman Catholic protectory or asylum for boys in the diocese, both being charities of a well-known and general character, is not void for indefiniteness, either as to the charities or the beneficiaries, because the making of the rules by which the charities are to be governed, and for the selection of the persons to be benefited, is left to the discretion of the trustees.

Appeal from the Circuit Court of the United States for the District of Connecticut.

John C. Donnelly and C. Walter Artz, for appellants.

John O'Neill, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. John H. Duggan, of Waterbury, Conn., a priest of the Roman Catholic Church, who had never married, died on November 10, 1895, leaving a last will and testament, which was duly proved, and was approved by the probate court for the district of Waterbury. In this will he gave two legacies for religious or charitable purposes, and the residue of his property in the manner following:

"Fourth. All the rest, residue, and remainder of my estate, both real and personal, and wheresoever situated, I give, devise, and bequeath to my executors hereinafter named, in trust, however, for the following purposes, viz.: One-half to be used for the purpose of establishing and maintaining a library and reading room in connection with St. Patrick's parish, in said Waterbury, or in whatever part of said Waterbury may be deemed by my said executors most suitable and convenient for the general public; and one-half for the purpose of establishing or maintaining a Roman Catholic protectory for boys in said diocese of Hartford; it being my will that the personal estate and the rents accruing from any real estate of which I may die possessed be invested in safe securities for a term of ten years or more, at the discretion of my said executors. I also will that the management and disposal of my real estate be at the discretion of my said executors.

"Fifth. I name and appoint the Rt. Rev. Michael Tierney, of Hartford, Conn., and Hon. William C. Robinson, of New Haven, Conn., executors of this, my last will and testament."

Bishop Tierney and Mr. Robinson declined the executorship, whereupon Rev. William J. Slocum, of Waterbury, was appointed administrator with the will annexed.

Hugh Duggan, a citizen of the state of Michigan, and William Duggan, an alien, were the brothers, and Ann Enright, an alien, was the sister, of Father Duggan, and the three are his next of kin. This bill in equity was brought by the named brothers and sisters against Mr. Slocum, as administrator, before the circuit court for the district of Connecticut, to obtain a decree that the provisions of the residuary clause of the will are void, and that in respect to the property mentioned therein John H. Duggan died intestate. The estate had not been settled, and no successors in the trusteeship had been appointed, when the suit was brought. The record is silent in regard to the amount of the estate, except that the bill avers that the amount to be disposed of under the residuary clause is "twenty thousand dollars and upwards." To this bill a demurrer was filed, which was sustained by the circuit court, upon the ground of the validity of the fourth clause, and the bill was dismissed. 83 Fed. 244.

The statute of Connecticut in regard to charitable uses was passed in 1684, but did not appear in the printed statutes until the Revision of 1702, and therefore has been generally called "the Statutes of 1702." *Adye v. Smith*, 44 Conn. 60. It has been uniformly regarded by the courts of that state as a statute of importance, because, inasmuch as it declared the fixed purpose of the state to preserve estates for charitable uses in accordance with the intent of the grantor, it was an instruction to the courts to enforce such gifts accordingly. It is as follows:

"Sec. 2051. All estates that have been or shall be granted for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for the preservation, care, and maintenance of any cemetery, cemetery lot, or of the monuments thereon, or for any other public and charitable use, shall forever remain to the uses to which they have been or shall be granted, according to the true intent and meaning of the grantor, and to no other use whatever."

The statute which had existed in Connecticut in regard to perpetuities was repealed before the testator's death, and no statute now exists on the subject. The rule of the common law, which limits the inalienability of an estate to a life or lives in being at the death of the testator and 21 years afterwards, is now the rule in that state.

The special demurrer raises a number of legal questions in regard to the jurisdiction of a federal court over a decedent's estate at this stage in its progress of settlement in the probate court which are worthy of consideration, but we shall only look at the vital questions arising under the fourth clause of the will, which are whether its provisions are void either because the beneficial enjoyment of the charities may be postponed for a period which is styled "remoteness," or because the objects of the charities and the beneficiaries are too indefinitely stated. By the residuary clause an immediate and unconditional gift of the estate is made to trustees, to be used by them in the establishment and maintenance of two distinct charities. Their title is burdened with no conditions. They are not to hold it until some other person appears, who may wish to establish

these charities, or until a corporation is formed, or until a certain amount of money is contributed, but the gift is absolute, and they can have the permanent control of the charities, subject to the provision that the income is to accumulate for at least 10 years, "or more," at their discretion. This discretionary provision in regard to accumulation makes the gift obnoxious to criticism in the mind of the complainants. "A perpetuity is a limitation of property which renders it inalienable beyond the period allowed by law. That period is a life or lives in being and twenty-one years more, with a fraction of a year added for the time of gestation in cases of posthumous birth." *Ould v. Washington Hospital*, 95 U. S. 303. A secondary meaning is "an interest which will not vest till a remote period" (Gray, *Perp.* § 140); and the complainants assert that the beneficial interest in this fund may not be enjoyed by the people of Waterbury, or the boys of the diocese of Hartford, for a remote period, if the trustees should neglect or decline to establish the charities; and that, therefore, the entire gift is void. It is true that the time before a gift can take beneficial effect may be so remote as to avoid the gift. "There may be such an interval of time possible between the gift and the consummation of the use as will be fatal to the former. The rule of perpetuity applies to trust as well as to legal estates." *Ould v. Hospital*, *supra*. The validity of this class of bequests depends upon the law of the state of the testator; but the law of Connecticut, as will hereafter be seen, is that of England and of the states of this country generally, except where special statutes have created a peculiar system, and by this general law "trusts for public charitable purposes are upheld under circumstances under which private trusts would fail." *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327; *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. 846. Charities are favored; the "stern rule against perpetuities is relaxed for their benefit"; and where the gift is made directly in trust for a charity, although the beneficial effect of the gift may be postponed for a longer period than the strict rule against perpetuities permits, provided there is no gift meanwhile to or for the benefit of a private corporation or person, courts of equity will declare the gift valid, if they can see a reasonable prospect of the consummation of the charitable purpose. In *Russell v. Allen*, *supra*, it is declared as a consensus of the cases "that a gift in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that may probably not happen within a life or lives in being and twenty-one years afterwards, is valid, provided there is no gift of the property meanwhile to or for the benefit of any private corporation or person." *Attorney General v. Downing*, Amb. 550; *Sinnett v. Herbert*, L. R. 7 Ch. 237; *Chamberlayne v. Brockett*, 8 Ch. App. 206; *Inglis v. Trustees*, 3 Pet. 99; *Ould v. Washington Hospital*, *supra*.

The complainants rely upon *Jocelyn v. Nott*, 44 Conn. 55, which they think states a different rule. In that case two pieces of real estate were devised to trustees to be conveyed to an ecclesiastical society of the Congregational faith, if application should be made by said society to erect a church on one of the two pieces, and the

society should, in the opinion of the trustees, be able to build and complete the church, and be free from debt. Meanwhile, until such conveyance, the house upon one of the parcels could be occupied by named individuals, rent free. No application was ever made for the benefit of the trust provision, and the opinion declares that it is not probable that one will ever be made. The trustee had no funds with which to repair, or pay taxes, which, amounting to more than \$1,500, were overdue. A part of the house was not in a condition to rent. The devise was held to be void. The time when the estate should vest for charitable purposes depended upon the existence of a state of facts which would, in all probability, never occur. Meanwhile, a third person and his family had a right to occupy a part of the house rent free. The state of the property showed the result of the incapacity of the trustee to use or to convey. In this case no condition or estate intervenes between the estate of the trustees and the enjoyment of the charitable use, except the necessity of an accumulation of income for 10 years. The differences between the two cases are vital. The facts in the other Connecticut cases upon the subject of perpetuities do not relate to an accumulation of all the income, but the decisions with great uniformity protect estates for charitable uses, and show that the position of the courts of the state is in entire accord with the rule in *Russell v. Allen*. *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. 846; *Storrs Agricultural School v. Whitney*, 54 Conn. 342, 8 Atl. 141. The cases in the courts of England and of this country which relate to the validity of provisions in bequests for charitable uses relating to the accumulation of the entire income before the beneficial enjoyment of the charity commences are somewhat infrequent. The subject was considered with care by the supreme court of Massachusetts, which spoke through Judge Gray, in *Odell v. Odell*, 10 Allen, 1. The court declined to state what was the legal limit of accumulation for a charity, but held that a bequest to trustees of an annual sum of \$100 from real estate for 50 years, to be invested by the trustees during that time, and at its expiration the accumulated sum "to be appropriated" by a charitable society, was a valid bequest, even if the accumulation could not be allowed for so long a period. In *Magistrates of Dundee v. Morris*, 3 Macq. 134, the subject of the validity of provisions for accumulation before the charity is established was considered favorably to such provisions, and a previous decision by the house of lords in *Ewen v. Bannerman*, 2 Dow & C. 74, against the validity of a provision of that character was declared by Lords Chelmsford and Wensleydale to be unsatisfactory. The case of *Chamberlayne v. Brockett*, 8 Ch. App. 206, is to the effect that this class of provisions in bequests of an absolute gift for charitable uses will not be permitted to disturb the validity of the gift. The position of courts of equity in regard to accumulations of the income of charitable gifts is the same as that which has been stated in regard to the principal of such gifts. Courts which are not controlled by a statute upon the subject of remoteness will protect the accumulation of income for charitable uses within reasonable limits, although the limits exceed the strict rule of perpetuities. In this case, an absolute gift of property, said to be about

\$20,000, was made to trustees, with directions to accumulate the income for 10 years, and a permission to them to enlarge that time. It is possible that they will use their discretion to an extent which will not be satisfactory to the people who may become interested in the establishment of the charities, but a plainly indiscreet exercise of their discretion is within the control of a court of equity, and would be corrected. Story, Eq. Jur. § 1191. We are of opinion that the permission to the trustees to exceed 10 years in the accumulation of income, the gift of the principal being an absolute and unconditional gift to charity, does not make the provisions of the residuary clause void for remoteness. We have not considered the effect of the provision in regard to accumulation, if it had been found to be excessive, upon the validity of the gift of the principal. *Chamberlayne v. Brockett*, *supra*; *City of Philadelphia v. Girard's Heirs*, 45 Pa. St. 9; Gray, *Perp.* § 678.

It is next claimed by the complainants that the residuary clause is void by reason of its indefiniteness in regard to the charities, or the persons to be selected. The charities to be established are a library and a Roman Catholic protectory, or asylum, for boys, each of which is a public charity. There is a manifest distinction between the definiteness required in a charitable bequest for the benefit or relief of particular individuals, such as "indigent students," or "poor persons," and in a gift to a public charity for a library, or a hospital, or an asylum. In the latter case the selection of the persons to be benefited is from a very large class, and is to be made under general rules established by the managers of the public charity, and minuteness by the testator in regard to the manner in which the library or the asylum was to be used would probably paralyze the usefulness of each. In this case the charities are of a well-known and widely-spread character. The trustees are to manage and appropriate the principal and income, and, as a matter of course, are to make the rules by which each charity is to be governed. A like objection in regard to the indefiniteness of a gift of land for a hospital for foundlings was regarded in *Ould v. Washington Hospital*, *supra*, as without force, and other cases on the subject to the same effect are abundant. *Russell v. Allen*, *supra*; *Woodruff v. Marsh*, *supra*. The decree of the circuit court is affirmed, with costs of this court.

LACOMBE, Circuit Judge. I entirely concur in the opinion of the majority, but think it was unnecessary to enter upon so exhaustive a discussion of the questions presented, since it is the duty of federal courts, when construing a will, to administer the law of the particular state where the property affected is located and the trusts created. The reported decisions of the courts of Connecticut clearly indicate how this case would be decided if brought before them. Indeed, it seems quite apparent that complainants adopted the extraordinary and somewhat questionable course of suing in the federal court only because they were advised that their contentions would be disposed of adversely in the state tribunals.

COCKRILL v. COCKRILL et al.

(Circuit Court of Appeals, Eighth Circuit. February 7, 1899.)

No. 1,025.

1. CANCELLATION OF DEED—LACHES.

A grantor is estopped by laches from seeking to set aside a deed on the ground of his mental incapacity at the time it was executed, and fraud practiced upon him, where, after his acknowledged recovery, he delayed seven years before bringing suit or making complaint, during which time a considerable sum was expended in improvements on the property, and the grantee had become incompetent to testify by reason of age and infirmity.

2. USURY—WHAT CONSTITUTES.

Where a father-in-law required, as a condition of a loan to his spend-thrift son-in-law, that the latter should convey to his wife a certain tract of land, such conveyance does not constitute usury.

3. DEED OF PERSON UNDER GUARDIANSHIP.

The deed of a person under guardianship by reason of incapacity to manage his own affairs, in consequence of habitual drunkenness, is void.

4. INSANITY—HABITUAL DRUNKENNESS—REMOVAL OF GUARDIAN.

Under Rev. St. Mo. 1889, § 5549, which provides that "any person" may institute an inquiry as to whether one who has been declared of unsound mind has been restored, one who is under guardianship on account of habitual drunkenness may by his own petition institute such an inquiry.

5. SAME—NOTICE.

Where one who is under guardianship as a person of unsound mind makes an application to a probate court of Missouri for restoration to his rights, notice to his family or guardian is not jurisdictional; the want of it being at most an irregularity only, which cannot be taken advantage of in a collateral proceeding.

6. SAME.

One who was discharged from guardianship as a drunkard by a probate court on his own application cannot impeach the judgment of discharge on the ground that no notice of the application was given to his guardian.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

J. E. Merryman and J. F. Merryman (J. G. Woerner, on the brief), for appellants.

E. H. Norton and Willard P. Hall (Ben J. Woodson, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. After fully considering the evidence and briefs in this case, we are all of the opinion that the statement of the case, the findings of fact, and conclusions of law contained in the opinion of the learned judge who tried the case at the circuit are correct, and we adopt his opinion as the opinion of this court. 79 Fed. 143. The opinion is as follows:

ADAMS, District Judge. This suit was instituted by complainant, William F. Cockrill, against defendants, Clinton Cockrill, Helen Woodson, and others, to set aside a deed to 251 acres of land sold by him to Clinton Cockrill on May 19, 1881, on the grounds of fraud,

undue influence, and especially on account of the alleged incompetency of complainant at that time to transact his business, and for the further purpose of setting aside a deed made by complainant to Clinton Cockrill for the 160 acres known as the Fielding Cockrill homestead. This deed was made November 2, 1887. The same reasons are assigned for setting aside this deed as the former. The defendant Clinton Cockrill is the father-in-law of complainant, and the father of defendant Helen Woodson, who was formerly the wife of complainant. Two of the other defendants are complainant's minor children by his wife Helen. The other two defendants are children of Helen by her second husband, the defendant Byron Woodson. By deed dated May 19, 1881, the complainant, for the consideration of \$6,000 paid to him, deeded a tract of 251 acres of land in Platte county, Mo., to his father-in-law, Clinton Cockrill. On the same day Clinton Cockrill and wife duly conveyed the same to Helen Cockrill and her bodily heirs, intending the same as an advancement to his daughter and her children. She then had two children by her husband, the complainant herein. The tract of land, according to the evidence before me, was not worth over \$6,000 at the time, and this sum was paid to the complainant by his father-in-law for it. The complainant was then without doubt capable of attending to business, and no fraud or undue influence was practiced upon him in the transaction. I find no warrant in the evidence for the contention of complainant's counsel that Clinton Cockrill undertook or agreed to pay complainant any sum above the consideration mentioned in the deed, \$6,000; and therefore there is no ground for ordering an accounting in favor of the complainant for any unpaid purchase money. This disposes of the first ground of complaint alleged in the bill.

The second alleged ground of complaint relates to the homestead tract of 160 acres. The complainant inherited a fortune, in land, from his father, and indulged the reasonable expectation that his father-in-law would in a short time die, and leave another fortune for his own or his family's use and support. As is usual in such cases, he became inattentive to business, and convivial in his tastes and habits, and soon became addicted to the excessive use of alcoholic liquors. Under such circumstances, and with such habits, he became frequently short of money, and resorted to the common expedient of borrowing. Being still the owner of lands, inherited from his father, his credit was, to a limited extent, good. Prior to the year 1885 he had, from time to time, borrowed money from the bank of Wells & Co., of Platte City, till it amounted in April of that year to the sum of \$2,739.02. He then applied for more, and could have secured it from the bank at 10 per cent. interest; but it was finally determined, in order to avoid paying the high rate of interest demanded by the bank, that the father-in-law should loan him \$3,300 at 6 per cent. interest per annum. This was done, and with the money so borrowed he paid \$2,739.02 to the bank, and had \$560.98 for his own use. To secure the payment of this loan, the complainant executed a deed of trust bearing date April 29, 1885, whereby he conveyed to one C. C. Kemper, as trustee, a tract of 160 acres of

land situate in Platte county, Mo., already referred to as the Fielding Cockrill homestead. As a part of this transaction, the complainant was required by Clinton Cockrill to make, and did make, a deed to another tract of 80 acres of land in Platte county to his wife, Helen. No consideration was paid by his wife to him for this grant, and only a nominal consideration of one dollar is mentioned in the conveyance. In passing it is proper to say that no relief is asked against this conveyance, but it is claimed that because the father-in-law persuaded the complainant to make this gift to his wife, at just this juncture, it amounts to exacting usurious interest for the loan of the \$3,300, and therefore is to be considered in determining the issue of fraud in relation to the execution of the deed of trust itself. The complainant at this time had a family consisting of his wife and two children, aged, respectively, five and seven years. He so mistreated his wife that she was compelled to, and did some time after the month of April, 1887, take her children, and leave him. She instituted a suit for divorce, and on April 2, 1889, secured a decree. This decree also awarded to her the care and custody of the two children. While the complainant, even before April, 1885, had been addicted to the use of alcoholic beverages, and had frequently been under the influence of liquor, the evidence shows that he was fully capable of managing his own affairs, and at the time of executing the Kemper deed of trust understood what he was about. No coercion or undue influence was practiced upon him by his father-in-law in this transaction unless it be in requiring him to make the gift of the 80-acre tract of land to his wife, which will be considered later. After 1885 the drinking habit seems to have increased. His sprees became more frequent, and were longer continued. He became abusive and cruel to his wife and family, and in June, 1887, due and proper proceedings were taken, at the instance of his relatives, in the probate court of Platte county, to have him adjudged non compos mentis, and on June 3, 1887, on inquisition had, he was duly adjudged by said court incapable of attending to his own business, and an habitual drunkard, and one William C. Wells was thereupon appointed guardian of his person and estate. Wells, the guardian, entered upon the discharge of his duty, and at once committed his ward to the St. Vincent's Inebriate Hospital at St. Louis for treatment. He remained there for nearly three months, and on September 1, 1887, was discharged by the medical staff of the hospital, consisting of Drs. Bauduy and Herman, as apparently cured. After his discharge, he endeavored to secure employment at Kansas City and other places, and succeeded in doing so for a space of a month or six weeks. Between September and November he occasionally appeared to be under the influence of liquor, but, after a careful reading of all the evidence relating to his conduct and mental condition up to November 1st, I am of the opinion that he did not, up to that time, resume his intemperate habits as of old, but that his maudlin condition, as occasionally observed, was rather the effect of some stupefying drug. Many witnesses testify to seeing him, and observing his conduct during this period, and pronounced him to have been intelli-

gent, sensible, and entirely capable of transacting his own business. On the whole, I believe the evidence fairly warrants this conclusion. In this state of facts, the complainant, on November 1, 1887, after personal interviews with the probate judge of Platte county, prepared and filed a petition in said probate court in words and figures as follows:

"To the Probate Court of Platte County, Missouri: The petition of W. F. Cockrill shows to the probate court that on the 2d day of June, 1887, he was found by a jury and adjudged by said probate court to be incapable of managing his own affairs, and Wm. C. Wells was duly appointed guardian, and gave bond as required by law. Petitioner states that he has undergone treatment for his disability, and has been cured, and is now in condition to take charge of his own affairs. He therefore asks that proper, legal steps be taken to restore to him his rights, that inquiry be had into his present condition in the manner required by law, and that upon proper finding of a jury that his property be restored to him subject to his own control and management.

"[Signed]

W. F. Cockrill."

—and duly sworn to. The evidence shows that the complainant wrote this petition himself, and presented it to the court for its action, and I am unable to find from a careful examination of the evidence that he was inspired or aided to do this by any of the defendants, or any persons acting for them. On the contrary, the evidence shows that this proceeding was entirely of his own motion; and, notwithstanding its suspiciously close proximity in time to the transaction of the next day, I can find no satisfactory evidence of any connection with it by the defendants, and much less of any fraudulent connection. On the filing of this petition, on November 1, 1887, the court issued a venire for a jury to inquire into the mental condition of complainant, and thereupon a jury of 12 lawful men of Platte county came, and, after hearing the testimony, in the presence of complainant, returned the following verdict:

"We, the jury, find that the within-named, William F. Cockrill, is competent to attend to his own affairs.

"[Signed]

William Kimsey, Foreman."

And the court then and there made the following order:

"It is therefore considered by the court that said William F. Cockrill is a person of good mind, and competent to attend to his own affairs. Wherefore it is ordered that William C. Wells, guardian of the person and estate of said William F. Cockrill, do make final settlement of his accounts, and that he restore to the said William F. Cockrill all things remaining in his hands."

Prior to this time the complainant had made such default in the payment of the loan of \$3,300 due to Clinton Cockrill as entitled him, Cockrill, to foreclose his deed of trust by a sale of the mortgaged property, and the requisite advertisement had already been commenced in one of the newspapers of Platte county. The complainant had no money to make payment of the loan, and on the advice and with the aid of his friends William C. Wells, his former guardian, E. O. Waller, one of the most respected citizens of Platte county, and others, who acted as intermediaries between him and Clinton Cockrill, who were now not on speaking terms, a settlement was concluded, by the terms of which complainant agreed to convey his interest in this home place of 160 acres (conveyed by the

deed of trust) to Clinton Cockrill for \$6,000. His title was subject to his wife's dower. Complainant made his deed to Clinton Cockrill, and the grantee, after taking out the \$3,300 and interest due him from complainant, paid the balance of the \$6,000 over to complainant, or to such persons as he directed; and subsequently, and prior to the institution of this suit, conveyed the land so acquired from complainant to his daughter, the former wife of the complainant, as a gift to or settlement upon her. The evidence shows no coercion, undue influence, or fraud of any kind exercised by Clinton Cockrill in this transaction, and further shows that the persons who advised the complainant in regard to it did it in good faith, believing at the time that they were rendering material, disinterested, and valuable aid to him. In my opinion, also, the transaction was in fact a reasonably fair one. Complainant's title was subject to the dower of his wife, and for that reason practicably not salable for even its value. Ordinarily, purchasers want a clear title, and usually, in their negotiations, exaggerate the importance of defects. The witnesses who testify as to the value of complainant's title and interest in the land in 1887 differ in their opinions somewhat, but no more than is usual in the expression of opinions in cases of this kind. From them all, taking into consideration the infirmity of complainant's title, I am satisfied that \$6,000 was a fair and reasonable price for it at the time. At any rate, it cannot be claimed by any fair-minded person that it was so unreasonably low a price as to be in itself a badge of fraud.

Complainant also contends that he was in fact so incapable of managing his own affairs at the time this last-mentioned deed was made that his act and deed was and is void. I do not think so. The evidence satisfies me that on November 1 and 2, 1887, to which dates much evidence is directed, the complainant was sober, understood well what he was about, and made the deed in question as his own voluntary act and deed. I quite agree with defendants' counsel in the following summary of the real facts of this case:

"The complainant's case is one of the common kind of a young man inheriting a fortune from his father, and wasting it in idleness and riotous living. The complainant was idle, and he was dissipated, but he was not an imbecile, and neither was he a lunatic. He had inherited one fortune, and he had, he fancied, married another; and this he thought made it unnecessary for him to labor, and so he did nothing but dissipate and fritter away the opportunities for a successful, useful, and happy life."

When urged by his wife not to neglect his business, but to go to work, his response to her was "that he wouldn't work; that when her old daddy died he would have more money than he could spend." As a result of such conception of his rights and duty, and of such a course of life as he led, he soon began, as already stated, to abuse and illtreat his wife, and she was compelled to resort to the courts to be legally separated from him. The conduct of Clinton Cockrill, in all the transactions complained of in this case, seems to me to have been inspired by a knowledge of the disposition and propensities of his son-in-law, and by a laudable desire to make the provisions for the maintenance and care of complainant's wife and family which the complainant neglected to make. Even if he had not

paid complainant the full value of the land acquired from him (which I cannot find to be the case), yet, considering the fact that all the lands so acquired have been vested in complainant's wife and children for their support and maintenance, and thereby, in spite of himself, a part of his legal and moral obligation to his wife and family has been discharged, I could not, as a chancellor administering rights in conscience and equity, hold his own benefactor to a very exact accounting. Besides the foregoing facts, which are directly incident to the transaction in question, it appears to me that complainant is guilty of gross laches in instituting proceedings to set aside the deeds in question. He deferred action for nearly eight years after the execution of the last deed complained of, and has not offered to return the consideration received by him for his conveyances. During this time the main defendant, of whom he principally complains, has, through advancing years, decrepitude, and failure of health and strength, become unable to give testimony in the case. During this time, also, complainant's former wife—now, by the generosity of her father, the owner of the property in controversy—has expended much money in improving the property, and the condition of things generally has been substantially changed.

In these observations concerning laches I do not overlook the proposition advanced by complainant's counsel, namely, that, as complainant was insane, no offer to restore or put defendants in *statu quo* was necessary. But this contention involves a finding of fact to the effect that complainant was insane at the time the conveyances were made by him, and has continued so. I do not find either of these facts to be true. Notwithstanding the fact that complainant was again in January, 1888, declared non compos mentis, and a guardian appointed for him, it is apparent that this was a spasmodic condition, occasioned by the excessive use of intoxicating liquors at the time. He was sent to an inebriate asylum at Ft. Hamilton, N. Y., when, on an examination by the medical staff, on entering, he was found in general good health, suffering only from excessive use of whisky and the associate habit of using tobacco. He remained there three months, when he was "paroled," as it is called in the report. He then went to South Dakota with a surveying party under Prof. Bannister, and remained there, keeping the notes of the surveyor for several weeks, and returned to Platte county, where, upon like petition, order, and proceedings as before, he was, on the 6th day of September, 1888, adjudged to be capable of managing his own affairs, and the guardian, Overbeck, was discharged. Certainly, since this last-mentioned date—September 6, 1888—there is no evidence of inability on his part to attend to his business. In fact, there is comparatively little in the record concerning his habits or condition after this date, and certainly nothing to overcome the presumption of continued sanity after the finding and judgment on the inquisition held September 6, 1888. The complainant must, therefore, be held to all the consequences of want of action by him since that date, at least. Taking this date as a starting point, he allowed over seven years to

elapse before even complaining of any ill treatment, much less instituting any suit for redress of his supposed wrongs. He waited until the supposed wrongdoer was unable to speak in his defense. He permitted his injured and innocent wife to expend money in improving the property which she supposed was her own. He retains the consideration received by him for the property, and makes no offer to return the same. His suit is against his own wife and children to take from them what her father, in times of her distress, occasioned by complainant's wrongful and cruel conduct, had given her. Whatever conclusion may be reached on questions hereinafter discussed, I am satisfied there is no equity in this bill; and, if there was, complainant is estopped by his own failure to do equity, and by his gross laches (*Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418; *Galligher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873; *Kinne v. Webb*, 49 Fed. 515; *Id.*, 4 C. C. A. 170, 54 Fed. 34-40), from asserting the same.

But complainant's counsel contend that his equitable rights are aided by certain strict rules of law, which I will now consider. And first, they claim that the deed of trust executed by the complainant to secure the loan of \$3,300 made to him by Clinton Cockrill, of date April 27, 1885, is a usurious transaction. It is said that Clinton Cockrill demanded of complainant, not only a note bearing 6 per cent. interest per annum, but also demanded, as a condition of making the loan, that complainant should simultaneously convey to his own wife the 80-acre tract of land already referred to, and it is contended that this conveyance was so made by the complainant at the time, without other consideration than securing the said loan of \$3,300. It is true that such requirement was made and conformed to, but this does not constitute usury in the particular case under consideration. The lender demanded nothing for himself but a low rate of interest. He did demand that complainant, who was then a spendthrift, and who was the husband of his daughter and the father of her children, should, while he was yet able, make some provision for his wife and family. The complainant obviously recognized the justice of this demand, and for the first and only time, as shown by this record, voluntarily devoted a small part of his inheritance to the discharge of his natural, equitable, and legal obligations. To hold that such a settlement, even though instigated by the father, is a badge of fraud, would, in my opinion, be a strange perversion of equity. But this is not all, even if such conveyances could be held to constitute usury to the extent of the value of the 80-acre tract, yet, under the statute of the state of Missouri, it would not avoid the obligation created by the loan to pay the principal debt as made. The lender could recover the same, and enforce all his legal remedies to that end; and even the legal rate of interest could be recovered from the debtor for the benefit of the school fund. *Ferguson v. Soden*, 111 Mo. 208, 19 S. W. 727. For the foregoing reasons, I cannot hold, either as a result of equitable considerations or legal rules, that the rights of the parties to this suit are at all affected by complainant's conveyance of the 80-acre tract of land to his wife. The most serious and stren-

uous contention of complainant's counsel in this case is: That on November 2, 1887, when complainant executed the deed to Clinton Cockrill conveying the 160-acre home place, he was, as a matter of law, conclusively presumed to be incompetent to make the deed, for the reason, as alleged, that he was then, under the judgment of the probate court of Platte county, incompetent to manage his own affairs, by reason of his being an habitual drunkard.

At the outset of the discussion of this question, it must be admitted that the deed of an insane person while under guardianship is absolutely void; that the existence of guardianship over him is conclusive respecting the disability of the ward; and that this rule applies to a person under guardianship by reason of his being incapable of managing his own affairs in consequence of habitual drunkenness. *Rannels v. Gerner*, 80 Mo. 474. The question remains whether the complainant was in fact under guardianship on November 2, 1887, when he made the deed to the 160 acres in question. He had confessedly been duly adjudged incompetent by the probate court of Platte county on June 3, 1887, and a guardian of his person and estate duly appointed; and he had been, by the same court, on November 1, 1887, duly adjudged relieved of his disability, and competent to attend to his own affairs, and his guardian had been duly discharged, provided, the last-mentioned judgment is not void for one of two reasons, namely: (1) Because complainant himself was the sole petitioner in the proceedings resulting in such judgment, or (2) because no notice was given of the proposed inquisition to his relatives or guardian.

Section 5549, Rev. St. Mo. 1889, provides as follows:

"If any person shall allege in writing, verified by oath or affirmation that any person, declared to be of unsound mind, has been restored to his right mind, the court, by which the proceedings were had, shall cause the facts to be inquired into by a jury."

Section 5550 provides, in substance, that if it be found that such person has been restored, he shall be discharged from care and custody, etc. The language of section 5549 is certainly broad enough to permit any one to inaugurate the inquiry as to the continued insanity of a ward, and I know of no one more interested in the commencement of such proceedings than the person who believes himself to have been restored, and entitled to be discharged from bondage. To deny him this privilege might be the means by which evil-disposed persons could permanently restrain him of his liberty, and deprive him of his rights. A construction of the statute which will permit the ward to petition for his own discharge is in harmony with the practice pursued in the chancery courts of England, in exercising their jurisdiction over insane persons (*Busw. Insan.* § 69); and, in the absence of statutes to the contrary, generally prevails in the states of this Union (*Id. § 70; In re Hanks, 3 Johns. Ch. 567; In re Christie, 5 Paige, 242*).

In the case of *McDonald v. Morton*, 1 Mass. 543, the supreme court of Massachusetts, in dealing with this subject, says "the law contemplates that there may be a time when a person in the situation of appellant [under guardianship as an insane person] may be re-

stored to his reason. I do not think he is to be left to his friends. Their ignorance of the fact, carelessness, or inattention ought not to leave him in bondage forever,"—and accordingly held that he might, by his own petition, institute an inquiry concerning his restoration. Inasmuch as the statute of Missouri, in sufficiently comprehensive language, confers this right upon any person, I am not disposed, in the light of reason or authority, to deny the right to the person above all others most interested in it.

The complainant further assails the validity of the judgment of the probate court of Platte county rendered on November 1, 1887, because no notice of the hearing of complainant's petition for restoration was given to complainant's family or guardian. In considering this question, it is well at the outset to note that the statutes of Missouri do not, in terms, require any notice in such cases; that the probate court of this state is a court of record, possessed of plenary jurisdiction to appoint, control, and discharge guardians of insane persons; and judgments within its jurisdictional limits are not subject to collateral attack for any mere irregularities. Bearing these facts and principles in mind, the question is: Does the above-mentioned want of notice of complainant's application for restoration to his rights so affect the jurisdiction of the court as to render its judgment thereon void? I think not, for the following reasons: The probate court had jurisdiction over the subject-matter. This subject-matter was the status of the complainant himself. The finding and judgment of the court as to such status affected him and his relation to his property only. The proceeding is, therefore, analogous to a proceeding in rem, where jurisdiction is acquired over the res. It was probably in view of considerations like these that the legislature made no provision requiring notice of the hearing of an application for restoration to be given to any persons. The omission of such legislation becomes significant when it is considered that a certain notice is expressly required to be given of the hearing of a petition for the original appointment of a guardian, and this significance may be, as suggested by counsel for the defendants, that the application for restoration is not a new proceeding, but a step in the progress of a pending cause, namely, that which was instituted by filing the original petition for the appointment of a guardian. This view finds support in the following cases: Dutcher v. Hill, 29 Mo. 271; In re Marquis, 85 Mo. 617. Under such circumstances it is my opinion that notice to the former guardian or relative of complainant's application for restoration to his rights is not a prerequisite to jurisdiction. The want of it, at the worst, is an irregularity only, which cannot be taken advantage of in this collateral proceeding. Henry v. McKerlie, 78 Mo. 416; Rowden v. Brown, 91 Mo. 429, 4 S. W. 129; Dutcher v. Hill, supra; Kimball v. Fisk, 39 N. H. 110; Busw. Insan. § 56; Rogers v. Walker, 6 Pa. St. 371; Willis v. Willis' Adm'rs, 12 Pa. St. 159; Bethea v. McLennon, 23 N. C. 523. I have proceeded so far in the consideration of this last question as if the former guardian, or members of the family of the complainant, were themselves assailing the judgment of the probate court of November 1, 1887. But

such is not the case. They are not complaining, or seeking to set aside the judgment for want of notice to them. The only person assailing the judgment is the complainant, who, by a petition drawn and presented by himself, invoked the jurisdiction of the probate court which rendered the judgment, and whose duty it was to give necessary notice in the case. His solicitude for the rights of others is very commendable as an abstract ethical question; but I know of no principle of law or equity which will permit the complainant to take advantage of his own wrong, even in the exercise of such praiseworthy solicitude.

From the foregoing it appears that there are no unyielding rules of law which demand an unconscionable solution of this case, and complainant's bill must therefore be dismissed.

The decree of the circuit court is affirmed.

ATLANTA, K. & N. RY. CO. v. HOOPER.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 626.

ACTION FOR WRONGFUL DEATH — LIMITATION — AMENDMENT OF DECLARATION
CHANGING BENEFICIARY.

Under the statute of Tennessee relating to actions for wrongful death (Mill. & V. Code, §§ 3130-3134), by which a right of action is given to the personal representative of the deceased for the benefit of his widow or next of kin, as construed by the supreme court of the state, it is necessary to the maintenance of the action that there shall be in existence persons for whose benefit the right of recovery is given, and that they shall be named in the declaration; and, as the direct personal injury to such persons is made by the statute an element of the damages recoverable, a suit in behalf of one beneficiary is a different suit from one in behalf of another, and an amendment of a declaration changing the beneficiary is in effect the beginning of a new suit, and is subject to a plea of limitation as such.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This is a writ of error to a judgment rendered by the circuit court in favor of the plaintiff, administrator of J. W. Lebow, deceased, against the Atlanta, Knoxville & Northern Railway Company.

The declaration was filed in the circuit court of Knox county, Tenn., November 15, 1897. In the declaration the plaintiff averred: "Plaintiff, S. M. Hooper, administrator of the estate of J. W. Lebow, deceased, brings this action as such administrator, and for the benefit of Mariah Lebow, the mother of the deceased, against the defendant, the Atlanta, Knoxville & Northern Railway Company." The declaration states that the injury was received by the deceased on the 25th of January, 1897. The ad damnum clause concludes: "To the great damage of plaintiff, as administrator as aforesaid, to wit, twenty thousand dollars, for which sum, for the benefit and use of said Mariah Lebow, the mother of the deceased, and for the benefit of the estate of the deceased, plaintiff sues, and demands a jury to try the issues that may be herein joined." On March 24, 1898, the plaintiff applied to the court for leave, and was granted leave, to amend its declaration upon its face, "so as to state that the suit is brought by plaintiff, as administrator of the estate of J. W. Lebow, deceased, for the use and benefit of James Madison Lebow, the father

of said J. W. Lebow; he, the said J. W. Lebow, having died without bodily issue." Thereupon the defendant amended his plea theretofore filed in the case, and as a special plea set up the statute of limitations, and averred that more than one year had elapsed since said cause of action arose and before said amendment was made. By section 3469, Mill. & V. Code, suit for injuries to person must be brought within one year after the cause of action arises. On motion of the plaintiff the court struck the defendant's plea of the statute of limitations from the files, on the ground that said plea was insufficient, in that it relied solely upon the fact that more than one year had elapsed from the date of the accident till the amendment of plaintiff's declaration was allowed, wherein the father of deceased was named as the beneficiary instead of the mother and brothers and sisters, when in law the suit was begun, in the meaning of the statute, at the issuance of the summons, and the amendment aforesaid did not change the parties to or nature of the action then brought, or modify plaintiff's right of recovery, but only assigned a different reason why said right existed. The cause then went to trial, resulting in a verdict for the plaintiff of \$2,500, from which the plaintiff subsequently remitted \$1,250, and judgment was entered against the defendant for the remainder.

Alexander M. Smith, for plaintiff in error.

W. R. Turner, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). The sole question presented upon this record is whether, when an administrator, under the present Code of Tennessee, brings his suit to recover damages for the wrongful death of his intestate, and avers in his petition that he brings the suit for the benefit of one person as the intestate's next of kin, and subsequently substitutes in his declaration for that person the name of another as next of kin, this is a change of the cause of action, such that the statute of limitations runs to the date of the amendment. The sections of the statutes of Tennessee prescribing the mode in which suits for wrongful death shall be brought are Mill. & V. Code, §§ 3130 to 3134, inclusive, and are as follows:

"Sec. 3130. The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission or killing by another, would have had against the wrong-doer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin, free from the claim of creditors.

"Sec. 3131. The action may be instituted by the personal representative of the deceased, but if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not in such case be responsible for costs, unless he sign his name to the prosecution bond.

"Sec. 3132. The action may also be instituted by the widow in her own name, or if there be no widow, by the children.

"Sec. 3133. If the deceased had commenced an action before his death, it shall proceed without a revivor. The damages shall go to the widow and next of kin, free from the claims of the creditors of the deceased, to be distributed as personal property.

"Sec. 3134. Where a person's death is caused by the wrongful act, fault or omission of another, and suit is brought for damages, the party suing shall, if entitled to damages, have the right to recover for the mental and physical

suffering, loss of time and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received."

It is settled by the decisions of the supreme court of Tennessee that no action can be maintained by an administrator of a deceased person under the foregoing sections unless there shall be in existence persons for whose benefit the right of action is given, and that a declaration drawn under these sections, which does not set forth the person for whose benefit the suit is brought, is fatally defective. Railway Co. v. Lilly, 90 Tenn. 563, 18 S. W. 243; Railroad Co. v. Pitt, 91 Tenn. 86, 18 S. W. 118. The next of kin for whose benefit the suit is brought are the real plaintiffs, and the administrator, though dominus litis, and a necessary party in all cases where there is no widow or child of the deceased, is, nevertheless, but a nominal party, and a mere trustee. Webb v. Railway Co., 88 Tenn. 128, 12 S. W. 428; Loague v. Railroad Co., 91 Tenn. 458, 19 S. W. 430; Railroad Co. v. Bean, 94 Tenn. 388, 29 S. W. 370. Under section 3134, the recovery is not only for the mental and physical suffering of the deceased, his loss of time, and necessary expenses incident to the injury, but it is also for the direct pecuniary injury to the beneficiary on whose behalf the suit is brought, caused by the death complained of. The cause of action may, therefore, vary materially in the extent of the recovery, as it is brought for one or another beneficiary. The administrator, except where there is a widow or child, must bring the suit; but his suit for one beneficiary is a different suit from a suit by him for another. To change the beneficiary, under the statute, changes the suit, the amount of recovery, and states a new and different cause of action. In the light of this conclusion, the plea of the statute was good against the amendment herein when filed, and should have been sustained.

The judgment of the circuit court is reversed, with directions to set aside the verdict, to sustain the plea of the statute of limitations to the declaration as amended, and to enter judgment for defendant.

CONTINENTAL CONST. CO. v. CITY OF ALTOONA.

(Circuit Court of Appeals, Third Circuit. January 25, 1899.)

No. 47, September Term.

1. MUNICIPAL CORPORATIONS—CONTRACTS—AUTHORITY TO MAKE.

The board of commissioners of the water department of cities of the third class having no power, under Act Pa. May 23, 1889, to enter into a contract for the construction of a water reservoir without previous consent of the city councils, such power is not conferred by an ordinance authorizing the issue of water bonds, and resolutions authorizing the commissioners to have plans prepared for the reservoir, and to advertise for bids therefor.

2. SAME—CONTROLLER'S CERTIFICATE.

The requirement of Act Pa. May 23, 1889, art. 9, § 5, that no contract by a city of the third class, requiring the appropriation of money, shall

take effect until the controller shall certify thereon that the estimated cost of the work has been charged against the proper item of appropriation, cannot be dispensed with by the councils or electors.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by the Continental Construction Company against the city of Altoona for damages for breach of a contract between plaintiff and the city, by its board of commissioners of the water department, for the construction of an impounding reservoir. There was a compulsory nonsuit at the close of the plaintiff's case. A motion to strike it off was denied, and plaintiff brings error. Affirmed.

The following is the opinion of the court below (ACHESON, Circuit Judge):

Under the provisions of the act of Pennsylvania of May 23, 1889, for the incorporation and government of cities of the third class, the power to enter into such a contract as the one declared on is not vested in the board of commissioners of the water department, without the previous consent and direction of city councils. There is, I think, no evidence of the previous consent of councils to the contract here in question, or of any subsequent ratification of it. Neither the ordinance of April 14, 1891, for an election to authorize an increase of the city debt and for the issue of water bonds, the resolution of August 1, 1892, for the preparation of plans and specifications for the contemplated work, nor the ordinance of October 17, 1892, directing the water commissioners to advertise for bids, conferred authority upon the board of water commissioners to enter into a contract for the construction of an impounding reservoir. Nor did all these ordinances, taken together, confer such authority on that board. To advertise for bids is one thing, but to bind the city by the acceptance of one of several bids is quite a different thing. I am of opinion that the city of Altoona was not bound by the contract which the water commissioners undertook to enter into with the plaintiff, for lack of legal authority in the commissioners to make such contract.

Moreover, there is an entire want of any certificate by the city controller, as prescribed by the act of May 23, 1889, and declared by the supreme court of Pennsylvania, in the case of *City of Erie v. Moody*, 176 Pa. St. 478, 35 Atl. 136, to be essential to the validity of such a contract as that here in question. I do not see that such a certificate was dispensed with by anything that was done by the councils or the electors of the city. Indeed, the prescribed certificate by the controller could not thus be dispensed with.

The plaintiff company did no work whatever under the alleged contract. This suit is wholly for the recovery of damages for a breach by the city of the alleged contract set up by the plaintiff. The complaint is that the city councils would not permit the plaintiff to do the work, but repudiated the contract that the water commissioners had undertaken to enter into. I am of opinion that the plaintiff has failed to show any right of action, and the defendant's motion for a nonsuit must be allowed.

L. Laffin Kellogg, for plaintiff in error.

Geo. B. Bowers and Wm. M. Hall, Jr., for defendant in error.

Before DALLAS, Circuit Judge, and BUTLER and BRADFORD, District Judges.

DALLAS, Circuit Judge. This was an action in the circuit court for the Western district of Pennsylvania to recover for the breach of a contract alleged to have been made by the defendant in error. The court below entered a judgment of compulsory nonsuit, which it subsequently refused to strike off, and thereupon this writ of error was sued out. We are all of opinion that the action of the court

below was right. The contract alleged never had any legal existence, and this is so clearly demonstrated by the opinion of the learned judge that further discussion of the subject would be superfluous. The judgment is affirmed.

EDMUNSON v. PULLMAN PALACE-CAR CO.

(Circuit Court of Appeals, Fifth Circuit. March 14, 1899.)

No. 782.

SLEEPING-CAR COMPANIES—DUTY TO PASSENGERS—NEGLIGENCE.

A ventilating window at the top of a sleeping car was left open at night, in midsummer, and rain drove in upon the occupant of an upper berth, in consequence of which, as he claimed, he contracted a cold, and was made ill. It appeared that such windows were usually left open at that season, but were always opened or closed as requested by the person occupying the upper berth, and could be opened or closed by such person. The occupant in the case in question was an experienced traveler. He made no request that the window be closed, and there was nothing to give notice to the servants of the sleeping-car company that he required special care or attention. *Held*, that such facts did not establish negligence on the part of the company which rendered it liable for his illness, conceding it to have been due to the cause claimed by him.¹

In Error to the Circuit Court of the United States for the Western District of Texas.

James N. Edmunson filed his suit in the district court of El Paso county, Tex., against the Pullman Palace-Car Company, claiming damages in the sum of \$15,000. The suit was removed by the defendant company to the United States circuit court for the Western district of Texas. Edmunson alleged that on the evening of July 3, 1896, he became a passenger on the Chicago, Rock Island & Pacific Railroad from Colorado Springs, Colo., to Chicago, Ill.; that he purchased a regular ticket for passage over said railroad; that he purchased from the agent of defendant an upper berth in one of its sleeping cars, to ride in and sleep in from Colorado Springs to Belleville, in the state of Kansas; that the defendant company was then engaged in the business of supplying passengers on said railroad with accommodations for sleeping during the night; that it was the duty of the defendant company to have had the roof and ventilating windows of the sleeper in which he rode and slept in a good, safe, and secure condition, so as to prevent water or rain from coming into the berth that plaintiff occupied; that, after occupying the berth during the night, he was awakened in the morning by water dripping in on his arm from the place above him, and he discovered that there was a wet place in his berth, near the head of the same, which had been caused by the water dripping into and upon the same, it having rained during the night (said wet place being about two feet long and two feet wide), and he found himself, when he woke, lying in said wet place, and as soon as he rose he discovered that he had, on account of said water having come into his berth, caught a severe cold; that the cold so contracted from the water having dripped into and having run into his berth continued to grow worse from day to day, and settled on his lungs; that he was finally prostrated by a high fever and severe coughing, and a pneumonic condition set in, and he continued to suffer exceedingly, and about the night of July 11, 1896, while he was coughing violently as the result of his becoming wet in said berth, a blood vessel was burst in his left lung, and he was attacked with a hemorrhage of the lungs; that he had hemorrhages for the next five days whenever an attack of coughing came; that he was confined to his bed until about August

¹ As to duties and liabilities of sleeping-car companies, see note to *Duval v. Car Co.*, 10 C. C. A. 335.

8, 1896, and was dangerously ill, and on several occasions was at the point of death, but about August 8, 1896, through constant care and medical attention, he was able to leave his bed, and since that time he has been sufficiently strong and well to travel, and the general condition of his health is somewhat improved, but that through said exposure, and through his becoming wet in said berth, and through the negligence and carelessness of the defendant company in allowing the roof or the ventilating window of said sleeper to be in such an unsound, unsafe, and leaky condition, or in such a condition as to permit the coming in of water, he has been made an invalid for life, and has contracted and become permanently afflicted with consumption; and that since the night of July 3, 1896, he has suffered at times, as a result of the injuries mentioned, intense pain, and has suffered from repeated attacks of weakness and sickness, and has been compelled to expend large sums of money for the services of physicians and for medicines for his proper treatment, and has suffered great mental anguish. Subsequently Edmunson filed a supplemental petition, in which he set forth in detail the moneys expended by him for medical attendance and medicines.

The Pullman Palace-Car Company filed its answer in the United States circuit court. It pleaded a general demurrer, several special exceptions, a general denial, and special answers, in which it was alleged "that the car which plaintiff occupied on the night of July 3, 1896, which he claims was defective, whereby he was damaged, was not a leaky or defective car, but sound and in good condition, as were also the ventilating windows, and that, if any water or rain came in on the plaintiff's bed (which is denied), same was only such as, with the best of appliances, will enter when the wind strikes the car or window at certain angles, which cannot at all times be controlled without shutting off the air, or doing otherwise, to the great discomfort of the passenger, and which matter is always within the control of the passenger, and by custom and usage left to his discretion and direction, and that if plaintiff had exercised his right and prerogative, or used the proper precaution incumbent on him, he could and would have prevented the wetting he complained of,—in other words, if he or his bedding got wet on the occasion complained of, it was his own fault and want of proper care and precaution, and not that of defendant; that plaintiff was accustomed to traveling in sleeping cars, and knew the fact that in the summer months the ventilating windows were left open, for the comfort of the occupants of the berths, and knew, also, that he could have had same closed, if he so desired, and could have any proper attention for his protection in this regard, by notifying the porter or conductor in attendance. Defendant further denies that plaintiff's cold was contracted from the causes claimed by him, or that his maladies, sickness, or consumption was generated, created, or caused by said defective car, or the water dripping in on him and wetting him, as claimed by him. On the contrary, defendant says that the germ of said disease (he being then in a generally delicate condition) was in existence at and long before the 3d day of July, 1896, which fact was at the time he purchased his said ticket at Colorado Springs, as claimed by him, on said date, well known to him, but unknown to defendant. Defendant charges that plaintiff had suffered from pleurisy, and was a consumptive, long before the 3d day of July, 1896, and that this said disease was inherited by him, other constituents of his family being afflicted with the same trouble, and that defendant was at said time traveling for his health, and endeavoring to overcome said disease and prevent its further development, but that he negligently and carelessly took and accepted an upper berth, with windows open, knowing the condition of the weather, and knowingly took the risk attending such, if any there be." Defendant further answered that its business is not that of a carrier of any kind, but it only undertakes to furnish sleeping and toilet conveniences, and is under no obligations to furnish conveniences or accommodations of any particular class or kind, and did not on the occasion obligate itself or contract that no water would or could enter into the car, as claimed by plaintiff, and that, if any person was liable for the injuries received by plaintiff, the Chicago, Rock Island & Pacific Railway was liable.

The cause was tried in the United States circuit court, and resulted in a verdict and judgment in favor of the Pullman Palace-Car Company, defendant

below. During the trial, Edmunson, the plaintiff below, reserved three bills of exceptions. The first bill brings up all the evidence and testimony in the cause, and preserves the exceptions of the plaintiff below to the trial judge's general charge,—these exceptions being that the general charge "requires of the plaintiff a greater degree of proof than the law demands, or than is reasonable, and ignores the doctrine of the presumption of negligence which arises in this cause from the facts and circumstances established by the evidence; and the same is erroneous in the statement that, 'if, at the time of the occurrence, the plaintiff was afflicted with the disease known as "consumption" or "pulmonary tuberculosis," then he would not be entitled to recover.'" The second bill of exceptions preserves the refusal of the trial judge to give a special instruction requested by the plaintiff below, to the effect that proof on the part of the plaintiff that during the night water leaked into his berth and wet him, and that he was thereby injured, would entitle him to recover, unless the defendant should prove that it was without negligence in the matter complained of by the plaintiff. The third bill of exceptions preserves the refusal of the trial judge to grant a special instruction requested by the plaintiff below to the effect that, if the jury found for the plaintiff, he would be entitled to recover for all the sickness, loss, and injury which he may have suffered in consequence of getting wet in the berth, notwithstanding he may have had the consumption when he got wet. The fourth bill of exceptions relates to the granting by the trial judge of a special instruction requested by the defendant below to the effect that "the fact that water came into the car and wet the plaintiff is not in itself sufficient to prove negligence on the part of the defendant." James N. Edmunson, the plaintiff below, has sued out this writ of error.

P. S. Benedict, Max Dinkelspiel, W. O. Hart, and Millard Patterson, for plaintiff in error.

J. D. Guinn, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge, after stating the facts, delivered the opinion of the court.

The entire evidence adduced in the lower court is before us, having been embodied in one of the bills of exceptions. The view which we entertain of this cause on the evidence makes it unnecessary to pass on the assignment of errors. The alleged errors relate to certain charges given to the jury by the trial judge, and to his refusal to give certain other charges. Even if there be merit in these complaints,—and we are not to be understood as expressing any opinion on that matter,—Edmunson, the plaintiff below, who is the plaintiff in error here, could not have been injured by erroneous charges, if it is clear that under the evidence he could not have recovered. The negligence which the plaintiff below seems to have charged against the sleeping-car company, as the basis of the action, is that it allowed the roof or the ventilating window of its coach, above the berth occupied by him, to be in "an unsound, unsafe, and leaking condition," whereby water dripped upon and wet him; the result being that he contracted consumption, and incurred certain expenses for medical attendance and medicines. The evidence adduced on the trial by the plaintiff below, the charges asked for by him, the errors assigned, and the argument of the cause, all show that the alleged negligence upon which he based his case was that the roof or ventilating window of the coach was defective. If the plaintiff below

wished to raise the issue whether the rain dripped in, not because of any defect in the roof or window, but because the servants of the sleeping-car company did not close the ventilating window, that issue should have been plainly made in the pleadings. The allegations of negligence were "that it was the duty of the defendant to have had the roof and ventilating windows * * * in a good, safe, and secure condition, so as to prevent water or rain from coming into the berth," and that the defendant below was negligent "in allowing the roof or the ventilating window * * * to be in an unsound, unsafe, and leaking condition, or in such a condition as to permit of the coming in of water." We say again that, even if these allegations were sufficient to raise an issue as to whether, the roof and window being sound, it was the duty of the defendant below to have the window closed by its servants, the whole conduct of the case on the part of the plaintiff below shows that he was not relying upon such an issue. However this may be, we have carefully examined the cause as if both of the issues just mentioned had been fairly presented, and we are of opinion that under neither issue was the plaintiff below entitled to recover on the undisputed evidence. The uncontradicted proof showed that the roof and the ventilating window were sound and properly constructed; that, even with the best construction, if a ventilating window of a sleeper is left open, rain may enter and drip down on the upper berth, when the wind is high and blows the rain against the window, and the train is running rapidly,—especially when turning curves. The mother and sister of Edmunson occupied the lower berth, he himself taking the upper one. It rained very hard during the night. After sleeping during the night, he was awakened in the morning, about 6 or 7 o'clock, by water dripping on his arm, and he found that his bed was wet. He testified that the water seemed to come from about where the ventilating window was. He is a lawyer, and has traveled to a great extent in sleeping cars. He usually occupied a lower berth. A brother and sister of his died of consumption, as also a brother and sister of his mother. He had always had some little apprehension about having lung trouble, on account of his family history. It was shown, without denial, that his lungs were always weak and delicate, and that he was in danger of tuberculosis at any time. It was proven, without denial, that in the summer time the ventilating windows are generally left open, and that they are always opened or closed at the request of the occupants of the upper berths, and that a person occupying an upper berth can open or close the ventilating window. The occurrence complained of took place in midsummer. There was no proof that the defendant below was notified that Edmunson required any special care or attention, or that there was anything in his appearance which indicated that he needed such care or attention. On the contrary, he contended at the trial that he was well before the night on which he was wet, except that he was "a little run down."

It is clear that there was no proof that the defendant below was negligent, and that, under the undisputed facts in this cause, the plaintiff below could not recover. Therefore the judgment of the lower court is affirmed.

EVANS v. KISTER et al.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 651.

1. REVIEW—SPECIAL FINDINGS OF FACT.

Where a jury is waived, and a judgment is based on special findings of fact, the sufficiency of such findings to support the judgment may be reviewed on a writ of error.

2. SAME.

A defendant, sued as surety on a note, who admits signing the same, has the burden of proving as a defense that it was not accepted by the payee, or that he has been released; and special findings of the court, to sustain a judgment in his favor, must contain every fact necessary to establish such defense.

3. PRINCIPAL AND SURETY — RELEASE OF SURETY — FAILURE OF CREDITOR TO PERFECT LIEN.

Ky. St. § 2496, makes valid written contracts for the sale of railroad equipment or rolling stock which reserve the title in the seller until payment, but provides that, to be valid against subsequent purchasers for value without notice, or creditors, such contracts shall be acknowledged and registered. A street-railroad company purchased equipment, giving a note therefor which reserved the title to the property in the payee until the note should be paid. The note was signed by a surety, but was not acknowledged or registered. The property was attached to the real estate of the company, and thus became subject to a prior mortgage thereon. *Held*, that the mortgagee was not a "creditor," within the meaning of the statute, nor a subsequent purchaser without notice, and the payee's rights were not affected by the failure to register the note; hence the fact of such failure constituted no defense to the note on part of the surety.

4. SAME.

If, through mere passive neglect, a creditor loses his lien on a security which it was his duty to protect for the benefit of the surety, he will thereby release the surety from liability only to the extent the latter has suffered loss.

5. FIXTURES—PROPERTY ATTACHED TO MORTGAGED REALTY—MORTGAGEE AND MORTGAGOR.

Neither an agreement between a seller and purchaser of personal property that the title shall remain in the seller until the price is paid, nor the recording of such agreement, will prevent the property from passing under a previously existing mortgage of real estate to which it is attached, unless the mortgagee is a party to the agreement.

6. PRINCIPAL AND SURETY—RELEASE OF SURETY.

A surety on a note given for the purchase price of equipments for a street railroad, and which provided that the articles sold should not be attached to any real estate, so as to become a part thereof, but should remain the property of the seller until the note was paid, is not released from liability because the equipments were so attached to the company's realty as to pass under a previously existing mortgage thereon, nor because the seller assisted in making such attachment, where it was necessary to the use for which the property was purchased, and was contemplated by all the parties; the provision of the note being merely intended to apply to the legal effect of such attachment.

In Error to the Circuit Court of the United States for the District of Kentucky.

This was an action at law upon a promissory note executed for the purchase price of certain machinery.

The maker of the note was a street-railway corporation, called the Park City Railway Company, and F. L. Kister, Jr., was an accommodation security. The suit was against the street-railway company and its surety, Kister. The latter, after pleading jointly with his principal, obtained leave to plead separately, and in his defense pleaded among other defenses not now important: (1) That the obligation, though signed by him, was never accepted by the payee, and no credit was given on the faith of his undertaking; (2) that, if the note was accepted, and if he ever became bound as surety, he was released by the negligence of the payee in failing to defend a replevin suit brought by the street-railway company against the vendor company, through which the street-railway company obtained possession of the machinery for which the note was improperly and illegally given; (3) that, if he was ever bound as surety, he was released by the negligence of the payee in consenting to the attachment of the machinery, for which the note was given, to the realty of the railway company, before recording said note, whereby the machinery became a fixture, and subject to a previously existing mortgage and other existing liens in favor of mechanics and contractors; (4) that there had been a variation in the contract, to which he had not consented, and by which a material part of the machinery had been returned to the vendor, "he having the right to look to such property as indemnity." By stipulation a jury was waived, and the case submitted upon the law and the facts to the court. The findings of fact and law were as follows:

Findings of Fact.

(1) That on June 22, 1895, the Commercial Electric Company, of Indianapolis, entered into the following contract with the Park City Railway Company:

"We, the Commercial Electric Company, of Indianapolis, Ind., agree to furnish you two of our standard 100 K. W. generators, with switch board, instruments, and equipments complete, for the sum of (\$3,400) thirty-four hundred dollars, delivery to be made f. o. b. cars, Bowling Green, Ky., on or before August 25th, and payment of the said thirty-four hundred dollars to be made on or before October 1, 1895, or thirty days after date of delivery, if delivery is delayed beyond August 25th, provided they fulfill the following specifications: The generators shall be capable of generating 100 K. W. capacity for sixteen consecutive hours, with a rise in temperature not to exceed 70 Fah. above the surrounding air, and shall carry full rating without sparking, and fulfill all our claims as set forth in the accompanying catalogue. We moreover guaranty the apparatus to be free from all electrical and mechanical defects, and agree to repair any such defects, free of charge, as may develop through normal usage within two years from date of acceptance.

"Accepted, June 22, 1895.

Commercial Electric Company,

"Per M. O. Southworth.

"Park City Railway Company,

"Per M. H. Crump, Managing Director and Secty."

(2) That there were some delays in delivering this machinery, and some correspondence in regard thereto, which caused the railway company to send to the electric company a note for the amount agreed upon, which note is in the following words and figures:

"\$3,400.

Dated —, 18—.

"On or before the first day of November, 1895, for value received, in two one-hundred Kilowatts street-railway power generators, I promise to pay to the order of the Commercial Electric Company of Indianapolis, Ind., three thousand four hundred and no-100 dollars, negotiable and payable at Potter Bank, Bowling Green, Ky., without any relief whatever from valuation or appraisement laws until paid, and 5 per cent. attorney's fees. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest and nonpayment of this note. The express condition of the sale and purchase of the said machinery above named is such that the title and ownership of said machinery does not pass from the said Commercial Electric Company until this note and interest, and all other notes and interest

given in pursuance of such sale and purchase, are paid in full; and it is further agreed that the above property shall not be attached to, so as to become a part of, any real estate, but shall remain personal property until paid for.

"P. O. Address:

Park City Railway Company,
"By I. B. Wilford, Prest.
"M. H. Crump, Secty.
"F. L. Kister, Jr."

Subsequently indorsed: "Pay to the order of J. R. Evans, without recourse on us. Commercial Electric Co., by S. L. Hadley, Secy."

(3) That on the 17th of September, 1895, the electric company sent a letter, which it wrote, but did not sign, to the railway company, declining to accept said note with the single surety, and suggesting the name of another party as additional security, and also stating that it returned the note; that the note was not returned in said letter, nor at all. Thereafter the railway company, on September 19th, after its receipt of said letter, telegraphed the electric company to ship the generators immediately, with bill of lading attached, and to return note indorsed without recourse, which telegram the electric company received, and on the next day telegraphed the railway company that the generators were being loaded, and would be forwarded same night, with bill of lading and note attached.

(4) On the same day, September 20th, the electric company sent said note to J. L. Potter & Co., at Bowling Green, Ky., together with the following letter:

"Gentlemen: We inclose note of the Park City Railway Company, indorsed by F. L. Kister, attached to which you will find bill of lading for the apparatus, for which the note is given. The railway company wire us that they will discount the note without recourse. We have indorsed the note, leaving blank for the name of the party who will discount it, and we request that you deliver the bill of lading to them at such time as they pay you the \$3,400, less 7 per cent. interest per annum, until November 1st. Upon the mailing of the amount to us, kindly wire us at our expense, so that we may send tracer after the goods, and oblige.

"P. S. Deliver bill of lading only at such time as note is paid."

Potter & Co. notified the railway company, on September 22d, of the receipt of the note, and that it could be discounted.

(5) Subsequently, under the authority of a letter from the electric company, dated October 8th, Theodore Varney, an employé of the electric company, filled the blank indorsement on the note with the name of J. R. Evans, the plaintiff herein.

(6) The defendant Kister was notified by Vaughn, the vice president of the railway company,—but when, the record does not disclose,—that said note had been "rejected" by the electric company; but Kister took no action in the matter, and gave notice to no one that he regarded himself as not bound on the note, until the January following the bringing of this suit, when, in the following letter to the plaintiff, he seemed to recognize his liability:

"The railway company owe me [Kister] nearly as much as the note you hold, which I have brought suit on, and as our court is now in session, and as the parties who bought Vaughn's interest are responsible men, I don't expect any costs on account of the note, but expect they will settle with me, and release me from loss on your note before my case against them is reached."

(7) The plaintiff and the electric company both had knowledge that Kister was only a surety on the note sued on at the time the same was executed.

(8) On the 30th of September the railway company sued out a writ of delivery against the electric company, and a large part of the machinery, which had been shipped to Bowling Green, was seized by the sheriff of Warren county, and, after being retained for the statutory two days by the sheriff, was, on October 5, 1895, delivered by the sheriff to the railway company. This action thus brought in the Warren circuit court was dismissed in the

following May, without prejudice, and a judgment for costs entered in favor of the defendant.

(9) That the electric company thereafter directed Varney, its agent, to have the note sued on recorded, for the purpose of saving, by this constructive notice, its rights retained on the face of the note; that Varney was told that said note could not be recorded, except it were acknowledged by the railway company, so as to entitle it to be recorded; that said note was not recorded as required by the Kentucky Statutes. Said note had no acknowledgment upon it, nor was any application made by the electric company to have such acknowledgment.

(10) That, when the machinery came to Bowling Green, it was placed upon and fastened to stone foundations, which had been prepared for it in the railway company's power house; that it was absolutely necessary that this machinery should be fastened to such foundations in order to use it for the purpose for which it was intended; that defendant Kister knew, at the time he signed the note, of this necessity; that he knew, at the time it was being put into the building and fastened to the foundations, that it was being so put in and fastened; that the electric company aided and assisted in thus attaching the machinery to the realty; that it was so attached before the maturity of the note; and that at said time there was upon the property of the railway company a mortgage for some \$50,000.

(11) That the machinery thus delivered and attached to the freehold was the entire consideration for which the note was given, and was of equal value to the note.

(12) That the action of the electric company in thus aiding, assisting, directing, and controlling the putting in of the machinery in the railway company's power house, and attaching it to the freehold, before and without perfecting its lien security thereon by recording said note, as required by the Kentucky Statutes, was negligence; and that said Kister had no knowledge of said negligence, and did not acquiesce therein or consent thereto.

(13) That the railway company was not in a condition to receive and use the machinery on August 25, 1895, nor until very near the time it was actually received, and acquiesced in the delay of the electric company in delivering the same, and the time of delivery was modified by the consent of the parties, and the delivery was made and the machinery accepted, set up, on October 28, 1895, and no damage accrued to the railway company by reason of this delay.

(14) The electric company guarantied the machinery to be free from mechanical and electrical defects, and agreed to repair any such defects as might accrue within two years, and guarantied the capacity of the machinery, as stated in finding 1 hereof. The defendants have failed to sustain their claims to damages for failures in these particulars.

(15) The electric company agreed that it would send the railway company, without further costs to the latter, a new armature, if the old armature was shipped back to them, in accordance with the letter from the electric company of April, 1896. The price of a new armature was \$600. The old armature returned was damaged by fire in transit to the extent of \$300. The new armature was not shipped, and therefore the note should have a credit of \$600, the price of a new armature, less the \$300 damage done to the old armature, or a net credit of \$300 on this account.

(16) The plaintiff is not a bona fide holder for value without notice of the note sued upon, and the note is subject to the same defenses as though no transfer had been made of it from the electric company to the plaintiff.

Conclusions of Law.

(1) The note sued upon, as a matter of law, was executed by Kister, as surety of the railway company, and so accepted by the electric company, and is a binding obligation, even though it be conceded that it was accepted because of the telegram of the 19th of September, 1895.

(2) That the suit out of the writ of delivery in the Warren circuit court, and the proceedings thereunder, did not affect the title and ownership of the machinery for which the note was executed, and the rights of the parties in that regard remained the same as if said action had not been instituted,

and by reason of said action the rights and liabilities of Kister have not been affected in any way whatever.

(3) That the agreement in the note as to the title of the property by the laws of Kentucky is, in effect, a sale with a mortgage back, but, in order to be effective, as against subsequent purchasers or lienholders for value, it must be acknowledged and recorded pursuant to the provisions of section 2496 of the Kentucky Statutes; that the omission to have said note so recorded released the defendant Kister from liability as surety on said note, he having the right to rely upon the exercise of due diligence by the electric company to perfect its title, thus retained, as against subsequent purchasers and creditors, and Kister is entitled to his costs as the plaintiff.

(4) That the railway company is not entitled to damages for any delay in the delivery of the machinery, it having consented to such delay, and subsequently accepted the machinery.

(5) That the railway company, having failed to show a breach of the guaranty contained in the contract, is not entitled to damages upon its counter-claim therefor.

(6) That the railway company is entitled to recover, as a credit upon said note, the sum of \$300 on account of the shipment of the old armature to the electric company in April, 1896.

(7) That the plaintiff, Evans, is not a bona fide holder for value of the note sued upon, but stands as the representative of the electric company in this litigation.

(8) That the plaintiff, as the representative of the electric company, is entitled to judgment against the railway company for \$3,400, with interest from November 1, 1895, at 6 per cent. per annum, subject to a credit of \$300 as of April, 1896, and his costs; that the suit be dismissed as against Kister, and that he recover his costs from the plaintiff.

Upon the facts thus found there was a judgment in favor of plaintiff below for the amount of the note and interest, less \$300, the value of an armature returned, and a judgment in favor of the defendant F. L. Kister, Jr. The plaintiff alone has sued out this writ of error.

E. F. Trabue, for plaintiff in error.

Before TAFT and LURTON, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

Where a jury is waived, and a judgment rendered upon a special finding of fact by the court, the review of such judgment upon a writ of error "may extend to the sufficiency of the facts found to support the judgment." Rev. St. § 700; Dickinson v. Bank, 16 Wall. 250. It is otherwise if there be only a general finding, and no exceptions to the rulings of the court in the progress of the trial. British Queen Min. Co. v. Baker Silver Min. Co., 139 U. S. 222, 11 Sup. Ct. 523. The note in suit was signed by F. L. Kister, Jr. He did not deny his signature. It was in the possession of the plaintiff in error as indorsee. The burden was therefore upon him to show that a note, which he had signed and delivered, had in fact never been accepted by the payee. The burden was also upon him to show that, if he became bound, he had been released by the subsequent conduct of the creditor. Kortlander v. Elston, 6 U. S. App. 283, 2 C. C. A. 657, and 52 Fed. 180. Where the question for review is, as here, whether the facts found are sufficient to support the judgment, it is of the highest importance to him upon whom the burden rested that such special finding of facts shall include every fact es-

sential to support the judgment. *Sneed v. Milling Co.*, 20 C. C. A. 230, 73 Fed. 925; *Wesson v. Saline Co.*, 20 C. C. A. 227, 73 Fed. 917. In jury trials, it is the rule that, if there be special findings and a general verdict, and the former be irreconcilable with the latter, the special findings must control. *Larkin v. Upton*, 144 U. S. 19, 12 Sup. Ct. 614. The same rule must prevail where a jury has been waived, and a judgment rendered upon a special finding of facts. If the facts so found do not support the judgment, it should, upon writ of error, be reversed, with direction to enter the judgment which the facts demanded.

The ground upon which the plaintiff was denied a judgment was the negligence of the electric company in protecting the title to the machinery against subsequent purchasers and creditors by recording this note according to the provisions of section 2496 of the Kentucky Statutes, by Barbour & Carroll. That section is in these words:

"In any written contract of or for the sale of railroad equipment or rolling stock, deliverable immediately or subsequently, at stipulated periods, by the terms of which the purchase money, in whole or in part, is to be paid in the future, it may be agreed that the title to the property so sold, or contracted to be sold, shall not pass to or vest in the vendee until the purchase money shall have been fully paid, or that the vendor shall have and retain a lien thereon for the unpaid purchase money, notwithstanding delivery thereof to the vendee; but the terms of credit for the payment of the purchase money shall not exceed twenty-five years from the execution of the contract. Such agreement shall not be valid as against subsequent purchasers for value without notice, or against creditors until such contract shall have been acknowledged or proved as deeds of trust and mortgages are required to be, and lodged for record in the office of the secretary of state, where they shall be recorded."

This note, when delivered and accepted, was without acknowledgment, and could not be recorded. Neither does it appear that it was subsequently acknowledged, or that any effort was made by either the payee company or the surety thereon to obtain such acknowledgment as would admit the note to record. The section of the Code cited above seems to have originated in 1882. Prior to that provision the Kentucky supreme court had construed all contracts for the sale of personal property accompanied by delivery to the vendee, when the title was retained until payment of the price, as absolute sales "with mortgage back" to secure purchase price. Thus, in *Greer v. Church*, 13 Bush, 430, it was said that, if the facts showed a sale, "it does not matter whether the parties intended the title to pass or not." "The law, in furtherance of public policy and to prevent frauds, will treat the title as being where the nature of the transaction required it to be." *Baldwin v. Crow*, 86 Ky. 679, 7 S. W. 146. All such contracts were, therefore, subject to the general registry laws of the state, whereby all unregistered deeds of trust and mortgages were "invalid against a purchaser for a valuable consideration without notice thereof or against creditors." Ky. St. § 496.

The effect of section 2496 was to give validity to a contract of sale "of railway equipment and rolling stock," where, by agreement, the title was retained by the vendor until payment of the purchase

money, notwithstanding delivery of the property to the vendee. Registration of such contract is not made essential to its validity, except as against subsequent purchasers for value without notice and creditors. Nonregistration would, therefore, have no other or different consequence than that resulting from nonregistration of a mortgage under the general registration law cited above. From what we have said, it must follow that the nonrecording of the sale note in suit would be of no consequence to the surety, unless the rights of subsequent purchasers for value and without notice, or the rights of "creditors," have intervened, whereby the property has been subjected to their claims. One is not a "creditor," within the protection of the registration statute, cited above, who, at the time of his levy or before sale under execution, receives notice that the property is subject to an unrecorded lien or mortgage. *Baldwin v. Crow*, 86 Ky. 679, 7 S. W. 146. "To entitle a creditor, as such, to take advantage of an unrecorded mortgage, he should show that he had recovered judgment and sued out execution." *Underwood v. Ogden*, 6 B. Mon. 606. But a subsequent creditor may secure priority over an unrecorded mortgage by the levy of an execution or of an attachment. *Wicks v. McConnell* (Ky.) 43 S. W. 205. A previously existing mortgagee of the property of the railway company is, therefore, not a "creditor," within the meaning of section 2496. Neither is such a mortgagee a subsequent purchaser for value without notice. *Fosdick v. Schall*, 99 U. S. 235; *U. S. v. New Orleans R. Co.*, 12 Wall. 362; *Myer v. Car Co.*, 102 U. S. 1.

In *Joyce v. Cockrill* (decided at the present term) 92 Fed. 838, we had occasion to consider the circumstances under which a surety might be released through the conduct of the creditor, and there stated the general principle to be:

"If a creditor does any act inconsistent with the rights of the surety, and injurious to him, or omits to do any act which his duty to the surety obliges him to do, and thereby injures the surety, the latter will be discharged to the extent of such injury."

It is also elementary that the surety is entitled, for his indemnity, to the benefit of any securities which the creditor obtains from the principal debtor. If, therefore, the creditor surrenders such securities to the debtor without consent of the surety, or they are lost as a consequence of the failure of the creditor to discharge some duty owing to the surety in respect to their protection or preservation, the surety will be discharged to the extent that he sustains loss by such misconduct. No "creditor" has acquired any lien upon the machinery for which this note was given, by levy of attachment or execution; nor, so far as this record shows, has the property been acquired by any purchaser for value without notice. How, then, has the surety been injured by the alleged laches of the creditor in not recording this note? Counsel for the surety say that:

"It is not necessary to show any actual injury. If his risk as surety is increased by the negligence of the creditor, he is released."

To support this, counsel cite the following decisions of the supreme or superior court of Kentucky: *Sneed's Ex'r v. White*, 3 J. J. Marsh. 525; *Goodloe v. Clay*, 6 B. Mon. 236; *Ruble v. Norman*, 7

Bush, 582; Martin v. Taylor, 8 Bush, 384; Royster v. Heck, 14 Ky. Law Rep. 266. These cases do announce the principle as being:

"That any agreement or active interference by the obligee, whereby the surety may be injured, or subjected to increased risk, or deprived of or suspended in the assertion of his equitable right to force the obligee to sue the principal, or of his right to pay the debt and occupy the attitude, in equity, of the obligee, will release the surety in equity." 3 J. J. Marsh. 525.

Without giving our entire assent to the rule as stated, it is clear that it has no application here. The creditors have made no "agreement" with the principal debtor by which the surety has been "deprived of or suspended in the assertion of" any right he might have had against his principal or the obligee. Nor have such consequences resulted from any "active interference" by the creditor. The Kentucky cases cited, and in which the rule stated is found, were cases in which the creditor had affirmatively discharged some lien upon property of the person primarily liable, or surrendered to him property out of which the debt should have been paid. There was, in each case, not mere passive neglect by which some hold upon the debtor had been lost, but conduct which Chief Justice Robertson calls "active interference." It is true that in the principal case the chief justice did say that where there was such "active interference," by which a lien was discharged or property surrendered, "it is not material whether the property so exempted was sufficient to discharge the whole debt or not." "It is," said the court, "the fact that the creditor interfered, and thereby increased the risk of the surety, and not the extent of the injury resulting from the act, which will relieve the surety from his liability in equity."

With the exception of the case of Royster v. Heck, cited above, decided by a court inferior to the supreme court, the facts showed that the property surrendered or the lien discharged, was of value sufficient to have paid the debt. The question, therefore, as to whether the voluntary release of a security of less value than the debt would discharge the surety absolutely, or only pro tanto, was not involved. But, however that may be, the rule as stated in the Kentucky cases has no application where the creditor has not actively or affirmatively discharged some lien or security which he ought to have preserved. Here the creditor has made no new agreement with the debtor, nor has he affirmatively discharged any lien or surrendered any property as a consequence of the failure to record this note. It is only claimed that the creditor has negligently failed to record his note. If we assume that in this he was lacking in the discharge of a duty owing to the surety, what are the consequences? It is well settled that a surety is discharged absolutely if the creditor, without his consent, enters into a valid agreement for forbearance, or if there be any variation in the contract to which he has not consented. But this results in the latter case because a new contract has been made, and in the former instance for the same reason in effect; for the right of the surety to proceed in equity against his principal and compel payment, or to himself pay and immediately proceed against his principal, has been suspended without his consent, and his risk thereby increased. Rees v. Berring-

ton, 2 White & T. Lead. Cas. Eq. p. 1867, and cases cited in note on pages 1876, 1877, and pages 1906, 1907. But these reasons have no application where, through mere laches, the creditor has lost some lien or security to which the surety might have looked for indemnity. It is well settled that if, through mere passive neglect, the creditor loses his hold upon a security which it was his duty to protect for the benefit of the surety, he will thereby exonerate the surety only to the extent that the latter has suffered loss. 2 White & T. Lead. Cas. Eq. pp. 1901, 1902; *Wulf v. Jay*, L. R. 7 Q. B. 763; *Buri v. Boyer*, 2 Neb. 265; *Everly v. Rice*, 20 Pa. St. 297; *Vose v. Railway Co.*, 50 N. Y. 369; *Capel v. Butler*, 2 Sim. & S. 457; *Neff's Appeal*, 9 Watts & S. 36; *Payne v. Bank*, 6 Smedes & M. 24; *Hayes v. Ward*, 4 Johns. Ch. 123.

We shall not stop to inquire as to the duties owing to the surety in respect to the registration of a mortgage from the principal debtor, nor consider whether an unacknowledged sale note, such as that here involved, would stand in all respects as an instrument in a condition for registration, when accepted by the creditor. If we assume that it was the duty of the plaintiff in error, or his assignor, to have procured the acknowledgment and registration of this note, and that he has not done so, what then? The indemnity upon which the surety relied has not suffered as a consequence of nonregistration. The security which the parties intended to provide by a retention of title has been lost, if lost at all, by reason of the attachment of the machinery to the realty of the railway company, thereby becoming subject to a pre-existing mortgage, and not as a consequence of the previous nonregistration of the instrument retaining the title. Such a result would not have been saved by previous registration. If the subject of the sale was "loose property, susceptible of separate ownership and separate liens," it would pass under the mortgage, if there was an after-acquired property clause, in the same condition in which it came to the mortgagor. If, by agreement between the vendor and mortgagor, the former retained the title or a lien to secure the purchase price, the lien would be unaffected by any prior mortgage, whether registered or not. *Fosdick v. Schall*, 99 U. S. 235; *U. S. v. New Orleans R. Co.*, 12 Wall. 362; *Myer v. Car Co.*, 102 U. S. 1. Upon the other hand, if the machinery so purchased and set up has become so affixed as to be a part of the principal thing, it will pass under the mortgage, notwithstanding an agreement between the mortgagor and furnisher that the title shall remain in the vendor until payment. *Railway Co. v. Cowdrey*, 11 Wall. 459-482; *Porter v. Steel Co.*, 122 U. S. 267, 7 Sup. Ct. 1206; *Phoenix Iron-Works Co. v. New York Security & Trust Co.*, 54 U. S. App. 408, 28 C. C. A. 76, and 83 Fed. 757. Mere registration of an agreement between the mortgagor and vendor, preserving the personal character of property affixed to the freehold mortgaged, will not prevent the attached property from passing under a previously existing mortgage. To prevent such a result, the mortgagee must be a party to the agreement. *New York Security & Trust Co. v. Capital Ry. Co.*, 77 Fed. 529; *Jones, Real Prop.* §§ 1743-1748; *Snedeker v. Warring*, 12 N. Y. 170; *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21; *Win-*

slow v. Insurance Co., 4 Metc. (Mass.) 306. See Bank v. Baumeister, 87 Ky. 6, 7 S. W. 170; Manufacturing Co. v. Garven, 45 Ohio St. 289, 13 N. E. 493; Hunt v. Iron Co., 97 Mass. 279; Pierce v. George, 108 Mass. 78; McConnell v. Blood, 123 Mass. 47; Allen v. Woodard, 125 Mass. 400; Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279. It may, perhaps, be conceded that the owner of land may make a valid agreement by which articles are to retain their character as personality, notwithstanding they may be so annexed to the realty as that, without such agreement, they would in law be regarded as having become fixtures. Ford v. Cobb, 20 N. Y. 344. But such agreement will not affect a previous mortgagee who does not assent thereto. Jones, Real Prop. §§ 1750, 1751. It therefore follows that the mere neglect of the creditor to record this sale note has had no effect upon the rights of creditors having mortgages or other liens upon the freehold to which the machinery was attached at the time the note should have been recorded.

If, therefore, the judgment of the circuit court is to be sustained, it must be upon the ground that the creditor actively aided in so attaching the machinery to the mortgaged realty as that it became subject to the existing mortgage. It is true that it is provided in the sale note "that the above property shall not be attached to, so as to become a part of, any real estate, but shall remain personality until paid for." But the facts found show that it was the purpose of all the parties, when the note was made, to attach the property just as was subsequently done, and that the attachment actually made was "absolutely necessary," in order to use it for the purpose for which it was intended, and that Kister knew this when he signed the note, and knew, at the time the work was being done, that it was being attached as originally intended by all parties, including himself. To construe this term of the agreement as forbidding the parties from in fact attaching this machinery to the freehold, when it was well known that such was the intention, and that it was "absolutely necessary" in order to use it for the purposes for which all the parties knew it was intended, would be to do violence to the contract. The provision quoted should be construed as providing only that the intended annexation to the freehold should not have the legal effect which might result but for the agreement. Thus construed, the creditor violated no agreement or obligation owing to the surety when it assisted in placing this machinery in position according to its contract, although the annexation thereby resulting operated to give the existing mortgage precedence over the lien reserved. This is a consequence for which the creditor is not responsible. All parties had constructive notice, at least, of the existing mortgage, and must be regarded as in effect consenting that this machinery should be affixed to the freehold notwithstanding the mortgage. The legal consequences are that the mortgage takes precedence. For this result the creditor is not to be held responsible. The surety has suffered no loss through the creditor's malfeasance, and no injury through the nonregistration of the sale note.

That this machinery was so affixed to the freehold as to become attached thereto, as between mortgagor and mortgagee, has been the

insistence of counsel for the defendant in error. It was necessarily so found by Judge Barr. We think the facts bring the case within our own decision in the case of *Phœnix Iron-Works Co. v. New York Security & Trust Co.*, 54 U. S. App. 408, 28 C. C. A. 76, and 83 Fed. 757. But, if a different conclusion could be maintained upon the facts and law in respect to whether this machinery has been so affixed as to pass under the mortgage, the result would be the same to defendant in error. In that event, the surety would not have lost his right to recover the machinery upon payment of the debt. It has been argued that the evidence does not show that the creditor ever accepted this note, and that the judgment in favor of the surety should be affirmed, upon this ground. We think the findings of fact must be construed as including a finding that the note was accepted.

The third assignment of error must be overruled. The facts found justified the credit allowed for the armature not sent to replace one returned.

The first four assignments must be sustained. The judgment will be affirmed as to the Park City Railway Company, and reversed as to F. L. Kister, Jr., and remanded with directions to render judgment against him for the same amount found due from his principal.

JOYCE v. COCKRILL.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

No. 613.

1. SURETY ON NOTE—RELEASE—BREACH OF CONDITION.

Where, on sale of property by receiver, a surety indorses a note given for the purchase price, on condition that the receiver should take other security, and such condition is not known to the receiver, but the note is delivered to the payee, to be given to the receiver, a breach of such condition does not relieve the surety.

2. SAME—NOTICE TO PAYEE.

On sale of assets of an insolvent by a receiver, the decree directed the receiver to require personal security on the deferred payments, and reserve a lien in his deed of the real estate included in the sale. A surety on the purchase note understood from his principal that such lien would be reserved, but on delivery of the note to the receiver he either remained silent as to such condition or intrusted the note for delivery to the principal. *Held*, that the failure of the receiver to reserve a lien in his deed of conveyance did not release the surety.

3. SAME—NEGLIGENCE OF PAYEE.

Failure of the receiver to perform his official duty will not relieve the surety, as such duty was owing, not to the surety, but to the creditors of the insolvent, for whose benefit a sale was made.

4. SAME.

A sale of assets of an insolvent included notes which never came into the hands of the purchaser. The purchaser gave his note for the price, with defendant as surety. In an action on the note, the surety alleged that he became surety only on the understanding that all the assets should be delivered to his principal, and that the failure to obtain such notes constituted a failure of consideration, releasing him. *Held*, that the answer was insufficient to discharge the surety, because it did not appear that the receiver, who was the payee of the note, accepted the note, and delivered the assets for which it was in part executed, with notice of any condition.

5. ACTION ON NOTE—FAILURE OF CONSIDERATION.

A note, with defendant as surety, was executed for a lumping sale of the entire assets of an insolvent. In an action thereon, the answer of the surety alleged that certain promissory notes, which were sold, were never delivered to his principal, and also alleged that repeated demands for said notes had never been complied with. No objection was taken in the court in which the sale was made by reason of the refusal to deliver the notes, and no effort made to rescind the contract. No good reason was shown why the principal could not acquire title through appropriate legal proceedings. The answer alleged that plaintiff took the notes with knowledge of the facts set up in the answer. *Held* insufficient to show failure of consideration.

6. LIABILITY OF SURETY—SET-OFF AND COUNTERCLAIM.

On a sale of assets of an insolvent, two notes were given for the purchase price. Defendant was a surety on one of the notes, and a third person a surety on the other. The sale was a lumping sale, and the two notes were not given for any particular portion of the assets. Certain of the property sold was never delivered. But other facts appearing in the answer showed that the purchasers obtained a good title thereto, and that the present holder of the note in suit wrongfully withholds said notes from the purchasers, and is, therefore, liable to the purchasers for them or their value. Upon these facts it is held that this right of action is one which belongs solely to the purchasers or principals in the note now in suit, and is not a right of action available to the surety of such purchasers by way of either set-off or counterclaim, not being a mutual claim and the subject of set-off under the Ohio statute. There being outstanding and unpaid two notes, made by the purchasers, upon which different persons are bound as sureties, this affords an additional reason why one surety should not appropriate to himself a right of action against the payer, belonging to the maker of the note, at the expense of the surety upon the other note, still unpaid, and having an equal equity to such relief.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Thomas E. Powell, for plaintiff in error.

T. P. Linn, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge. This is an action upon a promissory note, made by James E. Joyce & Co., with the plaintiff in error, John Joyce, as surety. The note is one of several made for the purchase price of the assets of an insolvent trading corporation, sold under order and directions of a chancery court at Little Rock, Ark. All the notes were payable to a receiver appointed by said court, and the note in suit was assigned to the First National Bank of Little Rock, which sues through the defendant in error, its duly-appointed receiver. The suit was by petition according to the Ohio code practice, and was against John Joyce only. Joyce, by answer, presented two defenses. There was a general demurrer going to both defenses, which the court sustained. The defendant below refused to further plead, whereupon the court rendered judgment for the amount of the note, interest, and costs.

The action of the court in sustaining the demurrer to the answer has been assigned as error. The property sold by the receiver consisted of a stock of goods and merchandise, real estate, and choses in action. It was sold in bulk for the gross price of \$38,200. The note

in suit is for \$9,000, is dated March 20, 1893, and is payable three years after date. The decree of sale directed the receiver to require personal security upon the deferred payments, and to reserve a lien in his deed of conveyance of the real estate included in the sale. The first defense of the answer is that the said John Joyce became the surety of James E. Joyce & Co. upon the agreement and understanding that the lien directed by the court would be reserved. It is then averred that the receiver, negligently and in violation of said order of the court, conveyed said real estate without reserving any lien in his deed, and that said James E. Joyce & Co. have since sold and conveyed said property to third persons, who were ignorant of said order of court made for said sale, "whereby the lien which ought to have been retained and reserved has been lost." It is further averred that the value of the real estate so sold was sufficient to pay the unpaid purchase money, consisting, as alleged, of the note in suit and of another, of like amount, outstanding, upon which one Fitzgerald is sole security. These facts are pleaded in discharge and relief of plaintiff in error as surety upon the note in suit. While it is stated in the answer that the agreement and understanding between the plaintiff in error and the principal debtors was that the receiver should retain or reserve a lien, as provided by the statute law of Arkansas, in his deed conveying to said James E. Joyce & Co. the real estate, which was part of the consideration for which this note was executed, and that the Little Rock Bank, to whom the note was subsequently assigned, took the note with knowledge of the facts stated in the petition, yet it is not averred that the receiver, who was to reserve the lien, was informed, when he accepted the note or before he conveyed the land, that any such conditions were attached by the surety to his liability. It is not stated whether the note was delivered to the receiver by the surety, or by the purchasers of the property; but, whether by the one or the other, plaintiff in error chose to remain silent as to any conditions, or intrusted the note for delivery to the purchasers, and is equally bound by the silence of the latter. A surety is not discharged, even against the payee, by evidence that the obligation upon which he is sued was delivered to the principal obligor upon conditions which have not been performed, if the payee accepted the instrument without notice, and would sustain loss if deprived of the security upon which he relied. This principle has been applied to official bonds, as well as to promissory notes and other negotiable paper. Thus, in *Dair v. U. S.*, 16 Wall. 1, a distiller's bond, perfect upon its face, was signed by a surety, and delivered to one of the principal obligees, upon condition that it should not be delivered unless it was executed by other persons, who did not execute it. The obligee had no notice of this condition, and accepted it. It was held these facts constituted no defense by the surety, who had thus signed the bond upon a condition which had not been performed. To the same effect are the cases of *Amis v. Marks*, 3 Lea, 568, *Buford v. Cox*, *Id.* 518, *State v. Potter*, 63 Mo. 212, and *State v. Peck*, 53 Me. 284. Neither will a surety upon a promissory note, or a private bond, in the hands of the payee, be discharged upon evidence that he had signed the note or bond upon conditions not performed, but of which the payee had

no notice. *Jordan v. Jordan*, 10 Lea, 124; *Russell v. Freer*, 56 N. Y. 67; *McCormick v. Bay City*, 23 Mich. 457; *Davis v. Gray*, 61 Tex. 506; *Merriam v. Rockwood*, 47 N. H. 81.

But it is insisted that by the neglect of the receiver a lien has not been reserved, which would, through subrogation, have inured to the benefit of the surety. Undoubtedly the general principle is that, if a creditor does any act inconsistent with the rights of the surety and injurious to him, or omits to do any act which his duty to the surety obliges him to do, and thereby injures the surety, the latter will be discharged to the extent of such injury. Story, Eq. Jur. §§ 325, 693. So a surety is entitled to the benefit of all securities which the creditor obtains from the principal debtor, and if the creditor by any affirmative act surrender them to the debtor, or they are lost through the neglect of some duty owing to the surety, the latter will be exonerated to the extent of the loss thus sustained. *Evans v. Kister* (decided at this term) 92 Fed. 828. The facts of this case do not bring it within the principles relied upon. The receiver surrendered no lien. He never had a lien. He might have acquired one by an express reservation in his deed to the purchasers, but in no other way. The case would be very different if he had released such a lien after it had arisen. But the complaint is that he might have acquired a lien, and chose not to do so, and to rely alone upon the purchaser and his surety. It may be admitted that he failed in his duty by not reserving a lien as directed by the decree. But to whom was this duty due? To the court, and to the parties interested in the proceeds of sale. It was a duty imposed upon him by the court for the protection of the owners of the property and the creditors interested in its sale. Admit that he failed in the discharge of this official duty; can this surety obtain any benefit therefrom? If so, it will be at the expense of the creditors, who, having lost one security through the negligence of the receiver, will be deprived of the benefit of another which he did take. Yet the negligence of the creditors thus to be punished does not equal that of the surety who seeks to make it available for his own release. If those interested in the proceeds of the sale should have seen to it that the receiver did not neglect to take this lien, quite as much may be said as to the surety. He either delivered the note himself, or suffered his principals to deliver it, to the receiver, without notice that his liability was to depend upon the reservation of this lien. It is incredible that the receiver would have accepted the note subject to such conditions, or, if he did, that he would have conveyed the property without reserving a lien.

Upon the averments of the answer, the assignee of this note stood upon no higher footing than the receiver would, if he, in his official character, were plaintiff. Still, the negligence of the surety in failing to give notice to the receiver of the conditions upon which he was to become liable, and in failing to see that the receiver's deed reserved the lien directed by the court, is greater than that of the owners of the property or the creditors interested in the proceeds of sale. But this loss or injury has come about through the neglect of a public official to execute properly a duty imposed by the decree under which

he was acting. That duty was imposed, not for the benefit of the sureties, who might strengthen the notes of the purchaser, but for the benefit of the parties to the cause. He was, therefore, under no active or affirmative duty to the surety. He had no notice of the conditions upon which the surety had signed, nor of his reliance upon the lien of a vendor for his protection. The performance of this official duty might have prevented loss to this surety. But mere laches or negligence, or nonperformance of some act which might have benefited a surety, will not, in the absence of some express covenant or condition, discharge a surety. The neglect must be of some duty owing to the surety. In the case of *Board v. Otis*, 62 N. Y. 88-92, the sureties upon the official bond of a county treasurer sought to be discharged from liability upon their obligation because of the neglect of other county officials, whose duty it was to make stated examinations of the accounts of the treasurer. The court held that this duty was one owing to the public, and not to the sureties. In that case the court stated the rule, as between sureties and obligees, in a way which meets our approval:

"Mere passive negligence," said the court, "or laches of an obligee or creditor, mere nonperformance of some affirmative act which if performed might prevent loss to the surety, will not, in the absence of some express covenant or condition to that effect, discharge a surety, and that the neglect of duty which is available as a defense for a surety must be of some duty owing to the surety, and not to others,—some positive duty undertaken in behalf of and for the benefit of the surety."

To the same effect is the case of *Wornell v. Williams*, 19 Tex. 180, where the sureties upon the note of a purchaser at an administrator's sale sought to be released from liability upon the ground that the Texas statute and the order of the court required that a mortgage should be taken at such sales upon property sold, and that they would not have become sureties except in reliance upon this statute and order, and that the neglect of the administrator to take the security required by statute and order of the court should operate to relieve them. The Texas court held that upon these facts the sureties were not released.

In *Dye v. Dye*, 21 Ohio St. 93, the general principle is thus stated:

"A creditor may, however, in many ways do that which, though it may not affect the liability of the principal, will exonerate sureties. In all such cases the discharge of the surety is based on some recognized and well-defined principle, and, in general, results from a positive act of the creditor which operates to the prejudice of the surety. Passiveness on the part of the creditor will not discharge the surety, unless he omits to do, when required by the surety, what the law or his duty enjoins him to do, or unless he neglects, to the injury of the surety, to discharge his duty in any matter in which he occupies the position of a trustee for the surety. The discharge of the surety is not claimed in this case by reason of any positive act of the creditor, nor by reason of his neglect to prosecute the claim, after being required by the surety to do so by notice in writing, in accordance with the statute, nor, indeed, by reason of his neglect to comply with any requirement of the surety whatever; for, from aught that appears, the passiveness of the surety equaled that of the creditor. Nor did the creditor have anything in his hands, actually or constructively, in the nature of a trust. Then, upon the principles already so broadly stated, it would seem that the surety was not exonerated from liability on the note."

To the same general effect are the cases of *Schroeppell v. Shaw*, 3 N. Y. 446; *Humphrey v. Hitt*, 6 Grat. 509; *Sawyer v. Bradford*, 6 Ala. 572; *Mundorff v. Singer*, 5 Watts, 172.

The learned counsel for plaintiff in error have cited and relied upon a number of cases, including the cases of *Burr v. Boyer*, 2 Neb. 265, and *Wulff v. Jay*, L. R. 7 Q. B. 761. Most of them are distinguishable from the case in hand, but, in so far as they are in conflict with the cases cited and relied upon, it is enough to say that they do not meet with our approval, and are not in accord with the great weight of authority. The cases of *Burr v. Boyer*, *supra*, and *Wulff v. Jay*, *supra*, were cases in which an actual existing security was lost by the neglect of the creditor to register the instrument. Without stopping to consider these cases, it is enough to say that they are distinguishable from the one at bar by the fact that no existing lien has been sacrificed, and that the only fault of the creditor here complained of is that he did not reserve a lien when he might and should have done so in obedience to the order of the court.

There remains the defense of failure of consideration. This defense rests upon the averment that, among the assets of the McCarthy-Joyce Company, sold to James E. Joyce & Co., were certain promissory notes, then in possession of the defendant in error as receiver for the First National Bank of Little Rock, and that said receiver, though often requested, has refused to surrender same to said James E. Joyce & Co. The consideration which is sufficient to support the principal's contract is the consideration upon which that of the surety rests. It follows, therefore, that if the consideration upon which this note was executed by the principal makers was sufficient, there is no failure of consideration which can be available to the surety, unless his own engagement was entered upon under some other and independent agreement. This the answer attempts to show by the statement that the defendant became surety "only upon the understanding and faith" that all of the assets of the McCarthy-Joyce Company sold to his principals, James E. Joyce & Co., including the notes then in the possession of the bank or its receiver, would be delivered to said purchasers; and the failure to obtain said notes is relied upon as constituting a failure of consideration. This, if true, would constitute only a conditional obligation, and failure to comply with the condition would discharge the surety, without regard to its effect upon the obligation of his principals. It is manifest, however, that the averments of the answer are insufficient to discharge the surety; for it is not averred that either the court or its receiver, the payee of the note, accepted the note and delivered the assets for which it was in part executed with notice of any condition. The authorities for this conclusion have been already cited in disposing of the first defense.

Undoubtedly, a surety may, when the contract has not been assigned to a purchaser for value without notice, when called upon to perform, show either a total or partial failure of the consideration of his principal's contract. But such a defense, when made by the surety, must be one which would be available to the principal, if sued. Here, again, the averments of the answer are insufficient. This note in suit was not executed for any specific part of the property purchased

by James E. Joyce & Co., but was made in part consideration for a lumping sale of the entire assets of the McCarthy-Joyce Company, consisting of lands, a stock of merchandise, and a mass of choses in action. The averment is that among these choses in action were certain promissory notes, aggregating about \$11,000, payable to that company, which had been placed by the payee in possession of the Little Rock Bank for collection, and which were so in possession of that bank, or its receiver, both when that company made its general assignment and when its assets were sold to James E. Joyce & Co. The ground upon which the bank's receiver, the defendant in error, refused to surrender these notes, is not stated, though, as it is stated that the bank was a large creditor of the said McCarthy-Joyce Company, it is most probable that it asserted a banker's lien thereon to secure its general account as a creditor. But if we assume, as probably we should, in view of the averments of the answer, that the defendant in error would be estopped to assert such a lien, the bank having been a party to the suit in which it is averred a decree was rendered directing the sale, we are driven to the inevitable conclusion that James E. Joyce & Co. obtained the superior title to said notes, subject to no incumbrance in the nature of a banker's lien. The purchasers obtained, upon this hypothesis, just what the surety asserts they bought. That the purchaser knew that the notes in question were not actually in the custody of the court or its receiver when this sale occurred sufficiently appears, for the claim to these notes is rested upon the averment that the receiver had scheduled them as assets "in possession of the bank for collection." So it is stated that, after the sale had been reported and confirmed, and the terms of sale complied with by the purchasers, an order was made directing the court's receiver to deliver to the purchasers the property so sold, including said notes so at the time in possession of the defendant in error. It further appears that all of the property so sold was delivered to said purchasers, and proper conveyance made, except these notes. It is then stated that the said purchasers had made repeated demands upon the said bank and its receiver, the defendant in error, for said notes or their proceeds, but that such demand had been refused, and that the defendant in error continues to withhold said notes or their proceeds. No objection was taken in the court in which the sale was made by reason of this refusal of one of the parties to the cause to deliver these notes to the purchaser. No effort was then made to rescind the contract, or to obtain any abatement of price, or to obtain an order of that court upon the defendant in error for these notes. Upon the contrary, the case as made by the answer establishes that the purchaser bought, along with the other assets, certain notes at the time in possession of the defendant in error, and by the decree obtained the title and right to same, or their proceeds. They have not yet secured same, though, on the facts stated, no good reason is shown why they may not assert their title through appropriate legal proceedings. Upon this view of the case, there can be no pretense that the consideration of the principal's contract has failed in whole or part. Subsequently the note in suit seems to have been assigned to the bank's receiver by Wittemore, the court's receiver. Inferably,

this was done in course of the distribution of the assets among the creditors.

It is averred that the defendant in error took the note with knowledge of the facts stated in the defendant's answer. We have therefore assumed that the note is subject to all defenses which could be made against the original payee. As the defense of failure of consideration would not be available to the principals in the note, in a suit against them by the payee, it is a defense not available to their surety. It may be that, upon the facts stated in this answer, there exists against the defendant in error a liability to account to the principals of the plaintiff in error for the notes in question, or their proceeds. But such liability constitutes an independent right of action to recover the notes themselves, or for damages for their detention or conversion. But that is a right of action which belongs to the principals, and cannot be claimed or asserted by their surety. It is certainly not a right of set-off belonging to the surety, for only mutual claims are the subject of set-off. That it might be asserted as a counterclaim by the principals, if sued, may be conceded. Even then they would be under no obligation to set it up by way of recoupment or counterclaim; for, if the facts do not constitute a failure of consideration, they might reserve their claim, and bring a separate action. Under section 5072 of the Ohio Revised Statutes, the counterclaim which a defendant may set forth in his answer "must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition." Manifestly, this is not a right of action in favor of the surety upon which "a several judgment might be had."

But, upon general principles, this liability of the defendant in error to account for the notes in question cannot be relied upon as either a set-off or counterclaim—First, because, if it be set up and allowed here, it must bar any future action by the principal makers of the note; and, second, the answer shows another note of like amount outstanding upon which a different person is liable as surety. One surety has no more right to appropriate this counterclaim for his own benefit than the other. If each should be sued, and make the same defense, how would their conflicting claims to control and appropriate this counterclaim be reconciled? In *Gillespie v. Torrance*, 25 N. Y. 306, the suit was, as here, against the surety upon a note, and the defense was a failure of consideration. The note was given for the price of timber sold to the principal maker of the note. The timber was in a raft, and the quantity and quality was estimated upon certificates of a surveyor. The defense was that there was a gross mistake as to quantity, and a breach of warranty in that respect, as well as in quality. The court held that the defense of failure of consideration was not made out, and that the surety could not avail himself of the breach of warranty as to quantity or quality. The court said that, though there seemed "a strong equity in favor of the defendant to have the note canceled or reduced, by applying towards its satisfaction the damages which appear to be due to Van Pelt for the breach of warranty," it was an equity

in which Van Pelt was interested to even a greater extent than the defendant, and could not be disposed of without having him before the court. In *Lasher v. Williamson*, 55 N. Y. 619, the action was against the sureties of a lessee, who sought to defend by showing that the plaintiff, as part of the contract between himself and their principal lessee, had agreed "to furnish to him during the period of the lease a certain quantity of property, to be stored upon the leased premises at an agreed price," and that he breached this agreement. The court said:

"The breach of that promise gave [the lessee] a cause of action against the plaintiff, but this cause of action in favor of Gibbs [the lessee and principal maker of the bond] cannot be available to the sureties. It belongs to Gibbs and not to them. * * * The nonperformance or partial performance of Lasher's engagement to Gibbs is not to be regarded as a failure of consideration, but as an independent cause of action, which Gibbs, and he only, may assert. It is in his election to determine whether it shall be used defensively, or whether he will bring his own action for the damages, or whether he will forego his claim altogether. The defendants have no control over him in this respect, and cannot borrow and avail themselves of his rights."

It is proper to observe that neither set-off nor counterclaim were set forth as distinct defenses in the answer. Without admitting that either defense could be made under the defense of failure of consideration, we have preferred to treat the defenses as if properly pleaded. There was no error in sustaining the demurrer to the answer, and the judgment will be affirmed.

GRAVEN v. MacLEOD et al.

(Circuit Court of Appeals, Sixth Circuit. March 27, 1890.)

No. 609.

1. CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—FAILURE TO LOOK AND LISTEN.

Where a carrier so operates its trains at a station that a passenger is impliedly invited to cross an intervening track in going to or leaving his train, he is chargeable only with the exercise of reasonable care to avoid danger, and is not necessarily guilty of contributory negligence in failing to look and listen for an approaching train before crossing such track.

2. SAME— IMPLIED INVITATION TO CROSS TRACKS — EVIDENCE — QUESTION FOR JURY.

Deceased left a train, at a station, on the side opposite to the platform provided,—it being nearer to his residence,—and attempted to cross an intervening track, eight feet distant from the train, when he was struck and killed by another train, running in the opposite direction. Rain was falling at the time, which obscured vision; and deceased, as he left the car, pulled his hat over his face to shield it. The company's rules required trains to approach that station under full control, and prohibited trains from passing that station while other trains were receiving or discharging passengers. These rules were habitually disregarded, and the train which struck deceased was running at 15 miles per hour at the time. When the road was first built, cars were equipped with gates to prevent passengers from leaving, except on the platform side of the cars; but these had been taken off some time before the accident, and there was no notice or other warning forbidding passengers from alighting away from the platform. Deceased uniformly, and other passengers generally, without objection of the company, got off on either side, at their con-

venience. *Held*, that the company had impliedly invited passengers to alight on either side, and that the question of deceased's contributory negligence was for the jury.

In Error to the Circuit Court of the United States for the District of Kentucky.

This is an action for the negligent killing of Alpha Graven, the husband and intestate of Minnie Graven, the plaintiff in error. The deceased was a passenger upon the line of electric railway operated by defendants as receivers, extending from Louisville, Ky., west to the neighboring city of New Albany, on the Indiana side of the Ohio river. This line of railway consists of two parallel tracks, one of which is used exclusively by trains east bound, and the other by trains running in the opposite direction. The deceased lived in the western part of the city of Louisville, and was accustomed to travel between the city and his residence upon defendant's railway; taking and leaving the cars at its Twenty-Sixth street station, near which he lived. That station consisted of two platforms, one on each side of the right of way. Each was 118 feet in length, and each began at a point east of Twenty-Sixth street, and extended to the eastern line of that street. The platform on the south side of the railway was intended for the convenience of passengers taking or leaving trains east bound, while the opposite platform was along the side of the track used by west-bound trains, and was intended for the use of passengers taking or leaving trains bound west. On the latter was a small box house, used for the sale of railway tickets during certain hours of the day. The space between the two platforms was occupied by two parallel tracks, the space between the tracks being about eight feet. The evidence tended to show that the space between the rails was filled in smoothly with cinders, but the evidence was conflicting as to the condition of the space between the two tracks. On the afternoon of May 10, 1894, Graven took a train at Seventh street, Louisville, purposing to return to his residence. This train was due to arrive at Twenty-Sixth street at 5:58 p. m. The sun was not down, but a storm of wind and rain darkened the afternoon. This train, like all others operated on the road, consisted of a motor car and a trailer. Graven took his place in the motor car. As the train was slowing up for Twenty-Sixth street, he came out of his car, and stood under its rear hood, and, before it had come to a stop, jumped off, away from the platform, and undertook to cross the east-bound track diagonally, in the direction of Twenty-Sixth street, on which he lived. Just as he was about to step on that track, he was struck and knocked down by the corner of a passing east-bound train, and sustained injuries resulting in death.

In respect to the negligence of the railway company, there was evidence tending to show: (1) That there was a rule of the company which provided that "all trains and engines on either track must approach Twelfth, Eighteenth, Twenty-Sixth and Twenty-Ninth streets under full control, and keep a careful lookout for passengers crossing to and from Kentucky and Indiana trains, and must not under any circumstances pass these stations while Kentucky and Indiana trains are receiving and discharging passengers." (2) There was evidence tending to show that the train from which Graven debarked was several minutes behind time, and that the schedule passing point for that train to pass the east-bound train was between Twenty-Ninth and Thirty-First streets; but, being behind time, the east-bound train was due to pass at any moment. There was also evidence that under the schedules a train bound east passed Twenty-Sixth street every 15 minutes. (3) There was evidence tending to show that the train which collided with deceased did not approach this station under "full control," but was approaching at a speed estimated as high as 15 miles per hour, and that no effort was made to check or stop until Graven's danger was observed. There was conflicting evidence as to whether any warning was given of its approach to this station. (4) There was evidence tending to show that the rule requiring trains not to pass the stations named while other trains were receiving or discharging passengers was habitually disregarded; the customary practice being to pass without stopping, unless there were passengers to put off or take on. (5) There was evidence tending to show that Graven was observed as soon as he stepped off the standing train,

and every effort made to stop the train which was possible, but without avail. (6) There was evidence that when electric trains were first put on this railway the cars were provided with gates, which the trainmen were required to keep so closed that passengers could not take or leave the cars except by way of the platforms provided for that purpose. But the evidence also showed that these gates had been removed some time before this accident. (7) The evidence tended to show that no warning or other notice had ever been posted in the cars, or about the stations, forbidding passengers from alighting away from the platforms, or requiring them to use the platforms in getting on or off of trains. (8) There was conflicting evidence as to whether the employés had instructions to warn or forbid passengers from alighting away from the platforms, and evidence tending to show that, if employés had any duty in this respect, imposed by any rule of the company or of the receivers, the rule was generally disregarded, and passengers suffered, without objection, to leave the cars on or away from the platform, as suited their convenience. (9) Graven lived south of the station. His train came in on the northern track. There was evidence tending to show that he customarily left the train on the south side (that is, the side away from the platform provided for the use of west-bound trains), and crossed the east-bound track between the platforms to Twenty-Sixth street, and evidence tending to show that passengers living south of the railway customarily left the train away from the platform, and crossed the east-bound track diagonally to Twenty-Sixth street, as Graven undertook to do on this occasion.

Respecting the defense of contributory negligence, there was evidence as follows: (1) That, before stepping off the car, Graven pulled his coat collar up around his neck, and pulled a soft-brimmed hat down over his face, for the purpose of shielding his eyes and face from the wind and rain which was coming from the west; that being the direction in which his route took him. There was evidence tending to show that as he stepped out into the storm he bent or bowed his head, as if to shield his face. The evidence also tended to show that while standing under the hood of the car his back was to the west, but as he stepped down onto the track he was facing west, the direction from which the colliding train came. (2) The evidence conclusively established that the space between the train from which he debarked and the east-bound track was ample to protect him from collision, and that the distance from the spot on which he landed, when he stepped from his car, to Twenty-Sixth street, on which he lived, was from 30 to 50 feet, and that he could have safely walked between the tracks to Twenty-Sixth street, and then crossed the east-bound track at a public street crossing. By crossing diagonally to Twenty-Sixth street he saved about one-third of the distance. (3) The undisputed evidence established that, when Graven started diagonally, in a southwest direction, towards Twenty-Sixth street, the east-bound train was approaching from the west, and nearly in front of him, and was not more than from 20 to 40 feet away. He had taken not more than three or four steps before he was struck by the front corner of the motor car. (4) The evidence was that this accident occurred at 6 p. m., May 10, 1894, that the sun was not down, but that the storm of wind and rain rendered it difficult to see with distinctness any distance, especially in the direction from which the wind was coming. There was also some evidence tending to show that the deceased was slightly near-sighted.

At the close of all the evidence the learned trial judge instructed the jury to find for the defendants, upon the ground that, as matter of law, the deceased had been guilty of contributory negligence.

D. Moxley for plaintiff in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

Upon a former trial of this case there was a judgment for the plaintiff in error, which, upon a writ of error, was reversed by this

court for error in refusing to instruct the jury that, upon the undisputed facts, the deceased had, as matter of law, been guilty of contributory negligence. The facts upon which our judgment was based, and our reasons for the conclusion then reached, will fully appear by an examination of our opinion as reported in the case of *MacLeod v. Graven*, 73 Fed. 627; *Id.*, 47 U. S. App. 573, 24 C. C. A. 449, 79 Fed. 84. While the general facts in this and the former record are much the same, the case for the plaintiff in error has been somewhat strengthened in respect to the negligence of the railway company in the matter of both the existence and enforcement of any rule forbidding passengers to leave the cars away from the platforms provided for that purpose. Upon the former record we held that the undisputed evidence justified no other inference than that Graven, after alighting from the train, had, without either stopping or listening or looking, undertaken to cross a railway track upon which a train was rapidly approaching, which he could not but have seen, if he had looked or listened before going upon the track. We reached this conclusion irrespective of the question as to whether he had violated any rule of the company, in alighting away from the platform, and based our judgment upon his failure to observe that high degree of care required of one about to cross a railway track, as announced and applied in the cases of *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125; *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85; and *Blount's Adm'x v. Railway Co.*, 22 U. S. App. 129, 9 C. C. A. 526, 61 Fed. 375. We did not regard the case of *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281, as in any way conflicting with the ground upon which we rested our judgment, because in that case the alleged contributory negligence of Lowell consisted in his conduct in leaving the train away from the station platform, in supposed violation of a rule of the company known to him, and conspicuously posted in the cars. The question as to whether Lowell had been guilty of negligence in his manner of crossing the track cut no figure in the result; for Mr. Justice Brown, in announcing the opinion of the court, said:

"In his manner of leaving the train there seems to have been no negligence. He took hold of the iron railing at the end of the platform on the right-hand side, stepped down with the left foot first, and faced towards the west, on the south-line track, saw or heard no train coming upon that track, and supposed that he was perfectly safe in crossing, as he knew no train was then due."

But since that opinion, and since the former reversal of this case, the supreme court, in the case of *Warner v. Railroad Co.*, 168 U. S. 339, 18 Sup. Ct. 68, has drawn a distinction between the duty owing to a passenger by a railway company and that due to a traveler crossing its tracks. Upon that subject the court said:

"The duty owing by a railroad company to a passenger actually or constructively in its care is of such a character that the rules of law regulating the conduct of a traveler upon the highway, when about to cross, and the trespasser who ventures upon the tracks of a railroad company, are not a proper criterion by which to determine whether or not a passenger who sustains injury in going upon the tracks of the railroad was guilty of contributory negligence. A railroad company owes to one standing towards it in the relation of a passenger a different and higher degree of care from that which

is due to mere trespassers or strangers, and it is, conversely, equally true that the passenger, under given conditions, has a right to rely upon the exercise by the road of care; and the question of whether or not he is negligent, under all circumstances, must be determined on due consideration of the obligations of both the company and the passenger. As said by the court of appeals of New York in *Terry v. Jewett*, 78 N. Y. 338-344: "There is a difference between the care and caution demanded in crossing a railroad track on a highway, and in crossing while at a depot of a railroad company to reach the cars. No absolute rule can be laid down to govern the passenger in the latter case under all circumstances. While a passenger has a right to pass from the depot to the train on which such passenger intends to travel, and the company should furnish reasonable and adequate protection against accident in the enjoyment of this privilege, the passenger is bound to exercise proper care, prudence, and caution in avoiding danger. The degree of care and caution must be governed in all cases by the extent of the peril to be encountered, and the circumstances attending the exposure."

A peremptory instruction to find for the defendant was given upon proof that the plaintiff, who was a passenger, and who was under the necessity of crossing a track in order to reach a train standing upon another, had crossed an intervening track, on which a train was approaching, which he could not have failed to see, if he had stopped and looked before going on the track. The supreme court held that there was a view of the testimony which constituted "an implied invitation to the passenger to follow the only course which he could have followed in order to take the train; that is, to cross the track to the waiting train." Where the circumstances are such as to constitute an implied invitation to depart from a station by crossing a track, the passenger, while not absolutely free from the duty of exercising care and caution in avoiding danger, would be justified in assuming that, in holding out the invitation to leave its train by crossing an intervening track, the railroad company had not "so arranged its business as to expose him to the hazard of life and limb unless he exercised the very highest degree of care and caution." *Warner v. Railroad Co.*, 168 U. S. 339-347, 18 Sup. Ct. 68. While it is true that the case before us does not show, as in the Warner Case, that there was no other course left the deceased than to make his exit from this train away from the platform, and across the east-bound track, yet there was evidence tending to show that the way taken by him was not forbidden, and was the one customarily used by passengers living, as he did, on the side away from the platform. The circuit court was obliged to take that view of the evidence most favorable to the deceased, where the question was whether there was any evidence for the jury. There was, therefore, a view of the evidence which might, in the absence of other circumstances, have justified the deceased in assuming that an implied invitation was extended to him to leave the station in the way he did, if that was most convenient to him, and in relying upon the obligation thereby imposed upon the company of so operating its trains as that he should not be exposed to danger "unless he exercised the very highest degree of care and caution." This view of the law, as announced in the case of *Warner v. Railroad Co.*, *supra*, requires that the question of contributory negligence should be submitted to the jury, upon all the facts and circumstances of the case. If the deceased was not justified in assuming that the com-

pany extended to him an implied invitation to leave its trains as he did, and to cross its track between the platforms on his way from the station, he would not be justified in relying upon the company so operating its trains at this station as that he might cross this track at the time and place he did without the exercise of the highest degree of care and caution. On the other hand, if the circumstances were such as to justify the deceased in assuming that the company extended to him an implied invitation to leave its train away from its platform, and to make his way from the station upon or across its east-bound track, the company would come under an obligation to so regulate the running of its trains while passengers were being discharged from trains bound west, and standing at that station, as that those accepting such invitation would not be in danger of life or limb unless they exercised the highest degree of care and caution. If, from the facts and circumstances known to the deceased, or which, as a passenger accustomed to the use of the trains of this company, he is presumed to have known, he was justified in assuming that he might rely upon the exercise by the company of that degree of care due to a passenger crossing a track upon the implied invitation of the company, he would be chargeable only with reasonable care in avoiding danger. In such case, the mere fact that a passenger crosses a track to take his train, or in leaving his train, without looking or listening, would not necessarily be contributory negligence, but would be a question for the jury to determine whether, under all the facts, such conduct was due care. The right to rely upon the care and caution of the company furnishes some reason for the failure to exercise that high degree of care which one is bound to exercise when his safety depends wholly upon his own watchfulness. *Wheelock v. Railroad Co.*, 105 Mass. 203; *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. Railroad Co.*, 84 N. Y. 246.

In view of the law as announced and applied in the case of *Warner v. Railroad Co.*, 168 U. S. 339, 18 Sup. Ct. 68, and of the obligation of this court to conform its decisions to the opinion of that court, our former opinion in this case must be regarded as overruled. Reverse and remand for a new trial.

BROWN & HAYWOOD CO. et al. v. LIGON et al.

(Circuit Court, E. D. Missouri, E. D. March 17, 1899.)

No. 3,981.

1. ESTOPPEL—RECITALS IN BOND.

Where an underwriting bond recited the due execution of a bond by the obligees as sureties for a third person, and was conditioned for their indemnification from loss by reason of the obligation so incurred, the obligors are estopped by its recitals to set up the invalidity of the original bond by reason of formal defects after there has been a recovery thereon against the sureties.

2. BONDS—CONSTRUCTION—RECITALS.

There is no variance in a recital in an underwriting bond that the original bond was given to a county, because it runs to the state as obligee, where it is in fact, and by its terms, for the benefit of the county.

3. PRINCIPAL AND SURETY—RIGHT OF ACTION ON INDEMNIFYING BOND.

A bond recited that one L. had entered into a contract with a county to construct certain buildings, by which he was required to pay for all materials furnished and used in their construction, and that the obligees had become his sureties for the performance of such contract. The bond was conditioned that L. should well and truly perform and fulfill "said contract," and should save the obligees harmless from their obligation as such sureties. *Held*, that such bond was more than a bond of indemnity to the obligees, being, in addition, one for the due performance by L. of his contract, including the payment for materials, and that it was not essential, to give a right of action thereon, that a judgment for materials, obtained against the obligees as sureties for the contractor, had been paid, but that there was a breach of the bond when the obligees were subjected to such judgment, as well as by the failure of L. to pay for such materials, either of which gave the obligees a right of action thereon.

4. SAME—RELEASE OF SURETIES BY ALTERATION OF CONTRACT.

Such bond created a direct obligation in favor of subcontractors who furnished materials, which entitled them to maintain an action thereon in case of default of the contractor in making payment for such materials; and no subsequent alteration of the contract by agreement between the county and the contractor, though with the consent of his sureties, the obligees in the bond, could affect the rights of such subcontractor thereunder.

5. SUBROGATION—RIGHT OF CREDITOR TO ENFORCE SECURITY HELD BY SURETIES.

Where the sureties on the bond of a contractor for a public building, which is conditioned for the payment by the contractor for all materials purchased, have become insolvent, so that a judgment recovered on the bond by a subcontractor for materials furnished cannot be collected, the judgment plaintiff is entitled to be subrogated to any security held by the sureties, and may maintain a suit in equity to enforce for his benefit an underwriting bond taken by the sureties to indemnify them from loss or liability.

6. JUDGMENT AS EVIDENCE—PRIMA FACIE PROOF OF DEFENDANT'S LIABILITY.

A judgment against the sureties on a contractor's bond, rendered in a contested case and without collusion, is *prima facie* evidence of the validity of the bond, and of the liability of the defendants to the plaintiffs thereon, in a subsequent suit on an underwriting bond taken by such sureties.

This was a suit in equity by a judgment creditor of a building contractor and the sureties on his bond (such sureties joining as complainants) to enforce an underwriting bond taken by the sureties.

Farish & Williams, for complainants.

Noble & Shields, for defendants.

ADAMS, District Judge. The laws of the state of Washington provide as follows:

"Whenever a board of county commissioners of any county of this state * * * shall contract with any person or persons to do any work of any character which, if performed for an individual, a right of lien would exist under the law, * * * such board of county commissioners * * * shall take from the person with whom such contract is made a good and sufficient bond, with two or more sureties, * * * which bond shall be conditioned that such person shall pay all laborers, mechanics and material men, and persons who shall supply such contractor with provisions or goods of any kind, all debts due to such person, or to any person to whom any part of such work is given, incurred in carrying on said work." Hill's Ann. Code, § 2415.

Pierce county (one of the counties of the state of Washington) desired a court house and jail; and its commissioners on the 19th

day of September, 1890, entered into a contract of that date, with one John T. Long, for their construction. It became necessary, under the laws of Washington, that Long should give a bond, with resident sureties, for the faithful performance of the contract, and he procured a bond, with all of the complainants herein, except the Brown & Haywood Company, as sureties; agreeing with such sureties, at the time the bond was signed by them, that he would furnish them a bond executed by the defendants in this case, for their protection. This bond, signed by Addison and all the other complainants in this case, excepting the Brown & Haywood Company, will hereafter be referred to as the "Addison bond." Its condition is as follows:

"Whereas, the above-bounden J. T. Long has this day entered into a contract with Pierce county, a corporation of the state of Washington, wherein the said bounden J. T. Long, for a consideration therein named to be paid, [has agreed] to make certain improvements, by erecting, building, and furnishing materials for a court house and jail, to be built in the city of Tacoma, county of Pierce, in accordance with said contract and the plans and specifications therefor, and in said contract agrees to pay all persons performing labor upon said building and doing said work, and to pay for all materials furnished and used therein, and all persons who shall furnish such contractor with goods or provisions of any kind, and all claims for damages; Now, therefore, if the said bounden John T. Long, his heirs, administrators, and assigns, shall well and truly perform the covenants and agreements entered into in said contract, and pay all persons furnishing material therefor, all laborers, mechanics, and material men, and all persons who shall supply said contractor with provisions or goods of any kind, * * * and shall save the said Pierce county from, in, and against all liens or claims of persons performing the work or furnishing materials upon it, or about the work mentioned in said contract, and shall save said Pierce county harmless from and against all loss, damage, and expense occasioned to said Pierce county or to any person by reason of any negligence or carelessness in the performance of said contract, or by any breach or omission on the part of said contractor, then this obligation to be void, otherwise to be and remain in full force and effect; and any judgment obtained thereon shall be satisfied out of either community or separate property."

This bond purports, by its recitals, to be the bond of J. T. Long, as principal, with Addison and others as sureties, but, for some unexplained reason, was not actually signed by Long, but was signed by all the sureties. It appears to be dated September 15, 1890, four days before the date of the contract of September 19, 1890, but was accepted and approved by the commissioners of Pierce county on the 19th day of September, the date of the contract. This bond makes the state of Washington the obligee, but recites, substantially, that it was for the benefit of Pierce county; and its condition is, substantially, to save Pierce county harmless from liens, claims, loss, damage, or expense occasioned by Long's failure to perform his contract.

On September 23, 1890, the defendants executed their bond, whereby they acknowledged themselves indebted to J. R. Addison, and the other sureties in the Addison bond, in the penal sum of \$270,000. This bond was subject, however, to the following condition; that is to say:

"The conditions of the above obligation are such that whereas, one J. T. Long has entered into a contract with Pierce county, a corporation of the state of Washington, wherein the above-bounden J. T. Long, for a consideration therein named, to be paid, has agreed to make certain improvements, by erecting, building, and furnishing materials for a court house and jail, to be built in the city of Tacoma, county of Pierce, state of Washington, in accord-

ance with the said contract and plans and specifications therefor, and in said contract agrees to pay all persons performing labor upon said buildings and doing said work, and all persons who shall furnish said J. T. Long with goods or provisions of any kind, and all claims for damages; and whereas, J. R. Addison, W. H. Fife, Van Ogle, Jacob Ralph, Charles T. Uhlman, J. B. Catron, T. A. Bingham, L. L. Devoin, J. C. Mann, and W. B. Kelley have become sureties for the said J. T. Long, to the said county of Pierce, to the amount of \$270,000, in good and lawful money of the United States, and have bound themselves as such sureties to the said county for the performance by the said J. T. Long of all the covenants and agreements entered into by the said J. T. Long with said county of Pierce for the building of the court house and jail above referred to in accordance with a certain contract entered into by the said J. T. Long and the said county of Pierce: Now, therefore, the condition of the above obligation is such that if the said J. T. Long shall well and truly perform and fulfill the conditions of the contract entered into between him and the said county of Pierce, in manner and form as he is therein required to do, and at all times herein save harmless the said J. R. Addison and others, their heirs, executors, and administrators, of and from the obligation which the above-named sureties have entered into with the said J. T. Long and the said county of Pierce, and of and from all action, cost, and damage for and by reason thereof, then this obligation shall be void, otherwise to remain in full force and effect."

After the execution and delivery of the foregoing bonds, Long entered upon the execution of his contract with Pierce county. In so doing, he purchased of the complainant the Brown & Haywood Company certain materials and supplies, which were used in the construction of the buildings, and which he failed to pay for in full, and for which said last-mentioned company on January 29, 1896, recovered, in a contested action instituted by it in the superior court of Pierce county against Long and his sureties, Addison and others, on said Addison bond, the sum of \$6,003.31. On the same day (January 29, 1896) certain firms and corporations, named Wheaton, Reynolds & Co., Warren & Hines, and the Roberts Manufacturing Company, each recovered judgments in the same court on different causes of action instituted by them against Long and his sureties on the Addison bond, for materials and supplies furnished to Long, and used by him in the construction of said buildings. The judgment debtors in these actions, namely, Long, Addison, and all the other sureties on Long's bond to Pierce county, proved to be insolvent, so that the judgments could not be made. The three last-mentioned judgments were, prior to the institution of this suit, assigned to the complainant the Brown & Haywood Company, so that, with its own judgment, said last-named company is the holder and owner of claims, reduced to judgment, against Long and Addison and the other sureties on that bond, for material furnished for and used in the construction of the court house and jail, in the aggregate sum of \$20,916.38. The Brown & Haywood Company now institutes this suit, joining with itself, as co-complainants, Addison and the other sureties on the Addison bond, who are the obligees in the bond now sued on, against the obligors in said bond, namely, Ligon and others, to recover the aggregate amount of said judgments. The theory of complainant's bill is that its judgment debtors, the sureties on the Addison bond, have a security consisting of the underwriting bond of the defendants, to which it (the complainant) is equitably entitled to resort for the satisfaction of its judgment against its insolvent debtors. This is claimed on two

grounds: First, that complainant is entitled to be subrogated to the rights of its debtors, as against the defendants; and, second, is entitled to avail itself, in equity, of the promise made by the defendants to the obligees in the bond sued on, for its (the complainant's) benefit.

The defenses are: First, that because Long, who is mentioned as principal in the Addison bond, never in fact signed it, and because said Addison bond bears date four days before the date of the contract referred to therein, the said bond, as well as the bond sued upon, executed by the defendants, is without consideration and void. These defenses, if they ever had any merit, are concluded by the recitations of the bond in suit. This bond recites the making of the contract between Long and Pierce county, the due execution of the Addison bond by Addison and the other sureties, and their obligations to Pierce county thereunder; and the defendants ought to be estopped from asserting the contrary. Again, this contract and the two bonds must be held, notwithstanding their dates, to take effect and become operative as of the date of delivery. In addition to this, the liability of Addison and the other sureties in that bond has also been established by the judgments of the superior court of Pierce county already referred to.

It is next contended that because the bond in suit recites that the Addison bond was given to Pierce county, and because the Addison bond appears in fact to have been given to the state of Washington, as obligee, there is such a variance as is fatal to this action. I fail to appreciate the force of this objection. The Addison bond was, by its terms, manifestly for the benefit and security of Pierce county, and no more correct recitation could have been made than to say, as appears in the bond in suit, "that whereas, Addison and others have become sureties for Long to Pierce county." This is a correct recital of the fact and main purpose of the Addison bond, and there is no ground for the claim of fatal variance.

The next defense is that the bond sued on is one of mere indemnity, and that the obligees in the bond are not shown to have been actually damaged. In considering this defense, the language employed in the condition of the bond must be carefully considered. It first recites that Long has entered into a contract with Pierce county to construct a court house and jail, and has, in and as a part of said contract, agreed to pay for all materials furnished and used in such construction, and that Addison and others, sureties on the Addison bond, and obligees in the bond in suit, had become sureties for the performance by Long of all the covenants and agreements entered into by Long. The condition then proceeds to state that if Long shall well and truly perform and fulfill "said" contract (manifestly referring to Long's contract with Pierce county), and if he shall save Addison and the other sureties harmless from their obligations as such sureties, and if he shall save Addison and the other sureties harmless from all actions, cost, and damage by reason of their signing said Addison bond as sureties for Long, the bond sued on shall be void; otherwise (that is to say, if Long fails to perform his agreements with Pierce county, or if he fails to save Addison and the other sureties harmless from obligations, or if he fails to save them harmless from actions, cost, or

damage), the bond remains in full force and effect. It thus appears that the bond sued on is, in effect, an agreement that Long shall carry out the terms of his contract with Pierce county, including the payment to subcontractors for all materials furnished by them, and used in the construction of the court house and jail in question. It is also an agreement to save Addison, and the others who were sureties on Long's bond, harmless from the obligation and liability which they had assumed as sureties on that bond, and, in addition thereto, is an agreement to save Addison and others harmless from actions, cost, and damages. Such being the condition of the bond, it is more than a bond for indemnity, and the actual payment of the judgments obtained by the Brown & Haywood Company and others against Addison and others is not a necessary prerequisite to liability of defendants in this action. *Johnson v. Risk*, 137 U. S. 300, 11 Sup. Ct. 111; *Bank v. Leyser*, 116 Mo. 51, 22 S. W. 504; *Locke v. Homer*, 131 Mass. 93; *Farnsworth v. Boardman*, Id. 115; *Shattuck v. Adams*, 136 Mass. 34; *Conner v. Reeves*, 103 N. Y. 527, 9 N. E. 439; *Jones v. Childs*, 8 Nev. 121. Tested by the doctrine of these authorities, and many others to which my attention is called, there was certainly a breach of the bond in suit when judgments were rendered against Addison and others on the several causes of action already referred to. There was also another breach of the condition of the bond in suit when Long failed to pay the complainant, and other parties who secured judgments which have been assigned to the complainant, as already stated, for the materials furnished by them for the construction of the court house and jail in question. Long, it appears by his contract with Pierce county, had agreed to pay all such claims, and the condition of the bond in suit recites such an agreement. The Addison bond bound the obligors to pay Long's obligations to material men, and this obligation is recited in, and its performance is guaranteed by the defendants in and by, the bond in suit. Long's failure to pay these claims resulted in judgments against Addison and others. The defendants in this case, by their bond, agreed that no such judgments should be rendered against Addison and others. The defendants therefore could be made to respond to Addison and others, and the other complainants, exclusive of the Brown & Haywood Company, if they were the meritorious complainants in this case; and that, too, irrespective of whether Addison and others had, prior to bringing their suit, actually paid the judgments so rendered. See cases *supra*. If the complainants Addison and others could have recovered, the case clearly falls within the principle entitling the complainant the Brown & Haywood Company to be subrogated to the rights of Addison and others. The defendants' underwriting bond is a security taken by the Brown & Haywood Company's debtors, Addison and others, which, by reason of their insolvency, the Brown & Haywood Company is entitled to resort to, as an equitable asset, to satisfy its demands against its principal debtor.

But it is urgently contended by defendants' counsel that Long and Pierce county made some new agreements, without the knowledge or consent of Addison and others, sureties on Long's first bond, which varied the original contract, for the faithful performance of which

the Addison bond was given, and that such action of the principals relieved Addison and others from liability on that bond. This issue was presented, fully heard, and determined against Addison and others, in the several suits referred to, in the superior court of Pierce county. The judgments rendered in such suits, if not collusive,—and there is no evidence that they were,—are *prima facie* evidence in this case of the liability of Addison and others to the complainant. *Trust Co. v. Robinson*, 24 C. C. A. 650, 79 Fed. 420. This *prima facie* liability has not been overcome by any evidence in this case.

It is also urgently contended by defendants' counsel that the proof shows that Long and Pierce county, with the consent of Addison and others, who were Long's sureties, on January 7, 1892, made a substantial change in the original contract between Long and Pierce county, and that while such change so made with the consent of Addison and others, the sureties constituted no defense in favor of Addison and others in the suits of the Brown & Haywood Company and others against them, already referred to, it would constitute a defense in favor of the defendants in this case in a suit instituted by Addison and others on the bond in suit, and that, as a necessary consequence thereof, the complainant the Brown & Haywood Company, which must work out its remedy through the right of Addison and others, cannot recover in this case. It may or may not be that the change made by the modified contract of January 7, 1892, was so material as to relieve the defendants from liability on their bond, if Addison and others were the meritorious complainants; but, whether so or not, such change in the original contract cannot affect the complainant the Brown & Haywood Company's right to recover for the materials supplied by it to Long. As already observed, the bond in suit, although made to Addison and others as nominal obligees, contains a stipulation requiring the defendants, in effect, to pay material men's claims, and thus conform to the obligation imposed on Addison and others by their bond and by the laws of the state of Washington; and even though the defendants might be released from liability to the obligees named, by reason of the change in the contract, they are not released from their liability incurred in favor of material men. I need not discuss this question at any length, as I understand it is put at rest by the recent decision of the circuit court of appeals for the Eighth circuit in the case of *U. S. v. National Surety Co.*, 92 Fed. 549. This case holds, in effect, that where an act of congress provides that a contractor for public works should give a bond conditioned, among other things, to pay the claims of subcontractors, the subcontractors may recover on that bond, notwithstanding material changes made in the contract between the principal contractor and the government,—such changes, in fact, as would have precluded a recovery on the part of the government itself. Applying the doctrine of that case, and of the several cases cited as authority therein, there is but one conclusion to be reached upon this last contention of the defendants' counsel; and that is that the defendants are liable in this case to the complainant the Brown & Haywood Company for the amount of its demands for materials furnished to Long, as fixed by the judgments recovered by it and the other parties who have assigned to it, as already stated.

Complainant's equity may consist in the right to be subrogated to the securities held by its debtor, or it may consist in its right to enforce an agreement made by the defendants for its benefit, under the doctrine of the case of *Knapp v. Insurance Co.*, 29 C. C. A. 171, 85 Fed. 329. There will be a decree requiring the defendants to pay to the complainant the sum of \$20,916.38, the aggregate amount of the judgments recovered, with interest thereon from January 29, 1896. Counsel may compute the same, and prepare a decree, and submit it to the court.

O'DONOHUE et al. v. BRUCE et al.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 54, October Term, 1898.

1. PARTNERSHIP—JOINT ADVENTURE—EVIDENCE—QUESTION FOR JURY.

P. & W. ordered a quantity of tea from plaintiffs, and, being advised to increase the order, made an arrangement with defendants to become interested in the purchase, and then doubled the order. Plaintiffs' evidence was that defendants and P. & W. agreed to buy the teas together on joint account, and that they were to sell the same, and render closed accounts of the venture to defendants; while defendants testified that they never consented to such an agreement, but that the arrangement was that each should take one-half of the teas, and pay one-half of the price, according to the terms of the sale. *Held*, that whether defendants and P. & W. were partners in the venture, and therefore liable to plaintiffs for the price of the teas, was for the jury.

2. SAME—EVIDENCE—SETTLEMENTS.

Where two firms joined in a venture for the sale of teas, evidence respecting the final accounts between them which related to a period subsequent to the time when their joint liability for the teas, if any, was fixed, is inadmissible, since whether they were partners, as to plaintiffs, from whom they purchased the teas, could not be affected by subsequent transactions between them.

3. CIRCUIT COURT OF APPEALS—REVIEW—JURISDICTION.

The circuit court of appeals is without authority to review the refusal of the lower court to set aside a verdict as contrary to the weight of evidence.

In Error to the Circuit Court of the United States for the Southern District of New York.

M. B. Naumberg and B. F. Einstein, for plaintiffs in error.

E. N. Taft, for defendants in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error brought by John V. O'Donohue and Charles A. O'Donohue, two of the defendants in the court below, to review a judgment for the plaintiffs entered upon the verdict of a jury. The action was brought by partners, trading under the name of Tait & Co., to recover the unpaid balance of the purchase price of 20,000 packages of teas, bought of plaintiffs in September, 1894, upon the order by cable of Purdon & Wiggin. The two O'Donohues constituted the firm of John O'Donohue's Sons, and were joined as defendants with the members of the firm of Purdon

& Wiggin upon the theory that the two firms purchased the teas upon a joint venture.

Upon the trial it appeared that, on September 21st, the plaintiffs had advised Purdon & Wiggin to increase an order theretofore forwarded by the latter for 10,000 packages of teas, to one of 20,000; and thereupon Purdon & Wiggin made an arrangement with John O'Donohue's Sons to become interested with themselves in the purchase. Thereafter, Purdon & Wiggin cabled the plaintiffs, increasing the order to 20,000, and offering terms which, with some modifications, were accepted by plaintiffs. Payment was to be made in drafts on London at six months. Evidence was also introduced, in behalf of the plaintiffs, tending to show that the agreement between Purdon & Wiggin and John O'Donohue's Sons was that evidenced by two letters from the former to the latter, dated, respectively, September 28, and October 5, 1894. In the first of these letters Purdon & Wiggin state that they now "confirm our verbal agreement as to the purchase together" of the 20,000 packages, upon terms as follows:

"Teas to be consigned to us, and for cost of same Messrs. Tait & Co. to draw direct on ourselves, at six months, in pounds sterling, payable in London; teas to be on joint account,—yourselves $\frac{1}{2}$ interest, ourselves $\frac{1}{2}$ interest; we to receive and sell the teas in usual, customary way, and to render you closed accounts of the venture, consulting with you from time to time as to sales of same; selling commission of one and one-half per cent. charged by us in account of sales, one-half of which we return to you in account current. Kindly confirm the above at your early convenience."

In the second letter Purdon & Wiggin wrote to John O'Donohue's Sons as follows:

"Referring to our letter under date September 28th, 1894, and your verbal conversation to-day with our Mr. Gould: It is now understood that the sentence in above-named letter reading 'selling commission of one and one-half per cent. charged by us in account sales, one-half of which we return to you in account current' is eliminated, and our joint agreement is as if the sentence had not been written in our September 28th letter. * * * Kindly send us confirmation of the same."

On the part of the defendants, evidence was introduced tending to show that they had not consented to the terms recited in the letters of September 28th and October 5th, but that the agreement between John O'Donohue's Sons and Purdon & Wiggin in respect to the purchase was that the former should pay half of the purchase price of the teas when the drafts became due, and the teas should then be divided, each firm to have half. Further evidence tended to show that, after the original agreement for the purchase and disposition of the teas had been made, and had been in force for some time, a new arrangement was made, by which the teas were to be divided, each firm taking half. It further appeared that the teas remained in the custody of Purdon & Wiggin until June, 1895, when John O'Donohue's Sons paid to them the balance due for their half of the purchase price, and the teas were divided. The only issue raised upon the trial was whether the two firms were jointly liable to the plaintiffs, and upon that issue the trial judge refused a motion by the defendants O'Donohue to direct a verdict in their favor, and submitted two questions of fact to the jury. These questions were as follows:

"First, did the defendants agree that the teas, or any part of them, might be sold at any time, by Purdon & Wiggin, for a price to be agreed upon, and the proceeds accounted for to John O'Donohue's Sons? Second, did the defendants agree that the teas should be divided in kind between Purdon & Wiggin and John O'Donohue's Sons, each firm to attend to the sale of its own share?"

The jury answered the first question in the affirmative, and the second in the negative. Thereupon the trial judge directed a verdict for the plaintiffs.

Error is assigned to the refusal of the trial judge to direct a verdict, and of his submission to the jury of the two questions of fact. It is entirely clear that there was a question of fact for the jury upon the evidence introduced by the parties. According to the testimony of the witness Goold, the original agreement between John O'Donohue's Sons and Purdon & Wiggin, by which the two firms became jointly interested in the purchase of the teas, and pursuant to which the order for the purchase was sent, was as recited in the letter of September 28th, except in respect to the selling commission. If he told the truth, the purchase was a joint venture, and the teas were to be sold on joint account. The proceeds would, therefore, have been joint funds. It would follow, as a legal proposition, that if, at any time before the parties had substituted for this agreement some other one, there had been a sale of the teas, or of part of them, by Purdon & Wiggin, John O'Donohue's Sons would have been entitled to share in the profits if a profit had accrued, and would have sustained their share of the loss if a loss had arisen. The accepted definition of a partnership is "the voluntary association of two or more persons in sharing the profits and bearing the losses of a general trade, or a specific adventure." The facts of this case, assuming them to be such as the evidence for the plaintiffs justified the jury in finding them, brought it within that definition. On the other hand, if the agreement under which the teas were purchased was that they were to be divided, each firm paying half the cost and taking half the teas, there was no partnership, and, in the absence of any other evidence tending to show a partnership, or to show that the O'Donohues had held themselves out to the plaintiffs as partners with Purdon & Wiggin in the purchase, the plaintiffs would not have been entitled to recover of them. If these conclusions are correct, the questions of fact submitted to the jury properly presented the questions upon which the case turned, and the findings of the jury covered every disputed material issue, and justified the court in directing a verdict for the plaintiffs. We conclude that the errors assigned are without merit.

Error is also assigned of the refusal of the trial judge to receive evidence respecting the state of the final account between Purdon & Wiggin and John O'Donohue's Sons. This evidence related to a period long after the time when the joint liability of the two firms, if there was any, was fixed. The rights of the plaintiffs could not be affected by the later transactions between them. The evidence did not tend to throw any light upon the original character of the joint venture. This court is without authority to review the decision of the court below in refusing to set aside the verdict as contrary to the weight of evidence. We find no error in the record, and the judgment is affirmed.

MYLER v. STANDARD LIFE & ACCIDENT INS. CO.

(Circuit Court of Appeals, Third Circuit. January 30, 1899.)

No. 41, September Term, 1898.

INSURANCE—ACCIDENTAL DEATH OF ASSURED—EVIDENCE—QUESTION FOR JURY.

In an action on an accident policy exempting insurer from liability for an accident to assured while getting on or off a moving conveyance using steam as a motor, or walking or being on the roadbed of any railroad, etc., defendant's evidence tended to show that deceased was killed while attempting to board a freight train, while plaintiff offered evidence from which it appeared that deceased intended to take a train going in the opposite direction from that of the freight, and that it was impossible for deceased to have boarded the freight train as testified to by defendant's witnesses, testimony of some of whom was contradicted. *Held*, that the manner of decedent's death was for the jury, and that a peremptory instruction for defendant was error.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Louis McMullen, for plaintiff in error.

Wm. W. Wishart, for defendant in error.

Before DALLAS, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

KIRKPATRICK, District Judge. The action in this case was begun by Anna May Myler to recover from the Standard Life & Accident Insurance Company the sum of \$5,000 upon a policy issued by said company to J. T. Myler, insuring him for the term of 12 calendar months from March 18, 1895, against loss of time, not exceeding 52 consecutive weeks, resulting from bodily injuries caused solely during the term of insurance, by external, violent, and accidental means; or, if death result from such injuries alone within 90 days, it was agreed that they would pay to Anna May Myler, the plaintiff herein, the sum of \$5,000. On January 13, 1896, while the policy was still in force, the insured, J. T. Myler, met with an accident in the station of the Pittsburgh, Ft. Wayne & Chicago Railroad at Federal street, from the effect of which he died the next day.

The policy of insurance contained this condition:

"This insurance does not cover * * * death * * * resulting wholly or partly, directly or indirectly, from any of the following causes, conditions, or acts or happenings, where the assured is affected by or is under the influence of any such cause, condition, or act, viz.: * * * Getting on or off a moving conveyance using steam as a motor, * * * or walking or being on the roadbed * * * of any railway; * * * violation of law; * * * unnecessary exposure to danger."

Upon the trial of the cause the plaintiff offered testimony tending to show that it was the intention of the deceased, on the day in question, to go to a small town, called "Glenfield," on the Ft. Wayne road, by the train known as the "Alliance Accommodation," which left the Federal street station in Pittsburgh at 4:23 p. m., and that after this train had pulled out of the station, going westward, and when the engine and several cars of a freight train going eastward had passed the point, the body of Myler was seen lying between the

east and west bound tracks, with his head towards the westward, and his body straight with the rail; that Myler's body, when first seen, was being struck by the trucks of the passing freight cars; and that, from the effect of the injuries so sustained, Myler died on the morning of January 14, 1896. The execution of the policy of insurance having been admitted, the plaintiff rested her case. A motion for compulsory nonsuit was made and denied. The defendant then offered testimony tending to show that a person answering the description of the deceased had boarded the freight train going eastward when it was at Marion avenue, which is some 1,200 feet westward of the Federal street station, and that as the freight train approached the Federal street station a man was seen attempting to alight therefrom, and that in so doing he fell upon the ground between the east and west bound tracks; that this man was J. T. Myler; and that the injuries which he received were consequent upon, and due to, his attempt to alight from a moving train, contrary to the provision of the policy. It was also testified to by one of the defendant's witnesses (a doctor) that the deceased, prior to his death, admitted that he had sustained his injuries while alighting from the moving freight train. In rebuttal, witnesses were called on behalf of the plaintiff whose testimony tended to modify or contradict the doctor's statement as to deceased's statement of cause of injury; and one Snyder testified that he saw the deceased on Federal street after the Alliance accommodation had passed into the station, and half a minute only before its time for leaving for the West; that he spoke to Myler, and that he told him that he had no time to lose, and saw him hurrying to catch the train; and that within three minutes thereafter he heard of his having been crushed by the train. It was in evidence that the engines of the freight train and the Alliance accommodation passed each other 30 or 40 feet to the eastward of Marion street, and that the freight train was moving about 5 or 6 miles an hour.

In his charge to the jury, the learned judge said that the question at issue was one of fact, and that fact was what was the cause of Mr. Myler's injury; and after calling attention to the failure on the part of the plaintiff to offer any testimony on that point, and reviewing the testimony of the witnesses offered on the part of the defendant who claimed to be eyewitnesses of the occurrence, and asserting that to him they seemed to be disinterested, and their testimony not to be disregarded, the learned judge added, "Their credibility is, of course, for the jury." Subsequently the court delivered a supplemental charge, in which it again called the attention of the jury to the facts, and, referring specifically to the testimony of Snyder, said that, in the judgment of the court, there was no inconsistency between it and that of the witnesses for the defendant, but reiterated the assertion that the facts were for the jury, as well as the credibility of the witnesses. The jury failed to agree upon a verdict, and on the third day the court recalled them, and said:

"Upon reflection, I have concluded to relieve you from the further consideration of this case, and from responsibility for the result, by giving you a binding direction. I therefore withdraw my previous instructions, in so far

as they are inconsistent with what I am about to observe, and now say to you that there is no conflict of evidence with respect to the cause of the accident to the insured which resulted in his death, and said cause was not a risk insured against by the policy in suit. Hence I instruct you that, under the pleadings and evidence, the verdict should be for the defendant."

To this instruction the plaintiff's counsel excepted.

The question before this court is, was there error? It will be observed that in the original charge of the court the jury was instructed that there was a question of fact at issue, which it was for them to determine from the evidence; that the duty of the jury was to consider the evidence as given by the several witnesses, and that the weight to be attached to the testimony was for them alone; and that while the court saw no reason to reject the testimony of Carr, Doran, and Van Divender, who claimed to be eyewitnesses, yet the views of the court on that subject should not be controlling on the minds of the jurors. We are of the opinion that the learned judge in his original and first supplemental charge to the jury correctly stated the law applicable to the case at bar, and that, in so far as he modified those instructions by directing a verdict for the defendant, he fell into error. In the case of Navigation Co. v. Evans, 176 Pa. St. 28, 34 Atl. 999, the question raised in this appeal was considered; and the court quoted with approval the case of Reel v. Elder, 62 Pa. St. 316, where Sharswood, J., delivering the opinion of the court, said:

"However clear and indisputable may be the proofs, where it depends upon oral testimony, it is nevertheless the province of the jury to decide, under instructions of the court as to the law applicable to the facts, and subject to the salutary power of the court to award a new trial if it should deem the verdict contrary to the weight of the evidence."

And in Grambs v. Lynch, 20 Wkly. Notes Cas. 378, where the supreme court of Pennsylvania held that the question of the credibility of witnesses could not be taken away from the jury, and that "where a case depends upon oral testimony, though uncontradicted, such testimony must be submitted to the jury."

A careful review of the testimony satisfies us that there was a question of fact to be submitted to the jury, relating to the cause of the injury. The reasonable inference deducible from the facts presented by the plaintiff, and supported by competent proof, is that the deceased left his office to take the Alliance accommodation at Federal street for a point west. The testimony of Max Snyder tends to show that he met the deceased on the way to the station, and accompanied him to within a block of the same; that he sought to have a conversation with deceased, when he said, "I have not got much time. I want to catch this train;" that he (Snyder) pulled out his watch, and said, "You have only half a minute, if you want to make it;" that he separated from the deceased, and in two or three minutes afterwards he heard of his accident. Without going further into the details of Snyder's testimony, it is apparent that, if believed, it establishes the fact that it was impossible for the deceased to have been at Marion avenue, and boarded the freight train there, and, when taken in connection with certain indisputable facts in the case, almost, if not quite, establishes that the deceased was not on

the freight train, as the witnesses who described the accident testified. From the point where Snyder places the deceased on Federal street to Marion avenue, where the defendant sought to show that the deceased boarded the freight train, is, by the shortest route, 1,100 feet. That the deceased could not, on leaving Snyder at the time fixed by him, have reached Marion avenue crossing in time to board the freight train, seems to be conceded by defendant's counsel, who have on the argument advanced other theories to account for the way in which deceased got on the freight train; but all are apparently inconsistent with the testimony of their own witnesses. It would seem, therefore, that in the path to defendant's direct proofs, explanatory and descriptive of the accident, the plaintiff, by competent evidence, interposes the obstacle of great improbability, if not of actual impossibility, and that there was thus presented for the consideration of the jury a substantial issue or controversy as to the reliability of defendant's proofs and the credibility of its witnesses. There is also evidence on the part of the plaintiff which bears directly upon the credibility of certain of the witnesses called by the defendant. The testimony of Muckle, McPherson, and Horner tends to show that there was no one on the station platform at the time Doran and Van Divender (two of defendant's witnesses who describe the accident) say they were there; and the testimony of Crane, who says he was present constantly, and in a position to hear all deceased said, and that of Turner and Thomas Coslin, tend to challenge the defendant's proof that the deceased, while at the station, declared that he got hurt while alighting from the freight train. It is manifest that the plaintiff's case, if her witnesses are credited, afforded ground for legitimate inferences adverse to the credibility of the witnesses depended on by the defendant, and there was some direct testimony tending to discredit them. Thus, a substantial issue as to their credibility was raised, which it was the province of the jury to determine. "The jury are the judges of the credibility of the witnesses, and it is not in the province of the court to defeat their verdict upon the theory that they should have believed differently." *Fulton v. Lancaster Co. (Pa. Sup.) 29 Atl. 763.*

We are of the opinion that the court erred in giving binding instructions to the jury to find a verdict for the defendant. The record should be remitted, with instructions to the circuit court to award a new trial.

ATLANTIC LUMBER CO. v. L. BUCKI & SON LUMBER CO. (two cases).

(Circuit Court of Appeals, Fifth Circuit. January 3, 1899.)

Nos. 738 and 735.

REVIEW ON ERROR—FINAL JUDGMENT—ORDER DISSOLVING ATTACHMENT.

An order dissolving an attachment, made prior to the determination of the case on the merits, is not a final judgment from which a writ of error lies.¹

¹ As to finality of judgments for purposes of review, see note to *Trust Co. v. Madden*, 17 C. C. A. 238; and, supplementary thereto, note to *Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 28 C. C. A. 482.

In Error to the Circuit Court of the United States for the Southern District of Florida.

These were actions brought in the state court, and consolidated after their removal into the circuit court. The plaintiff has sued out two writs of error,—the first from an order dissolving an attachment issued by the state court in one of the actions, which is submitted on a motion to dismiss; and the second from the final judgment after trial, which is disposed of on the merits.

R. H. Liggitt, for plaintiff in error.

H. Bisbee, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

On Motion to Dismiss.

PARDEE, Circuit Judge. The defendant in error has made a motion to dismiss this writ of error on the ground that the judgment sought to be reviewed is a judgment dissolving a writ of attachment issued in a pending suit, and is not a final judgment within the meaning of the act of congress creating this court. 1 Supp. Rev. St. (2d Ed.) p. 901. The suit was commenced by plaintiff in error on the 1st day of October, 1897, by the issuance of a summons ad respondendum in an action of assumpsit. On the same day an affidavit was filed for an attachment, on the ground that the debt was actually due, and that the defendant lumber company was about to remove its property out of the state of Florida, and was fraudulently disposing of its property, and an attachment issued. In the course of the proceedings, after much and formal pleadings in the main case, the defendant moved to dissolve the attachment on issues of fact raised upon the formal pleadings, which motion was tried by the court without a jury (a jury having been waived by written stipulation), and the attachment was ordered dissolved, no decision being then reached on the merits nor any final judgment rendered in the case. From the order dissolving the attachment this writ was sued out. In Leitensdorfer v. Webb, 20 How. 176, 185, such a judgment or order is held not to be a final judgment from which a writ of error will lie; and the same case also decides that a rule in the state practice allowing appeals from orders dissolving attachments will not affect the practice in the federal courts. The question involved here seems to have been well considered and well decided in the case of Hamner v. Scott, 19 U. S. App. 639, 8 C. C. A. 655, and 60 Fed. 343, and we think the reasons and authorities there given should control our action. The writ of error is dismissed.

On the Merits.

PER CURIAM. This suit was brought on a contract entered into between the Ambler Lumber Company and Charles Lloyd Bucki on the 28th of June, 1892, covering the delivery, during a period of eight years, of pine logs, to the amount of 1,500,000 feet, board measure, each month, with the provision that at any time within four months from the starting up of the Bucki sawmill the quantity to be de-

livered per month might be increased, at the option of Bucki, on 30 days' notice, not to exceed 2,000,000 feet in any one month, and the amount so fixed was to be delivered monthly during the terms of the contract. The said contract was afterwards assumed by, and became binding upon, the L. Bucki & Son Lumber Company, the defendant in error, and performance thereof was entered upon by the plaintiff and defendant, and continued until October 1, 1897. On that day a praecipe for summons was filed by the plaintiff in the circuit court of Duval county, Fla., in a suit against the defendant, and an affidavit and bond for attachment were also filed. The amount claimed in the affidavit for attachment was \$9,980.80, and a writ of attachment was duly issued, which came to the hands of the sheriff at 6:25 p. m. on October 1st, and was executed by levying upon 1,250,000 feet of lumber belonging to the defendant. A summons ad respondentum was also issued, which came to the hands of the sheriff on October 2d, and was subsequently served upon the defendant. On October 1, 1897, another praecipe for summons was filed by the plaintiff in the circuit court of Duval county, Fla., in a suit against the defendant, and another affidavit and bond for attachment. The amount claimed in this affidavit was \$75,000, and a writ of attachment was duly issued, which came to the hands of the sheriff at 6:25 p. m. on that day, and was levied upon certain real and personal property belonging to the defendant. A summons ad respondentum was also issued, which came to the hands of the sheriff on October 2d, and was subsequently served upon the defendant. The former proceeding appears in the transcript as "No. 1," and the latter as "No. 2."

The Florida statute, providing for the filing of a traverse of a plaintiff's affidavit for attachment, contains the following provision, viz.:

"If such affidavit shall traverse the debt or sum demanded, the judge may, upon application of either party, require formal pleadings as to the debt or sum demanded, to be filed in such time as he may fix, and the issue of fact, if any, raised by such pleadings shall be tried as hereinbefore provided, and at the same time as the issue, if any, made by the affidavit as to the special cause assigned in the plaintiff's affidavit. Issues of law raised by such pleadings shall be determined and given effect to by the judge as in other controversies at law." Rev. St. Fla. § 1056.

Based upon the foregoing provision of the statute, a traverse having been filed in each case, denying the debt or sum demanded, a motion was made by the defendant for an order requiring formal pleadings as to the debt or sum demanded to be filed in each case; and the circuit court of Duval county, Fla., in each case made an order requiring such pleadings to be filed. Thereafter, in each case, the defendant presented and filed a petition for removal of the causes to the circuit court of the United States for the Southern district of Florida, on the ground that it was a citizen of New Jersey and the plaintiff was a citizen of the state of Florida. Bonds were given and approved, and the court in each case made an order for removal. Transcripts of the record were filed in the circuit court of the United States for the Southern district of Florida on October 23, 1897. On October 25, 1897, a declaration was filed by the plaintiff in suit No.

1, as to the debt or sum demanded in the attachment affidavit. A motion was made by defendant to dissolve this attachment upon certain grounds apparent upon the face of the papers, which the court, on November 1, 1897, granted, and at the same time refused a motion of the plaintiff to amend the affidavit for attachment. In case No. 2 a similar motion to dissolve the attachment was denied. On defendant's motion, an order was made on November 1, 1897, consolidating the causes; and thereafter, on January 7, 1898, an amended declaration was filed by the plaintiff in the causes as consolidated. This declaration contained 12 counts. After a run of demurrers, pleas, replications, rejoinders, and surrejoinders, issues were so made up that the cause was brought to trial on all the counts but the twelfth. The jury, under instructions from the court, found a verdict in favor of the plaintiff in the sum of \$8,988.37, apparently on the first, second, eighth, and ninth counts, and in favor of the defendant on the third, fourth, fifth, sixth, seventh, tenth, and eleventh counts. The court rendered judgment upon this verdict, and the plaintiff below sued out this writ of error, assigning 70 specific errors, 63 of which relate to rulings on the pleadings, 3 to the dissolution of the attachment, and the remaining 4 to the instructions of the court, based upon the construction of the contract under the facts offered to be proved by the plaintiff.

We do not find it necessary to pass upon any of the errors assigned as to the rulings on the pleadings, or as to the dissolution of the attachment, because, under the contract as construed by the trial judge (with which construction we agree), none of these rulings were prejudicial to the plaintiff in error.

The last four assignments raise the question as to the proper construction of the contract. We have already said that we concur in the construction of it announced by the trial judge. For his construction thereof and his rulings he gave reasons which fully appear in his written opinion with regard to the dissolution of the attachment, and we concur in these reasons.

As the questions raised are wholly in regard to the proper construction of the contract, and as no general principles are involved, we do not think it necessary to prepare an elaborate opinion, which, from the nature of the case, would be necessarily of great length, and involve much labor, without advantage or profit. The preliminary motions made in this case at the hearing are rendered immaterial by the disposition we make of the case. The judgment of the circuit court is affirmed.

MURRAY v. CHICAGO & N. W. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1899.)

No. 616.

1. COMMON LAW—APPLICATION TO MATTERS OF FEDERAL JURISDICTION.

The federal courts may resort to the common law as their guide, in cases where it is applicable.

2. CIRCUIT COURTS OF APPEALS—JURISDICTION—CONSTITUTIONAL QUESTIONS.

A constitutional question is not presented in a case where the court has occasion to apply the rules of the common law regulating transportation charges, whether or not the carriage be interstate.

3. FEDERAL COURTS—FOLLOWING STATE DECISIONS—LIMITATION OF ACTIONS.

The conclusion of a state court as to the time when a cause of action accrues, in case of fraud or concealment, is not binding on the United States courts, when based, not on a construction of a state statute, but on the view taken of the rule of the common law.¹

4. STATUTES OF LIMITATION—OPERATION—EXCEPTIONS.

Where a statute of limitations makes no exceptions, the courts can make none.

5. SAME—FRAUD AND CONCEALMENT—CARRIERS.

An action by a shipper against a carrier for unjust discrimination in the imposition of freight charges paid by plaintiff lies at common law, regardless of fraud, and the carrier's fraudulent concealment of the cause of action does not bring it within Code Iowa, § 2530, providing that, in actions for relief on the ground of fraud, the cause of action does not accrue until the fraud is discovered.

6. SAME—DISCOVERY OF CAUSE OF ACTION—DILIGENCE—PLEADING.

Where an action by a shipper against a carrier for unjust discrimination in the imposition of freight charges paid by plaintiff is commenced more than five years after the cause of action accrued, that being the period of limitation, it is not brought within an exception of the statute by an allegation that defendant fraudulently concealed the cause of action, and that plaintiff had no reason to suspect that the statements of defendant's agents of the regularity and uniformity of the charges were false, or that he had been discriminated against, until within 18 months of the commencement of the action; the petition should show what plaintiff discovered within the 18 months, how he discovered it, and why he did not discover it sooner.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This is an action by William Murray against the Chicago & Northwestern Railway Company. A demurrer to an amended petition was sustained (62 Fed. 24), and plaintiff brings error.

This is an action to recover damages for overcharges on freight. The material allegations in the petition are that commencing in 1875, and continuing to March, 1887, plaintiff was engaged in buying and shipping live stock and grain purchased in the state of Iowa for shipment to Chicago, Ill.; that he made large shipments during that time over the defendant's road from Belle Plaine and Chelsea, Iowa, to Chicago; that defendant demanded and plaintiff paid to it for these services the regular published tariff rates of freight; that in selling these articles in Chicago the plaintiff was compelled to come into competition with the sale of like articles shipped over defendant's line from said stations and others in the vicinity shipped over defendant's line; that, at the time these various shipments were made by plaintiff, defendant was engaged in making and paying drawbacks, rebates, and con-

¹As to conforming federal practice in common-law actions to practice of state court, see note to O'Connell v. Reed, 5 C. C. A. 594.

cessions of freight charges to others shipping like character of freight, and under the same circumstances and conditions, over the same line of road, as were shipped by plaintiff, and from the same stations, to an amount equal to \$32 per car load; that the freight carried by defendant for others was carried under the same circumstances and conditions as that transported for plaintiff; that defendant, at the time these shipments were made by plaintiff, kept posted at its stations freight tariff lists showing the tariff rates of freight for the transportation of such articles from its stations to Chicago, and informed plaintiff at the time he made his shipments that no deviations were made from these rates, and no rebates, drawbacks, or concessions from the posted rates were made to any shippers, and that plaintiff had equal rates and proportions of rates with other shippers from its stations to Chicago, and that no discriminations were made against him; that plaintiff believed these statements and relied on them, but that they were untrue and fraudulent, and that defendant was in fact at that time making such discriminations in favor of other shippers; that defendant fraudulently concealed that fact as to the giving of rebates; that plaintiff only ascertained the facts within 18 months before bringing suit. The circuit court sustained the demurrer to the petition upon the ground that the action was barred by the statute of limitations. On this point Judge Shiras, who heard the case at the circuit, said: "The ordinary rule is that the statute begins to run when the right of action is completed. Does the case fall within any exception to this rule? The provision of the statute applicable to the case is the general one, to wit, 'and all other actions not otherwise provided for in this respect, within five years.' Code Iowa, § 2529. By Id. § 2530, it is declared that, 'in actions for relief on the ground of fraud or mistake, and in actions for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake or trespass complained of shall have been discovered by the party aggrieved'; but it is settled that this statutory exception is not applicable to cases of the character of that now under consideration. Boomer Tp. v. French, 40 Iowa, 601; Carrier v. Railway Co., 79 Iowa, 80, 44 N. W. 203. It is, however, claimed by plaintiff that, under the principles of the common law, it will not be held that the cause of action has accrued until actual discovery of the fraud or concealment has been made. In Boomer Tp. v. French, supra, the supreme court of Iowa held that where a treasurer of the district, by false and fraudulent entries upon his books, concealed the fact of a misappropriation of a sum of money coming into his hands, the statute did not begin to run until discovery of the fraud thus practiced. In Carrier v. Railway Co., supra, the supreme court of Iowa held the common-law exception applicable, upon the authority of Boomer Tp. v. French; stating, however, that, 'if the question was before us for the first time, we might hesitate to declare the rule announced in Boomer Tp. v. French.' The conclusion reached in Carrier v. Railway Co. is followed and affirmed in Cook v. Railway Co., 81 Iowa, 551, 46 N. W. 1080. These decisions are based, not upon a construction of the provisions of the Iowa statute, but upon the view therein taken of the rule of the common law; and the conclusion reached is not, therefore, binding upon the courts of the United States when they are called upon to construe the common law, and apply its principles to cases arising between citizens of different states. Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 62 Fed. 24, 44."

Henry Rickel (E. H. Crocker and J. R. Christie, on the brief), for plaintiff in error.

Lloyd W. Bowers (N. M. Hubbard, F. F. Dawley, N. M. Hubbard, Jr., and Robert Mather, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge (after stating the facts). At the threshold of this case we are confronted with a question of jurisdiction. It is said this is a case that involves the construction of the constitution of the United States, for the reason that the case pre-

sents the question whether there is any common law of the United States regulating interstate transportation charges, and that the writ of error should have been issued from the supreme court of the United States, and not from this court. Some phases of this question have recently been much discussed in other jurisdictions, and were fully considered by the learned trial judge in this case. 62 Fed. 24. We do not feel called upon to indulge in any extended consideration of the question. For more than a century the federal courts, in the absence of a statute or other obligatory rule of decision, have had recourse to the common law for rules of decision in the trial of causes in those courts, and have, in cases where that law furnished an appropriate rule of decision, rested their judgments upon it. The same may be said of the admiralty law, the law merchant, the principles of equity jurisprudence, and, in a restricted and qualified sense, of the civil law. It never was supposed that the federal courts were denied the privilege of resorting to any or all of these sources of information for the purpose of enlightening their judgment upon any question presented for their determination in the trial of a cause. It has always been assumed that the federal courts were endowed with a power and jurisdiction adequate to the decision of every cause, and every question in a cause, presented for their consideration, and of applying to their solution and decision any rule of the common law, admiralty law, equity law, or civil law applicable to the case, and that would aid them in reaching a just result, which is the end for which courts were created. If a case is presented not covered by any law, written or unwritten, their powers are adequate, and it is their duty to adopt such rule of decision as right and justice in the particular case seem to demand. It is true that in such a case the decision makes the law, and not the law the decision, but this is the way the common law itself was made and the process is still going on. A case of first impression, rightly decided to-day, centuries hence will be common law, though not a part of that body of law now called by that name. It was implied in the very act of their creation that the federal courts would appeal to the common law as their guide in cases where it was applicable. A decision rested on that law no more raises a constitutional question than a decision based on the law merchant, the admiralty law, the equity law, or on the recognized and fundamental principles of right and justice in a case of first impression. We are all of the opinion that a constitutional question is not presented every time the court has occasion to apply the well-settled rules of the common law regulating and defining the rights, duties, and obligations of common carriers, whether the carriage be intrastate or interstate.

The suit was begun on August 25, 1892, more than 17 years after the first, and more than five years after the last, shipment had been made by the plaintiff. A demurrer was filed to the petition setting up several causes, but as the court below only sustained the plea of the statute of limitations of five years, and rendered judgment on that ground, it is unnecessary to notice the other grounds.

Is the action barred? The statute of Iowa applicable is section 2529, Iowa Code, which reads:

"The following actions may be brought within the times herein limited respectively after their causes accrue and not afterwards except when otherwise specially declared: * * * (4) Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in causes heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years."

The statute makes no exception of causes of action founded in a fraud which is undiscovered, but the supreme court of that state in several cases has held that, according to the rules of the common law, a case in which the cause of action is concealed is excepted from all statutes of limitations until the cause is, or by due diligence could have been, discovered. *Boomer Tp. v. French*, 40 Iowa, 601; *Carrier v. Railroad Co.*, 79 Iowa, 80, 44 N. W. 203; *Cook v. Railway Co.*, 81 Iowa, 551, 46 N. W. 1080.

As these decisions do not attempt to construe state statutes, but are expressly based on the supposed rules of the common law, they are not binding on the courts of the United States. As early as 1842 the supreme court in *Swift v. Tyson*, 16 Pet. 1, held "that the thirty-fourth section of the judiciary act of 1789 is limited in its application to state laws strictly local, and does not extend to contracts or other instruments of a local nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence." In *Chicago City v. Robbins*, 2 Black, 418, which was an action for injuries caused by the negligence of Robbins in permitting an excavation in the sidewalk to remain uncovered and unguarded, so that a person passing by there was injured and had recovered a judgment against the city for the injury suffered, it was urged that in such cases it was the duty of the United States courts to follow the decisions of the state courts, but the supreme court said: "Where private rights are to be determined by the application of common-law rules alone, this court, although entertaining for state tribunals the highest respect, does not feel bound by their decisions." In *Levy v. Stewart*, 11 Wall. 244, on error from the circuit court for the district of Louisiana, it was claimed that, the supreme court of that state having held in several cases that the Civil War did not interrupt the running of the statute, the federal courts are bound by those decisions, but the court said: "None of these decisions are founded upon any express enactment, and the reasons assigned for the conclusions are not satisfactory. * * * Authorities of the kind, though entitled to great respect, are not obligatory, and the court is of the opinion that the rule adopted in the case of *Hanger v. Abbott*, 6 Wall. 534, is more in accordance with the analogies of our law." The supreme court of the state of Arkansas held that the statute of limitations of that state was not suspended by the Civil War, although that was one of the states in insurrection (*Bennett v. Worthington*, 24 Ark. 487); but in the case of *Hanger v. Abbott*, supra, the supreme court of the United States held the statute of limitations of that state was suspended during the Civil War. Subsequently the supreme court of that state adopted and followed the ruling in *Hanger v. Abbott*. In *Railway Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, the question before the court was the effect to be given to the decisions

of the supreme court of Ohio in determining whether two employés were fellow servants, and the court said: "An examination of the opinions in the cases in the Ohio supreme court which are claimed to be authoritative here discloses that they proceeded, not upon any statute, or upon any custom or usage, or upon anything of a local nature, but simply announced the views of that court upon the question as one of general law. We agree with that court in holding it to be a question of general law, although we differ from it as to what the rule is by that law." In *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468, the court said "that the federal courts sitting in any state have equal and co-ordinate jurisdiction with the state court in determining questions of general law, although they will lean towards an agreement of views with the state court if the question seems to them balanced with doubt." At common law it is well settled that, where the statute makes no exceptions, courts can make none. *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. 537; *Jones v. Lemon*, 26 W. Va. 629; *Bennett v. Worthington*, 24 Ark. 487.

The Iowa statute makes no exceptions, and the exception we are asked to ingraft upon it is not one that can be made by the court. The plaintiff's cause of action is not founded on fraud; for, if the allegations as set out in the petition are true, he has a good cause of action, independently of any fraud or concealment. The unjust discriminations, and their payment by plaintiff, constitute the cause of action, regardless of the fraud and deceit, and, independent of any statute, the common law gives him the right to recover in such a case. *State v. Railway Co.*, 47 Ohio St. 130, 23 N. E. 928; *Railway Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311; *Fitzgerald v. Railway Co.*, 63 Vt. 169, 22 Atl. 76; *Cook v. Railway Co.*, 81 Iowa, 551, 46 N. W. 1080.

But suppose the holding in the Iowa cases to be obligatory upon this court, the plaintiff's action is still barred, because no sufficient reason is shown why the alleged fraud was not sooner discovered, or that any effort was ever made to discover it. In cases where concealment and ignorance of the facts suspend the statute, there must have been such concealment as would prevent a person exercising due diligence from discovering the facts, and what diligence was used is a question of law, to be determined by the court from the petition, and not a mere statement of a conclusion of law. The allegation of the petition is that "the plaintiff had no reason to believe or suspect that said statements, made to him as aforesaid, were untrue, or that he had been discriminated against, and deceived as aforesaid, until within the eighteen months last past, when for the first time he learned of such facts." Just such a general allegation as this was held bad in *Wood v. Carpenter*, 101 U. S. 135, where the rule on this subject is succinctly and clearly stated. "Statutes of limitations," say the court, "are vital to the welfare of society and are favored in the law. They promote repose, by giving security and stability to human affairs. While time is constantly destroying the evidence of rights, they supply its place by presumption, which renders proof unnecessary. * * * A general allegation of ignorance at one time, and of knowledge at another, are of no effect. If the plain-

tiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. * * * Whatever is notice enough to excite suspicion, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. * * * Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence, and the means of knowledge are the same thing, in effect, as knowledge itself. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence." The allegation in the petition in this case amounts to no more than "ignorance at one time and knowledge at another." The petition does not state what he discovered, how he discovered it, or show any reason why he did not discover it sooner. There is no allegation that he ever, at any time, made the slightest effort to discover whether he was being discriminated against, and there is no averment that such an effort would have been unavailing. The suspicion entertained by the public generally, and which found daily expression in the public prints, and an occasional judicial verification, and which was probably the origin of the interstate commerce act itself, that railroad companies did discriminate between shippers, particularly in shipments of the character the plaintiff was making, seems not to have shaken the plaintiff's perfect faith in the veracity of the railroad agent who billed his shipments. From a moral point of view, it may be that such credulity and trustfulness is a virtue, but it falls far below the standard of diligence required by law; that standard is what a reasonably prudent business man would do under like circumstances. There were numerous avenues of information open to one in the plaintiff's situation. He does not show that he ever sought information from other shippers or their agents, or commission merchants, or others having knowledge of the subject. In a word, he did nothing whatever, and how, finally, he made the discovery he declines to disclose. The judgment of the circuit court is affirmed.

GREEN v. CHICAGO & N. W. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 6, 1890.)

No. 1,104.

1. CONTRACTS—RELEASE—PAROL EVIDENCE.

Where a contractor signed a release reciting that a payment then made was for a final estimate of work done and materials furnished, and in full payment thereof under the contract, and in full satisfaction, payment, and discharge of all claims and liabilities accruing out of said contract, parol evidence of an agreement with the agent of the other party that such payment should not cancel the original agreement, and evidence its complete execution, as provided, and that such estimate should be considered an intermediate one, is inadmissible.

2. SAME—CONSTRUCTION.

Evidence of the agent's statement that such release merely covered work then completed, and had no reference to the future, nor to the contractor's

right to continue the work under the contract, was not admissible, since, in the absence of fraud concealing the terms of a contract from the party executing it, parol evidence of prior agreements as to the meaning of its unambiguous terms is inadmissible.

3. SAME—CONSIDERATION.

A contract for the building of certain masonry for a railroad provided that the company should retain 10 per cent. of the estimates to be made during the progress of the work, until final completion, and that on the final estimate being made, and payment to the contractor of the amount due, the contract should be terminated. Before the work was completed, the company discontinued it, and made an estimate, paid plaintiff the whole amount due, and took his receipt releasing the company from all liability under the contract. *Held*, that such release was based on a sufficient consideration, viz. the mutual releases of both parties of liabilities before the contract was completed, and the provision inherent in the original contract that it should be terminated on final estimate and payment of the amount due.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

In July, 1890, J. A. Green, the plaintiff in error, made a written contract with the Chicago & Northwestern Railway Company, a corporation, and the defendant in error, to perform the labor and furnish the materials to construct the masonry for the bridges and culverts on its line of railroad between Clinton and Lisbon, in the state of Iowa. This agreement provided that the estimates of the amount and value of the work done, and of the materials furnished, should be made and paid monthly, "ten (10) per cent. being deducted and retained by the company until the final completion of the work embraced in the contract, when all sums due the parties of the first part shall be fully paid, and the contract considered canceled"; that the contract should be completed on or before March 15, 1891; that the railroad company should not be liable for damages if the whole or any part of the work was suspended or delayed; but that Green should have an extension of time to complete it, equal to any delay caused by the railroad company. Green entered upon the performance of the agreement, and proceeded with it until January, 1891, when the company stopped him. He resumed work under the contract in April, 1891, and continued until September, 1891, when the company again suspended operations. He had then received 90 per cent. of nine estimates, which amounted in the aggregate to \$48,543.99; but the company had retained 10 per cent. of each of these estimates, to await the final completion of the contract. On October 19, 1891, he received \$9,362.23, which consisted of the 10 per cent. retained from the former estimates, and the amount due to him on the work he had performed since the last previous estimate was made; and thereupon he executed and delivered to the company a release in these words:

"Chicago & Northwestern Ry. Co. to J. A. Green, Dr.: For final estimate of work done and materials furnished on his contract for masonry for bridges for 2nd track from Clinton to Lisbon, Iowa. August 11, 1890, to September 26th, 1891."

Here follows a statement of the quantities, kinds, and prices of all the work and material put in the masonry under the contract, the aggregate amount of which was \$52,906.22; and then the receipt continues in this way:

"Received Oct. 19, 1891, of the Chicago & Northwestern Railway Company, the sum of nine thousand three hundred sixty-two $\frac{23}{100}$ dollars (\$9,362.23), in full payment for work done and for material and supplies furnished under a contract between the said railway company and the undersigned, dated on the 15th day of July, A. D. 1890, for masonry for bridges for 2d track from Clinton to Lisbon, Iowa, and which is in full satisfaction, payment, and discharge of all claims on account of the work, supplies, or materials mentioned in said contract, and for all liabilities of said railway company in any manner arising or growing out of said contract.

"[Signed]

J. A. Green."

At the time this settlement was made, Green had deposited along the railroad some stone which had not been placed in the bridges or culverts, and this stone was not included in this final estimate. In the year 1892 the company caused the remaining culverts and bridges between Clinton and Lisbon to be constructed by other contractors; and Green sued for the loose stone he had left along this track, and for the profits he would have made if he had been permitted to do this work. He set forth his causes of action in two counts in his petition. In the first one he pleaded the contract, the delivery of the loose stones along the track, their value, and the profits he would have realized if he had been permitted to put them in the form of masonry, and asked to recover \$865.64 and interest. In the second count he pleaded the contract, and the refusal of the company to permit him to construct the masonry for the bridges and culverts between Clinton and Lisbon, which had not been built in October, 1891, and sought to recover \$8,000, which he averred he would have gained if he had been permitted to complete this masonry under his contract. The company answered that it admitted that it had used some of the stones left along the track by plaintiff in error, and that it was liable for their value, but questioned the quantity and value alleged in the petition of the plaintiff, and denied that he was entitled to lay them up in masonry under the contract, or that he would have made any profit by so doing, if he had laid them. A verdict and judgment in favor of the plaintiff were rendered upon the first count of the petition, and no question concerning this result is presented to this court. In answer to the second count of the petition, the company pleaded the receipt and release of October 19, 1891, and alleged that it evidenced a cancellation of the contract, and a complete settlement and release of all liability of the company under it, except its liability for the loose stones along the track which it had subsequently used. The plaintiff replied that before and at the time the release was signed there was a parol agreement between the parties that the company waived its right to withhold the 10 per cent. until the completion of the contract; that the final estimate was not final; that the contract was not canceled thereby, but was to continue in force; that the plaintiff was to continue to perform it at some future time; and that, although the release reads that the \$9,362.23 was received in payment and discharge of all claims and liabilities of the company under the contract, yet that was not the fact. In support of the averments of this reply, the plaintiff testified, over the objections of the company, that, before and at about the time the final estimate and release was made, he had a conversation with Mr. Blunt, the chief engineer, of the defendant in error, in which the latter said to him that the president of the company was going to discontinue work for the present, and he could not tell how long it would be before the work would be resumed; that, as the duration of the suspension of the work was so indefinite, it would not be fair for the company to retain the 10 per cent., and he would put it in his voucher; that the stone on the right of way would go into his next estimate when he built it into the masonry; that he would allow him to take his tools from the right of way of the railroad, to repair them, but that he wanted him to hold himself in readiness to build again; and that he agreed and promised to do so. He also testified that no conversation was had about ending the contract; that he never received any consideration for the release, except the money due to him upon his work, and that, when it was presented to him for his signature, he objected to its form, and Mr. Blunt assured him that it was the company's general form of receipt, that it meant nothing but the work built up to that time, that it had no reference to the future; and that it was upon that understanding that he signed it. At the conclusion of the trial, the court struck out this oral testimony, on the ground that it contradicted the written contracts of the parties, and instructed the jury to return a verdict for the company on the second count of the petition. This is the ruling which is challenged by the writ of error in this case.

Charles A. Clark (James W. Clark, on the brief), for plaintiff in error.

F. F. Dawley and C. E. Wheeler (N. M. Hubbard and N. M. Hubbard, Jr., on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). A written contract is the highest evidence of the terms of the agreement between the parties to it, and, when those terms are clear and unambiguous, they cannot be contradicted or modified by parol evidence of the statements of the parties in the previous oral negotiations which led to it. In view of this rule, it becomes the duty of every contracting party to see to it that every agreement to which he puts his signature fairly and fully expresses the terms of his contract. He owes this duty to the party with whom he agrees, because the latter invariably pays his money or shapes his action in reliance upon the express terms of the agreement. If he fails to discharge this duty, his failure is the result of his own negligence; and he is, and ought to be, estopped thereby from showing that the terms of his contract were other than those expressed in the writing. Railway Co. v. Belliwith, 83 Fed. 437, 440, 28 C. C. A. 358, 361, and 55 U. S. App. 113, 119.

The real issue in the case at hand was whether or not the contract of July, 1890, ceased to be executory, and became executed, on October 19, 1891, when the release of that date was made and delivered. The claim of the company was that, by the express terms of the written agreements, it did become executed; and the contention of the plaintiff was that, in view of the terms of the contracts, and the oral testimony he produced, it remained executory. The contract of July, 1890, expressly provided that 10 per cent. of the amounts earned by the plaintiff under it should be retained by the company until the final completion of the work embraced in it, and that then all sums due to the plaintiff should be fully paid, and the contract should be considered canceled. In other words, it provided that the payment of the 10 per cent., and of all other sums due under the contract, should cancel the agreement, and evidence its completion. On October 19, 1891, after the plaintiff had suspended work the second time, he accepted the final estimate of, and payment for, all the work he had completed under the contract, including the 10 per cent. which was to be paid only when the contract was performed and canceled, and executed a receipt for \$9,362.23, the balance due him on this basis, "in full payment for work done and for material and supplies furnished under a contract between the said railway company and the undersigned, dated the 15th day of July, A. D. 1890, for masonry for bridges for 2nd track from Clinton to Lisbon, Iowa, and which is in full satisfaction, payment, and discharge of all claims on account of the work, supplies, or materials mentioned in said contract, and for all liabilities of said railway company in any manner arising or growing out of said contract." A final estimate, with a receipt and release at the foot of it, is the usual evidence of the completed execution of an agreement. This contract expressly provided that full payment for all the work and labor under it should cancel the agreement, and the plaintiff accepted full payment, and signed and delivered the final estimate and the complete release. How, then, does he seek to escape from the estop-

pel of these writings? He endeavors to do so in three ways: By testimony of the oral statements of Blunt, the engineer of the company, before and at the time when the release was made; by testimony that there was no consideration for the release; and by construction of the contracts.

Laying aside for the moment the question of consideration, the parol evidence upon which the plaintiff relies consists of testimony of the oral statements of Mr. Blunt prior to the execution of the release, and of his interpretation of its meaning when it was signed. The former tends to establish a parol agreement made before the release was executed, and while negotiations for it were progressing, to the effect that the payment in full for the work done under the contract, including the 10 per cent., should not cancel the original agreement, and evidence its complete execution, as it provided; that the final estimate which Green signed should not be a final estimate, but an intermediate one; and that, in essential particulars, the legal effect of the transaction should be contrary to that evidenced by the writings. No rule or principle of law occurs to us under which this testimony could have been admissible. It flies in the teeth of the rule that parol evidence cannot be received to contradict or modify written contracts, and of the conclusive presumption that the whole engagement of the parties, and the manner and extent of their undertaking, are expressed in their written agreements. *McKinley v. Williams*, 74 Fed. 94, 101, 20 C. C. A. 312, 319, and 36 U. S. App. 749, 761; *Thompson v. Libby*, 34 Minn. 374, 377, 26 N. W. 1; *Wilson v. Ranch Co.*, 73 Fed. 994, 999, 20 C. C. A. 244, 249, and 36 U. S. App. 634, 643. The testimony as to Blunt's interpretation of the release was equally objectionable. It was when Green was about to sign it that Blunt told him that it did not mean what it plainly read, that it covered nothing but the work up to that time, and that it had no reference to the future, when it expressly provided that he received the money in full payment and discharge of all work and materials mentioned in the contract, and of all liability of the railway company in any manner arising thereunder. The question which this evidence presents has been repeatedly considered and decided by this court, and our conclusion upon it has been embodied in this rule:

"No representation, promise, or agreement made or opinion expressed in the previous parol negotiations as to the terms or legal effect of the resulting written agreement can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice or fraud which concealed its terms, and prevented the complainant from reading it."

The reason for this rule is stated, many authorities in support of it are cited, and some of them are reviewed, in *Insurance Co. v. McMaster*, 87 Fed. 63, 68-72, 30 C. C. A. 532, 538-540, and 57 U. S. App. 638, and it is useless to repeat them here.

Turning now to the argument of counsel for the plaintiff in error upon the question of consideration, their contention is that the only consideration for the release of the liability of the company to pay for the work and labor done after October 19, 1891, was the fact

that the 10 per cent. of the amount already earned was paid before it was due; that it is always competent to prove by parol that a contract had no consideration to support it; that the company had the power to waive its right to retain this 10 per cent. until the contract was completed; that the plaintiff testified that it did so before the release was made; that he received no consideration for the release, except the payment for the work he had actually done, and the materials he had actually furnished, under the contract; and that this evidence establishes the want of any consideration for the release. In support of this position, much reliance is placed upon the case of *Association v. Wickham*, 141 U. S. 564, 580, 12 Sup. Ct. 84. In that case the defendants, who were the owners of a vessel, had two claims against the insurance companies, of about \$15,000 each,—one for damages to the vessel by fire, and the other for the cost of raising and saving her cargo after she had been scuttled and sunk to stop the fire. Each claim was in existence, was known to both parties, and was just and uncontested. The companies adjusted the first claim, paid it 55 days before it was due, and took receipts which by their terms released them from all liability under their policies. There was testimony that before the payment was made the companies waived their right to retain the amount owing on the first claim until it was due; and the trial court instructed the jury that, if the prepayment of the amount owing on this claim was understood to be the consideration for the release of all claims, it was sufficient to sustain it, but that otherwise it was not. The supreme court invoked the rule that the payment of a part of an entire debt which is conceded or shown to be owing is no consideration for the release of the part not paid; declared that the payment of \$15,364.78, which was the exact amount of the first claim as adjusted, constituted no consideration for the release of the second claim of \$15,000, which was justly owing; held that the insurance companies might lawfully waive their right to retain the \$15,364.78 until it became due, and that, if they did so before the release was made or agreed upon, there was no consideration for the satisfaction of the second claim; and sustained the charge of the court below. There is a marked distinction between that case and the one in hand. In the Wickham Case there were two debts in existence, established and known, and the payment of one was no consideration for the release of the other. In this case there was but one debt in existence, and that was paid in full. There was no other debt owing or due, and there was no knowledge on the part of either party that there ever would be one. The final estimate and receipt in the case at bar did not, in addition to the satisfaction of the debt actually owing, release or discharge another existing debt, but simply evidenced the agreement of the parties that no such debt should ever be incurred under the contract. Moreover, while we concede that the nature of the consideration for a contract, or the fact that there was no consideration, may be proved by parol, we are unwilling to adopt as a general rule the proposition that, where a single consideration is paid for a contract which contains several covenants or provisions, one may admit the receipt of the entire consideration,

and then escape from any of the provisions which seem burdensome to him by testifying that the consideration was not paid on account of those provisions, but on account of others which are less troublesome to him. The conclusive answer, however, to the contention of counsel for the plaintiff in error upon this question of consideration, is this: The real consideration for the agreement that the contract of July, 1890, became executed and *functus officio* on October 19, 1891, inhered in the original contract itself. That contract was valid and binding upon both the parties to it. It was supported by their mutual promises, and one of the covenants which it contained was that when the 10 per cent., and all the sums due under the contract, were fully paid, it should be considered canceled. They were fully paid, and by that payment itself, without more, the contract became executed, by its very terms. Not only this, but by the provisions of the final estimate and release of October 19, 1891, the parties agreed with each other that these sums were fully paid, and that the company was released from all liability under the original agreement. The payment of this money and the acceptance of this release by the company absolved Green from all obligations of further performance of the contract, as fully as it released the company from its undertaking to employ him. The result is that the mutual promises of the original contract and the mutual releases of the agreement of October 19, 1891, provide ample consideration for both agreements, without regard to the question whether or not the \$9,362.23 was paid before it was due.

But it is insisted that, under the true construction of the release itself, it must be confined in its effect to a satisfaction of plaintiff's claim for the specific work and labor described in it, and that it cannot have the effect of an agreement that the contract is executed. The familiar rules that the court may place itself in the situation of the parties at the time the contract was made, and then, in view of all the circumstances surrounding them, endeavor to ascertain the true meaning of their agreement; that, if its interpretation is doubtful, it should be construed more strongly against the party who prepared it; that, if it is ambiguous, the practical interpretation of the parties should prevail; that, where there is a particular recital followed by general words in a release, the latter are qualified by the particular recital; and that a release does not apply to claims of which the parties had no knowledge when it was made,—are invoked, and a learned and persuasive argument in support of the view of the counsel for plaintiff in error is presented under each rule. There are two reasons why the rules that the general words of a release are qualified by a particular recital, and that a release does not cover claims of which the parties had no knowledge, ought not to be applied to the agreements under consideration: One is that the original agreement on this subject, as we have attempted to show, is found in the contract of July, 1890, and the final estimate and release is but the agreed evidence that the contract has become *functus officio*, and that it is executed and canceled. The other is that the existence of the contract, and the question whether or not it was then completed and canceled, or continuing and executory, were

necessarily and actually in the minds of the parties when the release was signed. This appears from the terms of the release itself, as well as from the testimony of Green that he objected to those terms when he signed it. This release is not of the character of that quoted in *Railway Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 16, and 19 U. S. App. 612, in which it was held that a release of a claim for damages on account of injuries to the person from a collision with a railroad car which was specifically described, and also "from all manner of actions, causes of action, claims, and demands whatsoever, from the beginning of the world to this day," did not cover a cause of action for malpractice, which was unknown to both parties when it was signed. The final estimate and release in this case is the customary evidence of the complete execution of a construction contract. The full payment which it acknowledged was the very fact which, by the terms of the contract itself, the parties had agreed should evidence its complete execution, and effect its cancellation. The release which acknowledged this payment was denominated the "final estimate." It recited the contract, and the receipt of all that was due under it, and then declared that the receipt of this \$9,362.23 was "in full satisfaction, payment, and discharge of all claims on account of the work, supplies, or materials mentioned in said contract, and for all liabilities of said railway company in any manner arising or growing out of said contract." Thus, the specific question whether the contract was thereafter executory or executed was specified and determined by the final estimate and agreement provided for by the original contract, and not by the mere general words of the release. No good purpose would be served by extending this opinion to review other general and familiar rules of construction. Such rules are helpful to ascertain the true interpretation of contracts whose terms are doubtful or ambiguous, but they cannot be permitted to abrogate those whose provisions are clear and certain. It is sufficient to say that a careful consideration of the agreements of the parties to this suit, in the light of these rules and of the circumstances under which the agreements were made, has failed to convince us that there was any error in the decision of the trial court that they disclose a binding written contract between the parties, unassailable by the parol evidence offered, to the effect that the agreement of July, 1890, was executed and became functus officio on October 19, 1891, when the final estimate, receipt, and release were signed and delivered. In view of this conclusion, all the alleged errors which we have not considered become immaterial, and the judgment below must be affirmed. It is so ordered.

HANDFORD et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1899.)

No. 1,105.

UNITED STATES—ACTION TO RECOVER LOGS.

Where the United States claims the ownership of logs in the possession of another on the ground that they were cut from government land, its remedy, like that of an individual, is by an action of replevin or trespass. It cannot seize the logs from one having them in his possession, and, by filing a libel against them, cast upon him the burden of proving his ownership; and a district court is without jurisdiction of such a proceeding.

In Error to the District Court of the United States for the Eastern District of Arkansas.

Morris M. Cohn (J. C. Yancey, Robert Neil, and J. W. Butler, on the brief), for plaintiffs in error.

H. F. Auten and Jacob Trieber, for the United States.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. C. R. Handford and J. S. Handford, the plaintiffs in error, purchased and had in their actual possession in their dock at Batesville, Ark., a raft of cedar logs. A person described as "a special agent of the general land office of the United States" appeared in Batesville, and seized the logs, took them out of the possession of the plaintiffs in error, and turned them over to the United States marshal for the district; and thereupon the United States district attorney for the district filed in the court below the following information:

"In the District Court of the United States for the Northern Division of the Eastern District of Arkansas.

"The United States vs. Two Rafts of Timber.

"Comes the United States, by Jacob Trieber and H. F. Auten, its attorneys, and informs the court that on the 21st day of April, 1898, at Batesville, in the district and division aforesaid, the special agent of the general land office of the United States seized and took into his possession for and in behalf of the United States, in pursuance of and obedience to the instructions of the honorable secretary of the interior of the United States, one raft of cedar timber, consisting of sixty-three sticks, of the value of ninety dollars, and that said agent turned the same over to the United States marshal for said district, who has since that time been, and is now, in possession thereof, by virtue of said seizure and of his office. The United States further informs the court that said timber so seized is the property of the United States, having been unlawfully cut from the lands of the United States, in violation of the statutes in such case made and provided. Wherefore the United States prays that monition issue to the marshal requiring him to give notice of said seizure to all persons who claim to have any right or interest in said timber, to the end that they may intervene herein, and that said property be adjudged the property of the United States, and for such further and other relief as it may be legally entitled to."

Jacob Trieber,

"H. F. Auten,

"U. S. Attorneys."

In pursuance of an order of the court, notice of this proceeding was given by publication in a newspaper. The plaintiffs in error appeared, and prayed to be made parties defendant. This prayer was

denied, and thereupon, under protest, they put in a claim and answer, alleging that they were the owners of the logs. The logs were delivered to the claimants on stipulation, given under like protest, to pay their value or return them in case they were adjudged to be the property of the United States. The cause was tried before the court, who found that, "the burden of proof being on the interveners," the logs were the property of the United States, and decreed accordingly. The clause of the decree that "the burden of the proof being on the interveners" is explained by the record and briefs in this way: It seems that on the Upper White river, in a broken and sparsely settled region, there are extensive forests of cedar trees. Some of the land upon which these trees grow belongs to the United States, and some to individuals. Cedar logs are cut in that region, and floated down White river to Batesville, where they are sold to plaintiffs in error, and others, who are dealers in that kind of timber. It will be perceived at a glance that it would probably be quite difficult to prove that cedar logs found at Batesville were cut from the lands of the United States in the region mentioned. The government sought to escape this burden by seizing and taking them out of the possession of the plaintiffs in error, and filing the libel we have set out. It was assumed that by such proceedings the presumption that the logs were the property of the plaintiffs in error arising from their possession of them would be gotten rid of, and that after the seizure the presumption would be that they were the property of the United States, and that in any suit or action between the United States and the plaintiffs in error touching the ownership of the logs the burden of proof would rest on the plaintiffs in error to prove, not merely that they were in the actual and peaceable possession of the logs when the government agent seized them, but that the logs were not cut on government land. It is needless to say that the seizure of the logs had no such effect. The logs were not seized for a violation of the navigation or revenue or other laws of the United States providing for the seizure, forfeiture, and condemnation of property, and therefore section 909 of the Revised Statutes of the United States, and the presumptions arising in the class of cases mentioned, have no application to this case. A suit by the government to recover timber cut on the public lands, or its value, "is not a suit to recover a penalty, or to impose a punishment, or to declare a forfeiture." *Stone v. U. S.*, 167 U. S. 178, 187, 17 Sup. Ct. 778, 781. The government claims to be the owner of the logs because they were cut on government land. The government's ownership of the logs derived in this way is not different from ownership acquired in any other way. The title of the government to the logs grown on the land of an individual, and purchased by it, is precisely the same that it is to logs grown on its own land; and if one should wrongfully take the logs of the government, purchased from the owner on whose land they grew, or wrongfully cut and remove logs from the land of the government, the remedy in either case is by an action of trespass or replevin. The case is not different in its legal aspects from what it would have been if the government agent had gone into the private residence of the plaintiffs in error, and seized and carried off their

furniture on the claim that it was made out of timber cut on government land, for "the timber at all stages of the conversion" remains the property of the owner. *Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398. The right to seize and the legal consequences of the seizure would be the same. There is no higher or different right to seize logs cut from government land under existing laws than there is to seize any other kind of personal property which it is claimed the government owns. It is true that a private person may retake his personal property where it can be done without endangering the public peace. The government has this right also, but to no other or further extent, and with no different legal consequences, than in the case of a private person. Such extrajudicial redress, whether by the government or a private person, does not affect the title to the property seized, or deprive the person from whose possession it was taken of any legal right or presumption. Where the property is thus taken by one person out of the possession of another under claim of ownership, and that ownership is judicially challenged by the person from whose possession the property was taken, the burden of proof is cast upon the taker to prove his ownership whenever it is shown he took the property from the possession of the plaintiff. And this rule applies to the government as well as to a private person. If the government could be sued, the plaintiffs in error might have replevied the logs, and in that suit proof of their prior possession would have made a *prima facie* case upon which they would have been entitled to a verdict in the absence of countervailing testimony; and in any suit brought by the government in any form touching the ownership of the logs the same rule would obtain. In the brief filed on behalf of the plaintiff it is said: "The government, when it brought this action, came into court with the property in its possession, and with the legal presumption that its possession was rightful;" but this legal presumption that the possession of the government was rightful was dissipated the moment it was shown that that possession was acquired by taking the logs out of the possession of the plaintiffs in error on a mere claim of ownership. It is further said in the same brief: "It [the government] brought the property into court simply to allow any person having, or claiming to have, any right, title, or interest in the property, to come in, and make their claim, and establish the same by proof." But there is no law warranting any such proceeding. Assuming the government to be the owner of the logs, as it claimed to be when it seized them, the government is, by this proceeding, libeling its own property, which is a proceeding entirely unknown to the law. It is extremely clear that the district court had no jurisdiction of this anomalous case, and that all its proceedings are void. *Gastrel v. Cypress Raft*, 2 Woods, 213, Fed Cas. No. 5,266. "Undoubtedly, though not an inferior court, the district court is one of limited jurisdiction, and that it has jurisdiction of the particular case which it attempts to adjudicate must always appear. * * * A party cannot, by consent, confer jurisdiction where none would exist without it." *Confiscation Cases*, 20 Wall. 92, 107, 108. "It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide

a case. If this were once conceded, the federal courts would become the common resort of persons who have no right, either under the constitution or the laws of the United States, to litigate in those courts." People's Bank v. Calhoun, 102 U. S. 256. The disposition of the case which is rendered necessary leaves the logs in the possession of the plaintiffs in error. The appropriate remedy, and, indeed, the only mode of proceeding, by which the question of ownership to these logs can be judicially determined, is by an action of replevin or a suit for their value. The seizure by the government of the logs upon a claim of title leaves the question of ownership undetermined and indeterminable, for, the government being in possession of the logs, claiming to be the owner, can bring no action for the logs or their value, and no action for the logs or their value can be brought against the government, so that the ownership must remain forever unsettled. The judgment of the district court is reversed, and the case remanded, with instructions to dismiss the same for want of jurisdiction.

BAIRD v. REILLY.

(Circuit Court of Appeals, Second Circuit. January 25, 1899.)

No. 46.

1. **MASTER AND SERVANT—UNSAFE PLACE TO WORK—LIABILITY OF MASTER.**
There is an implied contract on the part of a master that he will see to it that the place where his employé is required to work is reasonably safe, and this obligation is not satisfied by devolving it on a subordinate; but if the place is originally safe, but becomes unsafe during its use by the servants through the negligence of a fellow servant, such fact is a defense to an action against the master for an injury resulting.
2. **EVIDENCE—HOSPITAL RECORD.**

A hospital record, containing remarks regarding a patient entered thereon by a nurse, is not competent evidence to prove the facts therein stated.

In Error to the Circuit Court of the United States for the Southern District of New York.

J. Woolsey Shepard, for plaintiff in error.

H. C. Smyth, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. This is an action for negligence, brought to recover for injuries received by the plaintiff, while in the employ of the defendant, by the caving in of a trench. The defendant, under a contract with the city of New York, was laying a system of water pipes in one of the streets; and for that purpose had caused a trench to be made, about ten feet deep and five or six feet wide. The plaintiff had nothing to do with cutting the trench, which had been going on for several weeks, but was one of a gang of men sent into it, after it had been cut, to lay the pipes upon the bottom. There was evidence upon the trial tending to show that, at that part of the trench which caved in, it had been cut through soil which in places was loose and soft. A steam engine and derrick, weighing about 20 tons, mounted upon a four-wheel platform straddling the trench, had been

used in the progress of the work over the place which caved in for several days previously. A competent foreman was in charge of the general work for the defendant, and he had been provided with all the necessary materials and appliances for protecting the side walls of the trench, but had not used them at that part of the work, because, in his judgment, it was not necessary. Error is assigned of the refusal of the trial judge to direct a verdict for the defendant, of his refusal to instruct the jury as requested on the part of the defendant, and of various rulings upon the trial in respect to the evidence.

The case was submitted to the jury by the trial judge upon instructions which accurately and adequately stated the rules of law applicable to the controversy, and presented the real questions of fact which the jury were called upon to decide. As there were questions of fact, which could not properly have been taken from the consideration of the jury, his refusal to direct a verdict was plainly right, and does not merit discussion. The request to instruct the jury, which he refused, was, in substance, that if they found from the evidence that the defendant had selected a foreman who was competent to take charge of the work, and had given him proper instructions, and if the cave-in occurred by reason of the foreman's subsequent neglect to shore up the trench, the neglect, if there was any, which caused the accident, was that of a co-servant of the plaintiff, and the defendant was not responsible. An employer is not relieved from responsibility to an employé, who has been injured in consequence of his failure to make the working place reasonably safe, by proof that he employed a competent superintendent or foreman, supplied him with necessary appliances, and gave him all needful instructions for the purpose. He cannot escape responsibility by delegating his duty in this behalf to another, because it is his implied contract with the employé that he will see to it that the working place is reasonably safe, in view of the character of the work to be performed; and this obligation is not satisfied by devolving it upon a subordinate. When, however, it appears that the working place originally, and when the employé was sent to do the work there, was reasonably safe, but became unsafe at the particular time of the accident by causes that could not have been anticipated, by exigencies created in carrying out the details of the work, or by the neglect of a fellow servant, a different rule is applicable. The employer's obligation towards an employé does not oblige him to keep the working place in a safe condition at every moment of the work, so far as its safety depends upon the due performance of their work by the fellow servants of the employé. *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433; *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021. The question of fact here is exhibited by an excerpt from the charge of the trial judge, as follows:

"The theory of the plaintiff is that the trench in which the defendant set the plaintiff to do the work was not a reasonably safe place for him to work in, or, in other words, that the master had not been reasonably careful and prudent in protecting that trench against accidents which might be expected to occur. It does not need any evidence to tell us that for a slight excavation in the ground, with perfectly hard banks, it is wholly unnecessary to do anything except to cut your trench; nor do we need any evidence to tell us

that if we go down far enough, and the side walls are sufficiently soft, the time will come when they are likely to cave in, unless shored. In the case of those two extremes, we need no experience to inform us about it. The question here arises as to the situation between those two extremes. When does the time arrive when the trench will need to be sheet-piled,—shored up? And was this trench in such a condition that, in the exercise of reasonable prudence, the defendant should have protected it by shoring?"

Assuming the evidence about the character of the soil to be true, the facts justified the jury in finding that in the absence of shoring or sheet-piling, such as it was customary to use when water pipes were being laid in the city of New York in trenches of depth, the working place to which the defendant was sent was not a reasonably safe one. There was no evidence tending to show that it became unsafe after he was sent there, and it would therefore have been error to have granted the instruction requested.

We have examined the exceptions to the rulings of the trial judge upon evidence, of which error is assigned, and find no error. It was proper to admit testimony showing that it was usual, when constructing similar works in the streets of New York, to protect the trenches from caving in by putting in sheet plank and braces. It was proper to exclude from the consideration of the jury that part of the hospital record which consisted of the remarks of the nurse who attended the plaintiff. If she had been called as a witness, this part of the record might have been competent for use by her to refresh her memory. It was not competent as independent evidence of the truth of the statements.

While we are not satisfied with the conclusions reached by the jury in this case; there was evidence to support them, and we can find no reason for reversing the judgment. It is accordingly affirmed.

In re BUNTROCK CLOTHING CO.

(District Court, N. D. Iowa, E. D. March 29, 1899.)

BANKRUPTCY—POSSESSION OF PROPERTY—MORTGAGEE.

Where personal property, scheduled as part of the assets of a bankrupt, passed into the possession of creditors holding mortgages thereon, before the commencement of the proceedings in bankruptcy, and is held by them as such mortgagees, they cannot be ordered to surrender such property to the trustee in bankruptcy, on his petition, in a summary proceeding in the court of bankruptcy. Yeatman v. Institution, 95 U. S. 764, followed.

In Bankruptcy. Submitted on certificate of referee.

F. F. Swale, for trustee.

W. J. Springer, for mortgagees.

SHIRAS, District Judge. From the report of the referee in this case it appears that on the 13th day of December, 1898, the Buntrock Clothing Company, upon the petition of creditors, was adjudged to be bankrupt, and on the 22d day of December it filed a schedule of assets, consisting, mainly, of a stock of clothing and furnishing goods valued at \$8,000. It further appears that on the 31st of August, 1898, the bankrupt firm executed a chattel mortgage on the stock of goods to W. J. Springer, as trustee, to secure certain debts,

alleged to be due and named in the mortgage, and on the same date executed another chattel mortgage to Shaffer Bros. to secure payment of certain notes held by them, and the mortgagees took possession of the property thus mortgaged before the initiation of the proceedings in bankruptcy. Upon the appointment of the trustee, he, under the instructions of the referee, demanded from W. J. Springer and Shaffer Bros. the delivery to him of the property included in the schedules filed by the bankrupt, and upon their refusal to yield up possession thereof he obtained from the referee the issuance of an order directing them to show cause why they did not deliver possession of the property to the trustee. In response to this order the mortgagees set forth in writing the fact that they were in possession of the property under the mortgages above described, and that the referee in bankruptcy, and this court sitting in bankruptcy, had not jurisdiction in the premises, and could not, in this summary mode, compel them to yield up possession of the mortgaged property to the trustee, and that the only remedy on part of the trustee was to bring suit in the proper state court for the possession of the property or its value. Upon a hearing before the referee, it was held by him that the trustee was entitled to the immediate possession of the property as part of the estate of the bankrupt firm, and an order was thereupon issued to the trustee, directing him to take possession of the property and to deal with the same according to law. The mortgagees excepting to this ruling, the matter has been certified up for review to this court, and thus is presented the question whether the court in bankruptcy can compel, by summary proceedings, the delivery to the trustee of property, forming part of the estate of a bankrupt, which is in possession of third parties, and which is held by them for their own benefit, and not merely as the agents or servants of the bankrupt.

This general question, under the provisions of the act of 1867, was considered by the supreme court in the case of *Yeatman v. Institution*, 95 U. S. 764, in which was involved the right to the possession of certain certificates of indebtedness issued by the state of Louisiana, which formed part of the property of the firm of O'Fallon & Hatch, who had been declared to be bankrupts. These certificates were pledged by the firm, before the initiation of proceedings in bankruptcy, as security for a debt due the New Orleans Savings Institution, and upon the appointment of the assignee in bankruptcy he demanded the surrender to him of the certificates, and upon the refusal to deliver up the same the assignee sued the savings institution for the value thereof. The supreme court held that the suit for wrongful conversion could not be maintained, and ruled that if the pledge was in fraud of the bankrupt act, and consequently void, the assignee might disregard the contract of pledge, and recover the property for the benefit of creditors, but, if the contract of pledge was valid, then the assignee would not be entitled to the possession of the property until he had redeemed the same by payment of the debt due the pledgee; the court saying that:

"If the assignee regarded them [the certificates] as of greater value than the debt for which they had been pledged, or if the interest of creditors re-

quired prompt action, he had authority, under the statute and the orders of court, to tender performance of the contract of pledge, or to discharge the debt for which the certificates were held. He had the right, perhaps, under the orders of the court, to sell them, subject to the claim of the defendant in error. If he desired a sale of them and a distribution of the proceeds, or if he doubted the validity of the pledge, he could have instituted an action against the corporation in some court of competent jurisdiction in Louisiana, and thereby obtained a judicial determination of the rights of the parties. But none of these obvious modes of proceeding were adopted. The receiver and assignee seem to have acted throughout upon the theory that they had the right, immediately upon and by virtue of the adjudication in bankruptcy, to assume control of all property of every kind and description, wherever held, in which the bankrupt had an interest, without reference to the just possession of others, lawfully acquired prior to the commencement of proceedings in bankruptcy, or to the liens, incumbrances, or equities which existed against the property at the time of the adjudication in bankruptcy. We have seen that such a theory is unsupported by law."

It seems to me that this ruling is applicable to the present statute, and that it is decisive of the questions certified to the court for its opinion. The facts show that the stock of goods, forming part of the estate of the bankrupt firm, had passed into the possession of the mortgagees before the proceedings in bankruptcy were instituted. As is said by the supreme court in the case just cited, if the trustee questions the validity of the mortgages, he can attack the same by proper proceedings to that end, or he may redeem the property by payment of the mortgage liens, or in other ways may perhaps protect the interests of creditors, but he cannot by summary proceedings compel the delivery of possession of property by third parties, who hold the same as mortgagees, and whose possession antedates the filing of the proceedings in bankruptcy.

It may be urged that the ruling of Judge Adams, of the Eastern district of Missouri, in *Re Sievers*, 91 Fed. 366, and which has been affirmed by the court of appeals for this circuit (92 Fed. 325), is in principle opposed to the view now advanced, in that it was therein held that property held by an assignee under a general deed of assignment for the benefit of creditors could be reached in a summary way by an order from the court in bankruptcy. In that case the assignee held possession for the benefit of creditors, and not in his own right. The deed of assignment was in itself an act of bankruptcy, and the facts showed that the parties interested in the property were the creditors of the bankrupt in whose behalf the proceedings in bankruptcy had been instituted, and no right of the assignee was invaded by transferring the possession of the property from the assignee. The difference in the facts makes the ruling in that case inapplicable to the question presented on the record now before the court.

For the reasons stated, I hold that the mortgagees cannot be compelled to yield up possession of the property in their hands, which passed into their possession before the proceedings in bankruptcy were begun, by an order entered in a summary proceeding of this character.

In re BECK.

Ex parte O'CONNELL.

(District Court, S. D. Iowa, E. D. February 9, 1899.)

No. 706.

1. BANKRUPTCY—ATTORNEYS' FEES IN VOLUNTARY CASES.

Under Bankruptcy Act 1898, § 64, par. b, providing that "the debts to have priority and to be paid in full out of bankrupt estates shall be * * * one reasonable attorney's fee * * * to the bankrupt in voluntary cases as the court may allow," the allowance of such fee in a voluntary case, and its amount, rest in the discretion of the court.

2. SAME.

In a case of voluntary bankruptcy, an attorney's fee for legal services rendered to the bankrupt in preparing and filing the petition and schedule, and during the proceedings, is not entitled to priority of payment out of the estate, such services being for the benefit of the bankrupt himself, is a proceeding instituted by him for his own advantage; and a claim for such fee is only provable as a general debt against the estate. But an allowance may be made to the attorney of the bankrupt for services of such a nature, and rendered under such circumstances, as to constitute a special benefit to the estate generally, as where the same were necessary to preserve the estate pending the appointment of a trustee.

3. SAME.

In a case of voluntary bankruptcy, where the amount realized for creditors was about \$200, and the amount of proved debts over \$2,000, and it appeared that, before the appointment of the trustee, the bankrupt's attorney had made several trips to neighboring cities to attend to litigation in respect to pending attachments and attempted judgments against the bankrupt in the state courts, his services therein resulting in benefit to the estate, *held*, that \$50 should be allowed to the attorney, and paid out of the estate, as compensation for such services and for his personal expenses connected therewith; his claim for fees for legal services rendered to the bankrupt before the filing of the petition in bankruptcy and after the appointment of the trustee being disallowed.

In Bankruptcy. On application for allowance for attorney's fees.

D. J. O'Connell, pro se.

WOOLSON, District Judge. This is a case of voluntary bankruptcy. So far as stated in the verified application for allowance of attorney's fees, the proceedings in bankruptcy herein have not been particularly different from such cases generally. Upon presentation by counsel for the bankrupt of his application for allowance of \$150 to him as attorney for the bankrupt, I referred said application to La Monte Cowles, Esq., a referee in bankruptcy, for examination and report as to special facts in said order of reference enumerated. His report has been filed, as also statement of counsel for bankrupt, additional to his application. In substance, the referee reports the estate as not yet closed, a part (but comparatively of small value) of the property being yet unsold. The value of the estate (not exempt from execution) coming into the hands of the trustee was less than \$500 exclusive of the real estate, covered by mortgages for its full value. The amount thus far realized by the trustee is about \$200, which will not be greatly increased by sale of property yet unsold. The unsecured claims filed in the estate amount to somewhat more

than \$2,000. The services of attorney for bankrupt, in and about the proceedings in bankruptcy, were about such as ordinarily attend a case of voluntary bankruptcy, where there are no special contests involved. No contests whatever seem to have been had in these proceedings. The attorney for the bankrupt, however, has, at the bankrupt's solicitation and before the appointment of the trustee, made several trips from Burlington to Mt. Pleasant and to Keokuk, to attend to litigation regarding attachment suits instituted in the state courts, and as to attempted judgments against the bankrupt. The attorney also states that his attorney fee, as claimed, includes services for the bankrupt up to and including his discharge. The referee reports that, in his judgment, a reasonable fee for the services by attorney for the bankrupt from the beginning of bankruptcy proceedings up to and including the discharge of the bankrupt is \$100.

The payment for which application is herein made is claimed to be authorized by clause 3 of paragraph b of section 64 of the present bankruptcy statute. The heading of the section is, "Debts Which Have Priority." Paragraph b itemizes the order of payment (except as to taxes) of all debts which, having priority, are to be paid in full out of the bankrupt estate. The first item relates to cost of preserving estate after petition filed; the second, to filing fees in involuntary cases; while the third item relates to "the costs of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupts in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases as the court may allow." A fourth item relates to wages due workmen, servants, etc., earned within three months, etc.; and a fifth item relates to debts owing to any person to which the laws of the state or of the United States give priority.

The third item, above quoted, apparently provides for an attorney's fee to petitioning creditors, as well as to the bankrupt, in involuntary cases; while in voluntary cases there appears to be contemplated only a fee for the attorney for the bankrupt in cases where "the court may allow,"—that is, in the discretion of the court. There seems to be good reason for this distinction. The petitioning creditors, if successful in their attempt, reap no specially personal benefit from their efforts. The estate is to be distributed among all the allowed claims, and the petitioning creditors only receive their proportionate share of amounts distributed. Their efforts are therefore for the creditors generally, and the proper expense attending same may well be laid as an expense on the general estate, thus compelling each creditor to bear his proportionate share. The alleged bankrupt, resisting his alleged insolvency or bankruptcy, and contesting for the possession and control of his property and the right to dispose of it, is entitled to have assistance of counsel in his efforts. Unless he has already arranged with counsel therefor, he must largely rely on obtaining from his property compensation for counsel. If his property pass into the hands of a trustee by reason of

his being adjudicated a bankrupt, his counsel may have nothing available from which to make his fees; and it seems proper that the claim of the attorney for the bankrupt for services in resisting involuntary proceedings should be regarded and paid as a prior claim, and not be required to be filed as a general claim. If the alleged bankrupt shall pay money or transfer property to an attorney for services to be rendered in bankruptcy proceedings, the court may re-examine the transaction, and award any excess, above reasonable amount for such services, to the trustee for the benefit of the estate. Bankruptcy Act, § 60, par. d.

The reasons underlying the provision (clause 3, par. b, § 64) above referred to for attorneys for alleged bankrupts in involuntary proceedings have not the same force when applied to voluntary proceedings. In the involuntary cases there is generally a considerable amount of assets. Were it not so, there would be little inducement for placing the debtor in bankruptcy. The proceedings are begun with the intention of compelling application of the assets to payment of the debts. In voluntary cases, however, the instances are comparatively rare where the assets are sufficient to afford any considerable dividend on the claims. Thus far, under the present statute, in this district at least, the assets have usually brought substantially nothing towards payment of claims; and the inducement to the debtor to avail himself of the provisions of the statute with reference to voluntary bankruptcy is largely that, with his smallness of assets, he can wipe out a largeness of debts. Take the case now under consideration: The assets in the hands of the trustee will net not much above \$200, to apply on allowed claims exceeding \$2,000. Here would be little, if any, inducement for creditors to institute involuntary proceedings. However, as such inducement to creditors becomes less and less, the inducement to the insolvent to avail himself of voluntary proceedings increases accordingly. If, in the present case, the claim of counsel (\$150) for attorney's fees were allowed, there would be left little over \$50 for dividend purposes to creditors. Hence is apparent the different bases on which attorney's fees for services on behalf of the bankrupt are considered in cases of voluntary and of involuntary bankruptcy.

Under the former bankruptcy statute (section 28, Act 1867) legal services in preparing the petition and schedules, and for advice in relation thereto, were held not to be a claim payable in full as a privileged debt or one having priority. *In re Hirschberg*, 2 Ben. 466, Fed. Cas. No. 6,530; *In re Evans*, Fed. Cas. No. 4,552; *In re Rosenfeld*, Fed. Cas. No. 12,057. An attorney is a general creditor in respect to services rendered in the preparation of the petition and schedules, and consultation therefor, and must prove his debt in the usual form, and take his dividend in concurrence with the other creditors of the bankrupt. *In re Jaycox*, 7 N. B. R. 140, Fed. Cas. No. 7,239. In the same case it is further held that, in order to justify payment out of the bankrupt's estate for legal services rendered to the bankrupt after adjudication of bankruptcy, and up to approval of choice of assignee, "it must be clearly shown that the alleged services were properly and necessarily rendered, for the purpose of

benefiting or preserving the estate of the bankrupt, in the interest of the general creditors, and not in the interest of any creditor or class of creditors. It was the duty of the bankrupt to see that the property was preserved until the appointment of an assignee; and, if it was necessary that other persons should render similar services, and the petitioners actually rendered valuable service in respect to the bankrupt's property, and to the advantage of the general creditors, the extent and value and necessity of such services should be clearly established. *In re Bigelow, Fed. Cas. No. 1,397.*"

To my mind, the distinction made in the decision just quoted is applicable to the clause now under consideration of the present act. In cases of voluntary bankruptcy, generally, the services of the attorney for the bankrupt, in counseling with the bankrupt and preparing and presenting his voluntary petition for adjudication, are in the interest of the bankrupt, and are not services on behalf of the creditors generally. So, after adjudication is had, his services, generally, are likewise for and in the interest of the bankrupt. It may be presumed that, if services are required for the trustee, he will—generally with the approval of the referee—employ counsel. If, meanwhile, legal services are actually needed for preservation of the property, pending the appointment of the trustee, and such necessity clearly appears, and, as well, that such services were rendered which were beneficial to the general creditors,—that is, to the estate of the bankrupt,—this court is authorized to allow a reasonable fee therefor. In other words, fees for legal services rendered for bankrupt in instituting and during proceedings in voluntary bankruptcy, being services for the benefit of the bankrupt, in proceedings instituted by the bankrupt for his own benefit, will not be allowed as a debt having the priority given under the clause under consideration. Such fee, if allowable at all, must be presented as a claim against the estate, and take its place with other general claims. But, if legal services are rendered under circumstances and of a nature which constitute a special benefit to the estate generally, as in case where same were necessary to preserve the property pending appointment, etc., of trustee, the court may allow therefor, when such necessity and benefit clearly appear. It will be understood I am attempting to state the general proposition, and do not undertake to decide that no exceptions thereto can exist. The case in hand requires but the general statement above made.

The correctness of the conclusion thus reached is clearly apparent when the general policy of the present bankruptcy statute as to fees and costs is considered. One of the strongest objections urged against the bankruptcy statute of 1867 was what was claimed by many to be the excessive fees possible thereunder, in whose payment the estate was largely consumed, leaving to the creditors little, if any, desirable dividends. The present statute localizes the expense of the proceedings, in substituting in place of the general assignee (under former act), who was frequently situated remote from the estate of the bankrupt, a referee, who is generally of the county of the bankrupt, or situated conveniently thereto. Thus, witness fees, expense of personal attendance of the bankrupt, and

the like, are thereby practically minimized. Whatever contests arise in the proceedings, save when carried in review to the judge, are held practically at the home of the bankrupt. To those familiar with proceedings under the statute of 1867, the great saving of costs and expense thereby secured is at once apparent. Again, save as per cent. on assets may increase fees, the fees to referees and trustees for services in each estate are fixed at \$10 and \$5, respectively, and to the clerk of the court \$10, which several amounts are, by general order 25, ordered by the supreme court to be in full for all services performed by them in such estate. It would scarcely seem possible that, in the clause under consideration from section 64, congress could have contemplated, nor under said general order could the supreme court have intended, that the attorney for the bankrupt in voluntary proceedings, with no features or services therein specially distinguishing such cases from voluntary cases generally, should be paid for his services to the bankrupt in such estate 10 times the amount paid to the clerk or referee, and 20 times the amount paid to the trustee, such payment thereby to lessen or destroy the dividend-paying ability of the estate. And in the present case the referee reports \$100 as a reasonable fee for the legal services rendered (as itemized in the statement made by the attorney), while the attorney claims \$150 as such reasonable fee.

The conclusion reached is that the bill as rendered cannot be allowed; and yet there clearly appear legal services of benefit to the estate as rendered by such attorney, and personal expenses by him necessarily incurred in connection therewith, pending appointment, etc., of trustee, and after petition for adjudication was filed. For services or disbursements before such filing, and after appointment of trustee (which necessarily include services that may hereafter by said attorney be performed), no allowance is made. I am of the opinion that services, of the kind above stated to be allowable, were performed by Mr. O'Connell, as attorney for the bankrupt, in regard to litigation in progress against the bankrupt in Henry and Des Moines counties, which, with his personal expenses incident thereto, amount to the sum of \$50. Let an order be entered in his favor for payment to him by the trustee, out of the estate in his hands, of the amount of \$50.

In re WORLAND.

(District Court, N. D. Iowa, Cedar Rapids Division. March 30, 1890.)

1. BANKRUPTCY—SALE OF INCUMBERED PROPERTY.

Where the estate of a bankrupt includes real property subject to the liens of valid mortgages and judgments, the court may order it sold by the trustee in bankruptcy free of incumbrances, the liens being transferred to the proceeds of the sale, and may direct the method of sale and distribution so as to protect the rights and interests of all parties concerned.

2. SAME—PRIORITY OF LIENS.

Where real property of a bankrupt, improved by a building fitted for use as a cooper and carpenter shop, with a boiler, engine, and other machinery annexed to the building in the usual method, was subject to the lien of (1) a real-estate mortgage on the entire premises; (2) a subsequent

chattel mortgage on the stock, lumber, and other material, and the engine, boiler, tools, and machinery; and (3) a judgment recovered after the execution of both mortgages,—and the court of bankruptcy ordered the property sold by the trustee free of incumbrances, the liens to attach to the proceeds of sale, *held* that, out of such proceeds, the first mortgagee should be paid in full, and that the balance should be divided between the chattel mortgagee and the judgment creditor in the proportion which the value of the personality covered by the chattel mortgage bore to the value of the whole.

In Bankruptcy. Submitted on application for a review of the ruling of the referee on petition of trustee for order directing sale of certain property, and establishing priority of lien.

J. C. Herring and B. L. Wick, for trustee.

Powel & Harman, for creditor Richard Grant Co.

SHIRAS, District Judge. From the record submitted in this case, it appears that in the year 1895 the bankrupt erected upon a plot of ground by him owned, adjacent to the town of Norway, in Benton county, Iowa, a brick building, resting upon a stone foundation, and placed therein an engine, boiler, equalizer, steam planer, jointer, with certain shafting, belting, pulleys, and other like machinery; the building being thus erected and equipped with machinery for the purpose of using it as a combined cooper, wagon, and carpenter shop. The boiler, engine, and other parts of the machinery were annexed to the building in the usual method. On the 3d day of September, 1895, after the machinery had been placed in the building, the bankrupt executed to John De Klotz a real-estate mortgage upon the premises to secure the payment of a promissory note for \$500, payable in two years after its date, which debt remains due and unpaid. On the 3d day of August, 1896, the bankrupt executed to B. F. Tamblyn a chattel mortgage on the stock, lumber, and other material, and on the tools, machinery, engine, boiler, gearing, shafting, and belting, on said premises, to secure the payment of the sum of \$700. On the 18th day of February, 1898, the Richard Grant Company obtained a judgment in their favor against the bankrupt, in the district court of Benton county, Iowa, for the sum of \$365. On the 10th day of November, 1898, the petition in bankruptcy was filed. The adjudication followed, and the case was referred to the referee, in Linn county; and B. F. Tamblyn was appointed trustee of the bankrupt's estate, and, in his capacity as trustee, he petitioned the referee for an order directing the sale of the realty, and the machinery connected therewith, and asking that the latter should be sold separately, the proceeds to be applied to the payment of the debt secured by the chattel mortgage. Upon the hearing before the referee, it was ruled that the boiler, engine, and other machinery attached to the building had become part of the realty, so that no lien was created thereon by the chattel mortgage to B. F. Tamblyn. To review this ruling, the matter has been certified to this court; briefs on behalf of Tamblyn and the Richard Grant Company being submitted by counsel, in which the cases bearing upon the general question of the annexation of personality to realty are quite fully discussed, but I do not deem it necessary to consider these, in extenso, in this opinion.

Upon principle, as well as upon the authority of the decided cases, it is clear that the lien of the real-estate mortgage executed to John De Koltz covered the land, the building erected thereon, and the boiler, engine, and other machinery attached to the building; and this lien could not be displaced or defeated by the action of the bankrupt in subsequently treating the machinery as personalty, and giving a mortgage thereon. In order to protect this right of De Koltz, it is not necessary, however, to go to the extent of holding that the bankrupt could not sell the engine, boiler, and machinery to a third party, subject to the rights of De Koltz; and, if he could sell it, he could mortgage it to secure a just debt. The real contest in this matter seems to be between Tamblyn, as owner of the chattel mortgage, and the Richard Grant Company, the judgment creditor, on whose behalf the claim is made that the lien of the judgment is superior to that of Tamblyn. The evidence shows that no execution sale has been had under the judgment in favor of the Richard Grant Company, and the lien of the judgment attached only to the real interest held by the bankrupt in the property at the time of its rendition, or which he may have acquired subsequently. As against Tamblyn, the rights of the Richard Grant Company are those held by the bankrupt, and no greater; and thus the issue is reduced to the question whether, as against the bankrupt, who executed the chattel mortgage to Tamblyn, the latter is entitled to a lien on the property included in the mortgage. As between the mortgagor and mortgagee, I see no reason why the mortgage is not a valid and enforceable lien; and, if it was valid and enforceable against the mortgagor when executed, it was not rendered invalid simply because at a subsequent date a judgment was rendered in favor of the Richard Grant Company, which by operation of the statute of Iowa became a lien on the interest in realty belonging to the common debtor. The situation is this: By virtue of the mortgage executed to De Koltz, he has the right to assert a lien upon the realty, which, in his favor, must be held to include the lot, the building erected thereon, and the engine, boiler, and other machinery attached to the building. Under the mortgage executed to Tamblyn, he has the right to assert a lien, subject to the prior rights and lien of De Koltz, upon the machinery described in the mortgage, even though it may be attached to the building. Under the judgment rendered in the district court of Benton county, the Richard Grant Company has a lien upon the interest held by the bankrupt at the date of the judgment in the property in question; this lien being subject to the prior liens held by De Koltz and Tamblyn. Thus, if the whole property should be sold for the sum of \$1,000, De Koltz would be entitled to be paid the sum due him in full, and the remainder should be divided between Tamblyn and the Richard Grant Company in the proportion which the value of the personalty covered by the chattel mortgage bears to the value of the whole. The entire property being within the control of the court of bankruptcy, it can direct the method of sale and distribution, so as to protect the rights and interests of all concerned.

The first point for consideration is as to the mode of sale,—whether the property should be sold as an entirety, or should be separated.

The rule is to adopt the mode which will realize the largest amount. The sale should be made so that the purchaser takes a title free from all claims or liens, the liens being remitted to the proceeds of the sale. If the order is that the property should be sold as an entirety, then the question will arise as to the mode of determining the relative interests of Tamblyn and the Richard Grant Company in the balance left after paying the lien held by De Koltz, which requires a determination of the relative value of the property covered by the chattel mortgage, and included in the sale, as compared with the value of the whole property included in the sale. This question may be settled by the agreement of the parties, evidenced in writing duly signed, by a written agreement providing for an appraisement of the respective values by the appraisers, or by a submission of the question to the referee upon evidence taken under his direction.

Some question has been made in argument with respect to the amounts due on the several mortgages, and the validity of the chattel mortgage. The record does not present any issues upon these matters, and, in the consideration of the question decided, the court has assumed that the mortgages were executed in good faith to secure actual indebtedness.

CHEMICAL NAT. BANK et al. v. MEYER et al.

(District Court, E. D. New York. March 27, 1899.)

1. **BANKRUPTCY—PARTNERS—ACTS OF BANKRUPTCY.**

Where the liquidating partner of an insolvent firm makes a general assignment of the firm's property for the benefit of its creditors, the other partner making no attempt to prevent such assignment, it is an act of bankruptcy, upon which the firm, as such, may be adjudged bankrupt.

2. **SAME.**

Where an act of bankruptcy has been committed by an insolvent partnership, as such, it may be adjudged bankrupt on the petition of its creditors, although neither of the partners has done any act upon which he, as an individual, could be adjudged bankrupt.

3. **SAME.**

Where the liquidating partner of an insolvent firm makes a general assignment of the firm's property for the benefit of its creditors, it is an act of bankruptcy upon which such partner, as an individual, may be adjudged bankrupt, being a conveyance or transfer of a portion of his property with intent to hinder, delay, or defraud his individual creditors.

4. **SAME.**

Where the liquidating partner of an insolvent firm makes a general assignment of the firm's property for the benefit of its creditors, and thereupon an adjudication in bankruptcy is made against such partner and the firm, the other partner, though he made no attempt to prevent the assignment, should not be adjudged bankrupt if he has not individually committed an act of bankruptcy; but he is within the jurisdiction of the court, and is a proper party to the proceedings, and entitled to the rights of a party.

In Bankruptcy. This was a petition in involuntary bankruptcy by the Chemical National Bank and other creditors against the firm of Meyer & Dickinson, and against Henry L. Meyer and Joseph R. Dickinson as surviving partners of said firm.

George C. Kobbe and George H. Yeaman, for petitioning creditors.
Fred. W. Hinrichs, for opposing creditors.
Strong & Cadwalader and G. Woodward Wickersham, for assignee.
Goepel & Raegener, for Henry L. Meyer and partnership of Meyer & Dickinson.

THOMAS, District Judge. In the above matter the court has reached the conclusion that the firm of Meyer & Dickinson was, at the time of the filing of the petition herein, insolvent, as were the individuals Henry L. Meyer and Joseph R. Dickinson, surviving partners of such firm, and that the firm of Meyer & Dickinson committed an act of bankruptcy in making, through the action of Henry L. Meyer, the general assignment alleged in the petition. Meyer, under the power given him as liquidating partner, was competent to make a general assignment of the firm property. In any case, no attempt has been made on the part of the partner Dickinson to prevent the marshaling and distribution of the assets of the firm in such proceeding. If Meyer did not have the literal authority to make a valid assignment of the firm property, then his attempt to do so was tantamount to an attempted transfer or removal of the firm property with the intent to hinder, delay, or defraud the firm creditors, and although Dickinson claims that he did not consent, and refused to consent, to such action, his conduct with reference to the matter amounts to a practical acquiescence; so that, in either case, an act of bankruptcy has been committed as regards the firm. It may be assumed that no act of bankruptcy has been committed on the part of Dickinson as an individual, nor on the part of Henry L. Meyer as an individual, unless the latter's assignment, or attempted assignment, of the firm property for the benefit of creditors, be such. (1) Was such an assignment of the firm property by Meyer an act of bankruptcy by him individually? If so, may the firm be adjudged bankrupt without including Dickinson? (2) If neither partner has committed an act of bankruptcy, may the firm be adjudged bankrupt?

For a proper consideration of these questions, it is necessary to inquire, at the outset, into the primary nature of a partnership. This is sufficiently stated in the quotation in the brief of one of the counsel for the assignee to the effect that partnerships "do not form a collective whole, which is regarded as distinct from the individuals composing it, nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners, and are enforceable by or against them individually." Lindl. Partn. p. 4. The bankruptcy act of 1898, in its definitive section (section 1, subd. 19), states that "'persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar con-

trolling bodies of corporations." Therefore it is urged that a partnership is a "person." Section 4, which has to do with persons "who may become bankrupts," provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt"; while subdivision (b) of section 4 states that "any natural person" may be adjudged an involuntary bankrupt. Section 5 is specially devoted to partners, and under subdivision (a) it is enacted that "a partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt." Subdivision (b) of section 5 provides that "the creditors of the partnership shall appoint the trustee," and that "in other respects, so far as possible, the estate shall be administered as herein provided for other estates." Subdivision (c) provides that a "court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property." Subdivision (d) is to the effect that "the trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners"; while subdivisions (e) and (f) provide for the order of priority in the marshaling and application of individual and firm assets. Subdivision (g) provides that "the court may permit the proof of claim of the partnership estate against the individual estates, and vice versa." Subdivision (h) provides that, "in the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt." It is considered that subdivision (h) means that in case all the members of a partnership are not adjudged bankrupt, and the partnership itself has not committed an act of bankruptcy, and thereby becomes exposed to such adjudication, the partnership property shall, at the option of the other partner or partners, be administered by them or in bankruptcy. Without stopping to inquire whether the meaning is also suggested that, if all the members of a partnership have been individually adjudged bankrupt, the partnership property may or shall also be administered in bankruptcy, the essential question is reached whether the partnership property may be administered in bankruptcy, although the partnership be insolvent and has committed an act of bankruptcy, but none or less than all the partners, although insolvent individually, have done no act whereby they, as individuals, may be adjudged bankrupt. The result of a negative answer to this question would be that partnerships, although insolvent, and although the partners be individually insolvent, could make an assignment of their property for the benefit of creditors, and yet be beyond the jurisdiction of courts of bankruptcy, and that all the insolvent laws of the states would be in force as regards partnerships, although the firm had committed an act of bankruptcy sufficient to give jurisdiction in the case of other "persons." The

anomaly would result that the insolvency laws of the state would be in force as to the partnership property of persons, who by agreements had brought themselves within the definition of a "partnership" as above given, although, if they made an assignment of their individual property, they and their property would be amenable to the bankruptcy act. If this be so, assignments by partners for the benefit of creditors, under certain conditions, are unimpeachable, and beyond the reach of the federal statute. In such case, what would be the meaning of section 5, subd. (a), that "a partnership * * * may be adjudged a bankrupt"? Of what practical and efficient use is the provision? What ordinary skill cannot evade it, and at pleasure make full use of the insolvency laws of the state? It cannot be for a moment assumed that the statute intended to give such immunity to partnerships, whatever the consequences to which the opposite construction may lead. The precise reading of the statute is that a partnership, which is declared a "person," may be adjudged a bankrupt. It is true that a partnership is but the relation which arises from the agreement of certain persons to combine their property, labor, and skill in business for the purposes of profit, and that it cannot commit an act of bankruptcy unless one or more individuals composing the partnership, acting as a partner, does some act of bankruptcy, which is tantamount to the partnership itself committing the act. It is difficult to conceive of a partnership, although it be regarded as a person, being adjudged bankrupt, unless one or more of the partners be at the same time adjudged bankrupt, as the purpose of the bankruptcy act is not only to distribute the property, but to relieve the debtor. While the discharge of an individual debtor would discharge him from all his property, the discharge of a partner, as such, from partnership debts, so far as the partnership property was concerned, would leave him still liable to the full extent of his individual property, subject to his individual debts, for whatever might remain unpaid of a partnership obligation. Therefore, the mere administration of partnership property would furnish no personal relief whatever to the debtor, and the grand purpose, which is commonly proclaimed to be the spirit and to lie at the foundation of the act, viz. to relieve the debtor class from the burden of obligations impossible for them to discharge, would be unfulfilled. Yet let it be repeated that the plain reading of the statute is that, for the purposes of the act, partnerships are "persons," and that partnerships may be adjudged bankrupt. This seems to illustrate that congress has endowed a partnership with something of the nature of a separate and distinct entity, while in the reason of the thing, in view of a knowledge of what a partnership is, it seems neither practical to give a partnership such personality, nor to administer its affairs without a contemporaneous administration of the estate of at least one of the partners. However, if the statute is to be literally construed, such a contention is defensible, and the decision is to rest upon the words of the statute, whatever other result might be attained by a consideration of the essential principles of law relating to partnerships. The plain language of the statute

wars against its acknowledged object, to discharge debtors, as well as against the essential nature of a partnership.

For the moment coming back to the definition of a "partnership" given above, it will be seen that a partnership has no collective entity; that it acts entirely through individuals, and within the limits of the real or apparent purposes of a partnership. Each partner represents all; hence each partner owns the partnership property in tenancy with his fellow partners, and has an ultimate individual interest therein. This ultimate individual interest is, subject to the firm obligations, applicable to the payment of his individual debts; and when any individual partner commits an act with reference to the firm property, tending to delay or defraud creditors of the firm, the same act also tends ultimately to delay or defraud his individual creditors who have a secondary right in the property, for the relation of the partnership and individual creditors to the partnership property is merely one of marshaling and administering the firm assets; for the firm simply acts through its individual partners, or an individual partner, and the act of the individual partner, as such, if it tends to defraud one class of creditors, in its result tends to defraud another class. Although the bankruptcy act makes an assignment for the benefit of creditors itself an act of bankruptcy, yet such act of assignment is in itself a conveyance or transfer of a portion of his property with intent to hinder, delay, or defraud his creditors, who have claims against him individually, which is an act of bankruptcy, under section 3, subd. 1. This was decided by the circuit court of appeals, Second circuit, in the case of *In re Gutwillig*, 92 Fed. 337, where it was held that "a voluntary general assignment, with or without preferences, made by an insolvent debtor within the prescribed four months, is fraudulent, and intended by him to 'hinder, delay, and defraud' creditors, within the meaning of the section." It is difficult to see how it could defraud his partnership creditors, unless it also affected his individual creditors. But it is suggested that it could not have been the intention to defraud the individual creditors, for the reason that, if the partnership be insolvent, there would be no surplus remaining to pay the individual debts. There is no evidence whatever before the court that the partnership was insolvent at the time the assignment was made, and, if it were otherwise, the court would not, upon application, wait to determine, by nice investigation, whether the partnership was insolvent at such prior time, where the act itself would indicate a fraudulent intention, even though in final result the individual creditors lost nothing by it, because there was no surplus after payment of their debts. The debtor has attempted to divert property, and the diversion, in legal theory, is equivalent to an attempt to delay and defraud creditors. This matter has received attention, and careful study and presentation, on the part of the several counsel engaged, and it is appreciated by the court that the conclusions in the matter may not be wholly defended by the statute or by principle. It is considered, however, that a suitable respect for the words of the statute, read with permissible regard for the principles

of law concerning the nature of a partnership, constrains the court to hold that jurisdiction of both of the surviving partners has been obtained; that the firm is insolvent, as is each partner thereof; that the firm and Henry L. Meyer, one of the partners, have each committed an act of bankruptcy; and that the firm and Meyer should be adjudged bankrupts accordingly. Joseph R. Dickinson is a proper party to the proceeding, and is entitled to the rights due to a person thus connected with the record.

In re KLETCHKA.

(District Court, S. D. New York. February 8, 1899.)

BANKRUPTCY—STAY—SUPPLEMENTARY PROCEEDINGS.

Where proceedings supplementary to execution against the bankrupt, in a state court, begun within four months before the commencement of proceedings in bankruptcy, are pending at the time of the adjudication therein, the court of bankruptcy, by injunction, will stay all further proceedings in the action in the state court.

In Bankruptcy. On motion to dissolve injunction.

J. Brownson Ker, for creditor.

Edward J. McGean, for bankrupt.

BROWN, District Judge. Proceedings supplementary to execution in the state court should be stayed after an adjudication in bankruptcy, because otherwise the property of the bankrupt, which ought to be distributed equally among creditors through the trustee, might be discovered and turned over to the receiver in supplementary proceedings and thereby sold and lost to creditors before the trustee was appointed. Section 67 provides that any lien obtained by such proceedings within four months shall be dissolved by the adjudication. It is the duty of this court to enforce that provision; and subdivision 15 of section 2 provides that this court may make "such orders as are necessary for that purpose." A stay of the proceedings is not only an appropriate mode of doing so, but absolutely necessary for that purpose. See Johnson v. Rogers, 15 N. B. R. 1, 10, 13 Fed. Cas. 794, 797; In re Pitts, 9 Fed. 542; Becker v. Torrance, 31 N. Y. 631; Bank v. Shuler, 153 N. Y. 172, 47 N. E. 262; Olney v. Tanner, 10 Fed. 101, 113, affirmed in 18 Fed. 636; Kitchen v. Lowery, 127 N. Y. 53, 27 N. E. 357.

In re PITTELKOW.

(District Court, E. D. Wisconsin. April 6, 1899.)

1. BANKRUPTCY — JURISDICTION OVER INCUMBERED PROPERTY AND SECURED CREDITORS.

The court of bankruptcy has jurisdiction, by virtue of its exclusive control over the bankrupt's estate and its equity powers, to restrain mortgage creditors, for a reasonable time, from instituting foreclosure proceedings, and to order the sale of mortgaged property, by the trustee in bankruptcy, free of incumbrances,—the mortgage liens being transferred to the proceeds

of sale,—in cases where the rights of parties are clear, and special circumstances render such a course advisable, and after due hearing.

2. SAME—SALES BY TRUSTEE—WHEN ORDERED.

The court of bankruptcy will not order the trustee to sell mortgaged property of the bankrupt free of incumbrances, unless it appears that a price will probably be realized substantially greater than the amount of the mortgage; that there are no rights which cannot be brought before the court in the bankruptcy proceedings, and which would require foreclosure under the mortgage; that the court is accurately informed as to the facts; and that all parties in interest have had notice, and full opportunity to be heard.

3. SAME—CASE STATED.

Where real property of the bankrupt, comprising numerous parcels, appraised at \$107,000, was subject to the liens of 39 mortgages, aggregating \$80,000, and the mortgage creditors were threatening immediate foreclosure, which would involve an expense of several thousand dollars, and the trustee applied for an order restraining the mortgagees from proceeding to foreclose, and authorizing him to sell the property free of incumbrances, alleging that a sale subject to liens would yield little or nothing for the unsecured creditors, whose claims amounted to \$60,000, *held*, that all the mortgagees should be enjoined from foreclosing until further ordered by the court, but with leave to any claimant to apply to be excepted from the order on the ground of necessity for immediate foreclosure, or of unreasonable delay on the part of the trustee, and that the petition of the trustee, and all matters relating to the sale of the property and the claims of mortgagees or other lienors, should be referred to the referee, to be heard on petitions and answers, with notice to all the parties in interest.

In Bankruptcy. On petition by the trustee for an order restraining the commencement of foreclosures by mortgagees, and for authority to sell the various parcels of real estate free of incumbrances, preserving the rights of all lien claimants against the proceeds.

The petition states the appraised value of the real estate, comprising numerous parcels, at \$107,000, and the aggregate amount of mortgages at about \$80,000; that there are 39 separate mortgages, and immediate foreclosure suits are threatened, of which the expense would aggregate several thousand dollars; that the claims of unsecured creditors amount to about \$60,000, and a sale subject to the mortgages and foreclosure proceedings would yield little or nothing for the general estate. An order being entered thereupon citing the mortgagees to show cause why relief should not be granted as prayed for, objections to the jurisdiction were raised by sundry mortgagees, for whom special appearance was made for the purpose, but the matter was submitted generally on behalf of others.

Bloodgood, Kemper & Bloodgood, for trustee.

N. Pereles & Sons, Moritz Wittig, Jr., Sheridan & Wollaeger, and others, for mortgagees.

SEAMAN, District Judge. Upon the general question of jurisdiction, I am of opinion that the district court is vested with exclusive jurisdiction over the property of the bankrupt, and with sufficient equity powers to have all claims by mortgagees brought in and administered; that sales may be authorized, under proper circumstances, free and clear from the mortgages, or other liens, by preserving and transferring the claims to the fund thus provided; and that the commencement of foreclosure proceedings can be restrained to that end. The decisions under the bankrupt acts of 1841 and 1867 clearly sustain each of these propositions. In the supreme court, the

cases of *In re Christy*, 3 How. 292, *Nugent v. Boyd*, 3 How. 426, and *Houston v. Bank*, 6 How. 486, established the doctrine in reference to the act of 1841; and under the act of 1867 the same view was declared in *Ray v. Norseworthy*, 23 Wall. 128, and in *Insurance Co. v. Murphy*, 111 U. S. 738, 4 Sup. Ct. 679. The decisions in the circuit and district courts under the latter act were uniform in the same line, and the following are sufficient citations: *In re Kirtland*, 10 Blatchf. 515, Fed. Cas. No. 7,851; *Sutherland v. Iron Co.*, 9 N. B. R. 298, Fed. Cas. No. 13,643; *In re Sacchi*, 10 Blatchf. 29, Fed. Cas. No. 12,200; *In re Brinkman*, 7 N. B. R. 421, Fed. Cas. No. 1,884; *In re Kahley*, 2 Biss. 383, Fed. Cas. No. 7,593; *Foster v. Ames*, 1 Low. 313, Fed. Cas. No. 4,965; *In re Mead*, 58 Fed. 312. The act of 1898 equally establishes paramount jurisdiction in its general provisions as a national bankruptcy enactment. Its interpretation in that view by this court in *Re Bruss-Ritter Co.*, 90 Fed. 651, has support in an unbroken current of recent decisions in circuit courts of appeals and in the district courts. The provisions conferring equity powers and jurisdiction over mortgagees and all classes of lien claimants, and over sales by trustees, are at least as clear as the corresponding provisions of the former acts upon which the doctrine was established as above referred to. Whatever may be the construction placed upon definitions of jurisdiction contained in section 23, I am of opinion that the section is not applicable, in any view, to mortgagees of real estate, where possession of the res is vested in the bankruptcy court, and is held in fact by the trustee; the distinctions being well stated by Judge Baker in *Re Goodykoontz* (*Carter v. Hobbs*, 92 Fed. 594), in opinion of March 10, 1899. In section 57, jurisdiction over such claimants is clearly conferred, is necessarily complete; and, in accord with the uniform rule in such cases, there can be no interference with the possession, and no foreclosure proceedings, where the trustee is an indispensable party, except upon leave of the bankruptcy court. See cases cited *supra*. It is, however, the duty of the court to consider the interests of mortgagees and other secured creditors as well as those of the general creditors; and unless it is apparent (1) that the mortgaged premises in the given case will probably realize upon a sale an amount substantially in excess of the mortgage, and (2) that there are no complications, by dower rights, conveyances, or other conditions, which require foreclosure under the mortgage, the power to proceed summarily by sale, including the interest of the mortgagee, should not be exercised. *In re Taliafero*, 3 Hughes, 422, Fed. Cas. No. 13,736; *In re Kahley*, 2 Biss. 383; *Foster v. Ames*, 1 Low. 313, Fed. Cas. No. 4,965. Certainly, if foreclosure is necessary to bar rights which cannot be brought before the court in the bankruptcy proceeding, the mortgagee should have leave to that end, on proper showing of cause; otherwise, he would be compelled to bid for the protection of his mortgage interest, without the benefits of complete foreclosure. On the other hand, in a simple case in which the mortgagee and the owner of the equity are before the court, or may be brought in, a sale by order of the bankruptcy court, with provision saving the rights of the mortgagee to bid up to the ascertained amount of his

mortgage without advancing the money, except for expenses, would be beneficial to all parties and effective. No sale can be made, which affects the rights of mortgagees or other lienholders, without notice to them, and "due opportunity to defend their interests." *Ray v. Norseworthy*, 23 Wall. 128, 135; *Insurance Co. v. Murphy*, 111 U. S. 738, 742, 4 Sup. 679. The power to order a sale free of incumbrances ought not to be exercised in any instance unless the court is "accurately informed as to the facts," and all parties in interest have full opportunity to be heard, and the respective interests are ascertained. *In re Taliafero*, 3 Hughes, 422, Fed. Cas. No. 13,736, opinion by the chief justice; *In re Sacchi*, 10 Blatchf. 29, Fed. Cas. No. 12,200, on review by Woodruff, C. J.

My conclusions are:

1. That jurisdiction exists to restrain mortgagees, for a reasonable time, from commencing foreclosure proceedings, and to order sales free from incumbrances, in special instances, after due hearing, where the rights are clear.

2. That sufficient facts appear to enjoin all the mortgagees or lien claimants who were duly cited herein from instituting foreclosure proceedings until the further order of the court, but with leave to any mortgagee or lien claimant to present his petition before the referee to be heard respecting any alleged necessity for immediate foreclosure or of unreasonable delay on the part of the trustee, for report to the court whether the petitioner or petitioners should be exempted from the order.

3. That no general order for sale of real estate by the trustee, free from incumbrance, can be entered on the facts stated; and sufficient information does not appear to order such sale in any special instance.

4. That the petition of the trustee, and all matters relating to sales of the real estate, either subject to or free from incumbrances, and of claims by mortgagees or other lienholders, be referred to the referee, to be heard upon petitions and answers, and notice to all parties in interest as the referee may prescribe, consistently with the general orders, and reported to the court with his recommendations.

5. That sales be made, without unnecessary delay, of all the interest of the bankrupt in real estate not liable to sale under special order as above indicated.

Let orders enter accordingly.

In re SIMONSON et al.

(District Court, D. Kentucky. March 28, 1899.)

1. BANKRUPTCY—PLEADING—TIME TO ANSWER—UNAUTHORIZED EXTENSION.

Under Bankrupt Act 1898, § 18, subsec. b, providing that, in cases of involuntary bankruptcy, "the bankrupt or any creditor may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow," the time to plead cannot be extended for two months from the return day by an agreement between counsel for the petitioning creditors and counsel for the bankrupt, without leave of the court, and without the consent of other creditors, especially in a case

where, the allegations of the petition being simple and easily answered, the court, if applied to for that purpose, would not have extended the time.

2. SAME—DEFENSES—AGREEMENT TO COMPROMISE.

It is not a defense to a petition in involuntary bankruptcy that the petitioning creditors had previously agreed to compromise with the debtor on receiving half the amount of their claims, where it appears that such agreement was not founded on any valuable consideration, and was not carried into effect, and it is not alleged that the agreement of one creditor was made the basis for the agreement of any other creditor.

3. SAME—PETITIONING CREDITORS—ESTOPPEL.

Where a debtor makes a general assignment for the benefit of his creditors, and certain creditors appear in the state court having jurisdiction to administer the estate under such assignment, and there prove and assert their claims, they are not thereby estopped to file a petition in involuntary bankruptcy against the debtor, alleging such assignment as an act of bankruptcy.

4. SAME—DEFENSES—MOTIVE OF CREDITORS.

Where creditors had agreed to compromise with their debtor on the basis of receiving half the amount of their claims, but the agreement was not carried into effect, and afterwards the debtor made a general assignment, and the proper state court took jurisdiction of the assigned estate, and thereupon the creditors filed a petition in involuntary bankruptcy against the debtor, and the latter, for answer thereto, averred that the petition was not brought in good faith, but for a sinister motive, and to enable the creditors to obtain a larger proportion of their debts than they had agreed to accept under the compromise arrangement, or would recover in the proceedings in the state court, *held no sufficient defense; the motive of the creditors being immaterial.*

5. SAME—VERIFICATION OF PETITION—WAIVER OF OBJECTIONS.

If the respondent to a petition in involuntary bankruptcy does not seasonably object to the petition on the ground of any informality or insufficiency in its verification, but files a plea and answer on the merits, he will be deemed to have waived such objections, and cannot afterwards have the proceedings dismissed on account of such defective verification.

6. SAME—SUFFICIENCY OF VERIFICATION.

Quære, whether a petition in involuntary bankruptcy can properly be verified by the affidavit of the attorney for the petitioning creditors, deposing partly on information and belief, and not showing, in such affidavit, express authority to make the verification.

In Bankruptcy.

Kohn, Baird & Spindle and Barnetts & Poston, for petitioning creditors.

M. A., D. A. & J. G. Sachs, for bankrupts.

EVANS, District Judge. On the 5th day of December, 1898, the co-partnership firm of Simonson, Whiteson & Co. made a general assignment for the benefit of its creditors to L. Comingor. The latter accepted the trust, and was promptly qualified to act by the Jefferson county court, before which he executed the bond and took the oath required by law, and entered upon the discharge of his duties. On the 8th day of December, 1898, the trustee brought a suit in the Jefferson circuit court for the settlement of his trust; seeking, also, the advice and judgment of the court as to the proper disposition to be made of the assets of the bankrupt firm, which, in the main, consisted of a large stock of merchandise, certain book accounts, notes, bills receivable, etc. On the 31st day of January, 1899, the merchandise, after only three days' advertisement in the manner directed by

the state court, was sold for a lump sum, and the proceeds were paid into the state court, and are still held in its custody. It seems that in the meantime negotiations for a compromise and settlement of the firm's indebtedness were begun, but, though some progress was made, the settlement was not effected; and on the 14th of February, 1899, these proceedings in involuntary bankruptcy were instituted by three of the creditors of the firm, whose debts amounted, in the aggregate, to about \$20,000. The nature and amount of the debt due each of the petitioning creditors were set forth in apt and explicit language, and the one single act of bankruptcy alleged was that the debtor firm had made a general assignment for the benefit of its creditors. A copy of the deed of assignment was filed and exhibited with the petition, as was also authentic evidence of the acceptance of its provisions by the trustee, and his due qualification by the state court having jurisdiction of the subject. Service of the petition, with a writ of subpoena, was made upon the members of the co-partnership firm on February 15, 1899. The subpoena had been made returnable on the 28th day of the same month. Judge Barr (the district judge) having resigned, to take effect February 21st, and having on that day retired from the bench, there was a vacancy in the judgeship until his successor was appointed; and on February 27th Circuit Judge Taft designated Judge Thompson, of the Southern district of Ohio, to act in the meantime. Without applying to him for any order, the counsel, respectively, of the petitioning creditors and the defendant firm, acting alone, and without regard to other creditors, executed and filed in the clerk's office of this court an agreement, in writing, to the effect that the defendants might have time until April 28, 1899, to plead. Meantime, on the 20th day of February, Judge Barr had denied a motion for the appointment of a receiver made by the petitioning creditors on February 17th. Thus matters stood when the present judge of the court reached Kentucky, on the 10th day of March; that also happening to be the date upon which the 10 days expired after the return day fixed in the subpoena, and within which it was the duty of the defendants to plead, unless time for doing so was extended by the court. On the day after his arrival, his attention was called to the situation of this case, and he directed that notice to counsel be given of the necessity for some action in it on the following 14th inst. The matter, being mooted then, was postponed until the 17th, when the defendants tendered a paper which was denominated a "plea and answer," certain other creditors tendered petitions asking to join in the prayer of the original petition, and all sides tendered certain affidavits. The petitioning creditors objected to the pleading tendered by defendants as being insufficient, asked to withdraw the agreement extending the time to plead, and also insisted that there should be an adjudication of bankruptcy on the case made out by the petition and exhibits, in the absence of a sufficient pleading showing grounds to the contrary.

It will be observed that four months from December 5, 1898, when the general assignment was made, would expire on April 5, 1899; and yet the agreement filed, if given effect by the court, would carry the time for pleading more than three weeks beyond the latter date. It

is not suspected that there was any actual or contemplated collusion in this case, but, if such a practice were tolerated without the consent of all creditors of a bankrupt, it might be possible, by such an undue extension, to lull the vigilance of other creditors, and, after the expiration of four months, collusively to secure a dismissal of the petition. A practice which would permit this, or make it possible, should not be approved. Doubtless, in this case the only expectation was to secure a settlement by compromise; but that effort has evidently failed, and, as the bankrupt law provides abundant means for a composition, no delay is needed on that account.

Section 18 of the bankrupt act, after providing for the service of the petition and subpoena in such cases, and requiring that the subpoena shall be returnable within 15 days, unless the judge fixes a longer time, also provides:

"That the bankrupt or any creditor may appear and plead to the petition within ten days after the return day or within such further time as the court may allow."

And subsection e of section 18 is in the following language:

"If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors the judge shall on the next day if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition."

This requirement of the law appears to be imperative, though, in cases where all the creditors of the bankrupt might consent to waive it, its relaxation would not be improper. Here no one except the petitioning creditors and the alleged bankrupts were parties to the agreement to extend the time to April 28th. The court had not allowed the extension, and the allegations of the petition in this case being so few and so simple, and particularly as the act of bankruptcy had manifestly been committed, it could not have been appropriate to allow the extension to April 28th, even had the court been applied to for that purpose. It will be observed that there are only two classes of averments in the petition, namely: First, those which state the nature, origin, and amount of the respective debts of the petitioners; and, second, those which state the act of bankruptcy. The latter averment is not only supported by the documents exhibited with the petition, but was in every way admitted at bar by defendants' counsel. Of course, therefore, no longer time need be allowed as to that portion of the petition. Neither could there have been any need for extending the time to plead to the other averments, because it could not have been difficult for the alleged bankrupts (an experienced business firm) to know perfectly well, and at once, whether they owed the debts or not, and it was easy for them specifically to say so. The court, therefore, if the matter had been presented to it, should not have extended the time to plead beyond March 11th, and certainly not beyond March 17th, when the pleading was in fact presented, unless all the creditors of the bankrupts had agreed to it, in which event, of course, it would have injured no one.

These views were indicated to counsel on the 14th inst., and on the 17th, the day when the matter was again called up, the debtors tendered and asked leave to file what they called a "plea and an-

swer." The creditors objected to this being done, upon the ground that the pleading presented no defense whatever, and was wholly insufficient. The pleading, technically considered, being offered too late, it is within the sound discretion of the court to allow, or not to allow, it to be filed; but, if it contained any defense whatever to the action, the court would not hesitate to exercise its discretion in the direction of permitting the defense to be made. Analyzing the plea and answer, it is found to contain four supposed grounds of defense, to wit: First. It attempts to appear to deny, rather than to deny in fact, the allegations of indebtedness made in the petition. But it is manifest that the defendants do not mean to actually controvert the averments of the petition that the goods, wares, and merchandise were sold and delivered to them, and received by them, at the prices and to the amounts stated in the petition. The only real claim is that the respective creditors had, after the act of bankruptcy, voluntarily, and without any valuable considerations, so far as shown, agreed to settle their debts by accepting 50 cents on the dollar, but had not done so. Second. That the petitioning creditors had appeared in the state-court proceedings, and had proved and asserted their claims against the funds in that court, whereby it is contended that they are estopped from bringing this action. Third. That the creditors would get as much on their demands in the state-court proceedings as they can get here. And, fourth, that this proceeding was not brought in good faith, but for a sinister motive, and for the purpose of obtaining more on their debts than they had agreed to take under the proposed compromise.

In the opinion of the court, it is entirely clear that the plea and answer present no meritorious defense, and are insufficient. The pleading cannot, in any fair sense, be said to controvert or avoid any material allegation of the petition, either as to the indebtedness or act of bankruptcy alleged. There does not appear to have been any binding composition or compromise agreed upon or executed upon any consideration whatever. The appearance of the creditors in the state court in no way estopped them from bringing this action. Creditors might find it wise to go to the state courts in such a case, as it was by no means certain that there would be any proceedings in bankruptcy. The bankrupt act furnishes no foundation, in any of its provisions, for the contention that there is an estoppel. If invoked in a proper proceeding, the bankruptcy act was meant to be supreme and controlling in every case to which it applies; and it gives no hint that its operation for the equal benefit of all creditors can in that way be defeated by a few of them, nor by the suit of the assignee in the state courts. Neither of those propositions can be admitted. Manifestly, a good cause of action is stated in the petition; and, this being so, it cannot be admitted that there is a good defense to it in any general averments that the plaintiffs were not acting in good faith, even if they did hope (as it is surely admissible that they might) to get a larger dividend in these proceedings through a proper administration of the bankrupt law than they would in the state court, or by means of a voluntary compromise. Whatever the motive of a plaintiff may be, if he state a good cause of action he has

the right to bring his suit; and rare, indeed, must be the occasion when his right to sue can be made to depend upon his motive in doing so, rather than upon his cause of action.

It may be well to add that the alleged agreement to accept 50 cents on the dollar in full settlement is not well pleaded. It fails to show an accord and satisfaction of the debts; no consideration is alleged; no statement is made that the agreement of one creditor was made the basis for the agreement of any other creditor; no satisfaction of the original demands was shown; and, in short, no averment is made to bring the pleading within the rules laid down in cases like Robert v. Barnum, 80 Ky. 28; Huffaker v. Jones, 13 Ky. Law Rep. 432; Rosenthal v. Jacobs, 5 Ky. Law Rep. 419; and Newman v. Evans, Id. 603.

As no defense is presented by the answer, the court, alike in the exercise of its discretion, and on the merits of the proposition, overrules the motion of defendants for leave to file the plea and answer which are offered out of time.

It seems proper for the court to add that it is not regarded as good practice, nor one to be followed, after a petition in involuntary bankruptcy has been instituted, and after the court has thereby acquired jurisdiction of it, to permit it either to be made inept or inoperative by such an agreement as that filed here, nor by dismissing the action on the motion of the petitioners, unless in either case substantially all the creditors agree, or, after due notice, fail to object, to it. Of course, everything might yield to the unanimous consent of all who had an interest in the question, especially as they could control it after an adjudication had been made.

On the 21st inst., when the court had reached this point in the preparation of its opinion, the defendants again appeared, and moved the court to dismiss the proceedings because the petition had not been properly verified. This raised a very important question of practice, vitally affecting the proceedings, and the court adjourned the case over for further argument upon this new point. The verification of the petition is in the following language:

"Commonwealth of Kentucky, County of Jefferson.

"I, T. W. Spindle, do hereby make solemn oath that I am a member of the firm of Kohn, Baird & Spindle, and that the said Kohn, Baird & Spindle are solicitors for all of the petitioners above named, and that all of the statements contained in the foregoing petition are true, so far as the same are stated of my own personal knowledge, and those matters which are stated therein on information and belief are true, according to the best of my knowledge, information, and belief; and I do further state that all of the said petitioners, and all of the officers and agents of the said Sensheimer, Levenson & Company, are now absent from the state of Kentucky. T. W. Spindle.

"Subscribed and sworn to before me by T. W. Spindle this fourteenth day of February, 1899. Sam'l S. Lederman, N. P. Jeff. Co., Ky.

"My commission expires January, 1900."

The bankrupt act certainly requires that all pleadings setting up matters of fact shall be verified under oath, and it may be assumed that the petition is a pleading, within the meaning of the act. It is apparent, also, as an original proposition, that the oath should be taken by one who can swear to the facts as being within his knowl-

edge, and not by a mere attorney at law or solicitor, although section 1 of the act does provide that the word "creditor" may include a duly-authorized agent, attorney, or proxy. The implied authority of an attorney at law or solicitor was probably not in the contemplation of congress in the use of that phrase. The supreme court, in framing the rules in bankruptcy, has indicated its opinion in the matter by prescribing the following as the form of verification to a petition in involuntary bankruptcy proceedings, namely:

"United States of America, District of ——, ss.:

"_____, ____, ____, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

"Before me, ——, this —— day of ——, 189—.

"_____

Of course, the rules, in a general sense, are obligatory; but the practice in bankruptcy cases must be reasonably adapted to practical conditions, and the rules should be applied to promote the ends of justice, and not to the attainment merely of literal and technical exactness in formal matters. For example, although the forms prescribed indicate that the petitioners' names must appear on the right-hand side of the page, and those of counsel on the left-hand side, it does not follow that any departure from that order would be fatal. The petitioners, speaking generally, should certainly swear to the petition in person, though it might be that a duly-authorized agent might, under some circumstances, properly verify it, at the same time showing by his affidavit his authority. Unquestionably, the filing of a petition alleging an act of bankruptcy, which, connected with the prayer for an adjudication, is the subject-matter of the action, brings the case within the jurisdiction of the court, although it leaves to the defendant the right to avail himself of all his technical privileges. The defendant in such a case is, at his option, entitled to have all the requirements of law and the rules conformed to. Those requirements are made for his benefit. They afford him a shield, and he can, if he desires, check the progress of the proceedings by insisting upon compliance with them. But, being prescribed for his benefit, he may waive them; and, if he does, it is nobody's concern but his own. Once having waived them, he cannot afterwards be allowed to retract the waiver. This is a principle of universal application in matters of pleading. When the subpoena was served in this case, and the time for pleading had arrived, if the defendant, at any time during the 10 days allowed him, had challenged the right of the plaintiff to insist upon any pleading from them, it is manifest that they would have been entitled to a ruling that none could be required until there had been a proper verification of the petition; and meantime the defendants could have demanded a quashal of the subpoena and the service thereof, because the petition had not been so sworn to as to warrant the issue of the process. If the objection to the form of verification had been seasonably made, no doubt it would have prevailed, in which event an opportunity to secure a proper verification would have been allowed; but the defendants, instead of making any objection

in a matter which was possibly of some concern to themselves, and to themselves alone, in effect said to the court that it was not material to them, and that what they wanted was, not to make objections to form, but to secure an extension of time within which to plead. When that request was not approved by the court, they still passed over the formal and erroneous way of verifying the petition, and prepared and tendered an answer to the merits of the case; setting up what they intended should be, and supposed was, a full defense to the action. The case, at that point, and *eo instanti* that proceeding, passed beyond that stage when the previous formal steps were important. The defendants had then voluntarily left those matters behind, as immaterial, and the case had then advanced to the point where matters of substance were to be considered; and it seems to the court that the defendants had clearly waived any right afterwards to raise those questions, which, though previously important to them, had ceased to be so by their own plainly-implied consent to the contrary. The rule prescribed by the supreme court on this subject does not say that, unless a petition is verified in the precise manner indicated in the form, it shall be unavailing and void. Nothing of this sort is intimated in any positive sense. But in case the form is not literally followed, and in case the directory provisions of the act are not literally pursued, a defendant may avail himself of the defect, or he may waive those purely personal advantages or privileges. But to say that a slip made in the preparation of a petition (it may be, in the hurry rendered necessary by some suddenly developed exigency) should be fatal, would be indeed a sacrifice of substance to form, and the widest possible departure from all modern notions of the liberality and flexibility of rules of practice in courts of justice. We doubt if congress or the supreme court intended such a result. To say that a slip of the character indicated might be purposely disregarded or ignored by the defendant until after four months had passed, or, indeed, until after the whole proceeding was about concluded, and then be returned to and resurrected for the purpose of undoing all that had been done, would seem to be out of all reason. Yet that would be the direct and necessary result of a rigid adherence to the decisions in such cases as Hunt v. Pooke, 5 N. B. R. 161, Fed. Cas. No. 6,896; In re Butterfield, 6 N. B. R. 257; and Moore v. Harley, 4 N. B. R. 71, Fed. Cas. No. 9,764. The court is glad to be relieved from the stress of those decisions by the very much better reasoned opinions in all the later cases, such as In re Raynor, 7 N. B. R. 536, Fed. Cas. No. 11,597; In re McNaughton, 8 N. B. R. 44, Fed. Cas. No. 8,912; and In re Simmons, 10 N. B. R. 254, Fed. Cas. No. 12,864.

Upon this point the court has therefore reached the conclusion that the objection to the form of verification of the petition in this case comes too late. It seems to the court that the proper time to raise the objection ended with the tender of the answer to the merits, if not previously. The plain admission of the alleged act of bankruptcy emphasizes these conclusions. If the defendants had secured the extension of time to plead to the 28th of April, and if they could at that late date have made and maintained the objection that the failure

to properly verify the petition was jurisdictional and fatal, a dangerous precedent would have been established, from which much collusive harm might come, and the ends of justice and the wise purposes of the bankrupt act entirely frustrated, in many cases. The motion to dismiss the petition for want of proper verification is therefore overruled.

Upon the whole case as it now presents itself under section 18 of the bankrupt act, it seems to the court to be its imperative duty to make an adjudication as soon as practicable after 10 days have expired after the return day fixed in the subpoena; and as no reason has been suggested, legally sufficient to prevent or further delay it, the adjudication will be made now.

In re THOMAS.

(District Court, S. D. Iowa, Central Division. April 3, 1899.)

No. 531.

1. BANKRUPTCY—DISCHARGE—SPECIFICATIONS IN OPPOSITION.

A discharge in bankruptcy will not be postponed or refused on specifications in opposition which merely allege the creditor's belief that the bankrupt owns property which he is concealing, and has not listed in his schedule, since creditors have full opportunity to ascertain the facts in relation to such property by examination of the bankrupt.

2. SAME—BURDEN OF PROOF.

The bankrupt's application for discharge will not be denied unless creditors opposing the same allege and prove one of the statutory grounds for withholding the discharge. The court will not refuse to discharge the bankrupt on grounds not specified or proved by creditors.

3. SAME—GROUNDS FOR REFUSING DISCHARGE—FRAUD.

It is no ground for refusing to discharge a bankrupt that the debt of the opposing creditor was created by the fraud of the bankrupt.

In Bankruptcy. Application of bankrupt for discharge. On certificate of S. S. Ethridge, Esq., referee in bankruptcy.

L. L. Mosher, for bankrupt.

Anna Harding, pro se.

WOOLSON, District Judge. Application having been duly made for discharge of the bankrupt, and referred to the proper referee, notice was duly given to creditors of time fixed for filing written appearance in opposition to the discharge. Within the time so fixed, one creditor (Anna Harding, of Indianola, Iowa) filed with the referee certain specification of grounds in opposition to discharge. Briefly stated, these grounds were: That in 1893, she lent to the bankrupt \$100, taking his note therefor, note to mature in one year. After the debtor's repeated refusals to pay the debt, this creditor put the note into judgment, viz. in April, 1895. "That since the execution of said note said Thomas purchased a homestead in Indianola, Iowa, and, to avoid the payment of this and other debts, had the deed to said property executed to his wife. That he is now occupying said property as a home for himself and family, and in the enjoyment

of the luxuries of life in a home secured with funds received in part from your petitioner." The grounds of opposition to discharge, a part of which are quoted above, close with the expression of the creditor's belief that the bankrupt now has sufficient funds to pay her said claim against him, and that he is asking discharge for the sole purpose of avoiding payment of his honest debts, which he is abundantly able to pay.

With reference to that portion just summarized of the stated grounds, it is sufficient to say that the mere belief of the creditor cannot postpone granting the discharge. The present bankruptcy statute affords abundant opportunity for examination under oath of the bankrupt, touching every material phase of his rights and interests in property, so that the creditor is able to obtain the sworn testimony of the bankrupt in all these matters; and one ground for refusal to grant discharge is—section 14, b (1)—that he has committed the offense of—section 29, b (2)—making "a false oath in or in relation to any proceeding in bankruptcy." If the facts were as claimed, as to the bankrupt having property not scheduled, and the bankrupt had so testified on his examination, the trustee should have pursued the interest of said bankrupt, and brought its proceeds into the estate. If, with the facts as claimed, the bankrupt had testified otherwise, such false oath could successfully have been used to prevent his discharge. But no ground of opposition to discharge is herein based on a false oath.

Section 14, paragraph b, makes it the duty of the judge to grant the discharge, provided the requisites as to notice, etc., have been observed, unless one of the two grounds in said paragraph stated is proven. The duty of proving that such ground exists is on the opposing creditor. Where the grounds are duly specified, and, if proven, would prevent discharge, the judge will fix time and place of hearing. But the judge neither seeks to discover grounds, nor supplies lack of specification. "He shall discharge, unless," etc. The grounds here specified are (1) obtaining the loan of money under promises not performed, etc.,—in substance, that the debt was created by fraud; (2) that the bankrupt has an interest in the homestead standing in the name of the wife; and (3) belief of creditor that bankrupt has property with which, if he would, he might pay the claim.

That the debt was created by fraud of the bankrupt, if such be the case, is not a ground for refusal of discharge under the statute. Section 17 provides that from debts so created a discharge does not release the bankrupt. And, when the discharge is pleaded as a defense to the enforcement of such debt, proof that the debt was so created makes the discharge inoperative against it. But the statute does not justify withholding the discharge therefor. Collier, in his excellent treatise on Bankruptcy, says (page 135):

"A discharge can be refused only because the existence of one of the two grounds mentioned in this section is established, or else because it is shown that the court has no jurisdiction. The mere fact that the only debt is one which the discharge will not affect—for instance, that it was due from the debtor in a fiduciary capacity, or was created by his fraud—is no reason for refusing the discharge. The question how the discharge affects particular

debts is to be determined thereafter by the court in which the bankrupt may be sued upon the debt, should the bankrupt in that suit interpose the discharge as defense. In re Elliott, 2 N. B. R. 110, Fed. Cas. No. 4,391; In re Rathbone, 1 N. B. R. 324, 2 Ben. 138, Fed. Cas. No. 11,580; In re Rosenfield, 1 N. B. R. 575, Fed. Cas. No. 12,058; In re Wright, 2 N. B. R. 41, Fed. Cas. No. 18,070; In re Stokes, 2 N. B. R. 212, Fed. Cas. No. 13,476; In re Tracy, 2 N. B. R. 298, Fed. Cas. No. 14,124; Chapman v. Forsyth, 2 How. 202."

As to the other grounds attempted to be specified herein, the specifications do not state grounds here available, under the condition of the estate. As before stated, abundant opportunity has been given for examination of the bankrupt at the first meeting of creditors, and at the time fixed for filing appearance in opposition to discharge. The creditor did not avail herself of these, and no facts are specified which will justify refusal of discharge, under the statute. Therefore the objections to discharge, as specified, must be overruled, and discharge granted.

UNITED STATES v. H. B. CLAFLIN CO.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 49.

CUSTOMS DUTIES—SILK FABRICS—INTERPRETATION OF STATUTE.

Tariff Act July 24, 1897, par. 387, reads: "Woven fabrics in the piece * * * weighing not less than $1\frac{1}{3}$ ounces per square yard and not more than eight ounces per square yard, and containing not more than 20 per cent. in weight of silk, if in the gum, 50 cents per pound, and if dyed in the piece, 60 cents per pound; if containing more than 20 per cent. and not more than 30 per cent. in weight of silk, if in the gum, 65 cents per pound, and if dyed in the piece, 80 cents per pound; if containing more than 30 per cent. and not more than 45 per cent. in weight of silk, if in the gum, 90 cents per pound, and if dyed in the piece, \$1.10 per pound; if dyed in the thread or yarn and containing not more than 30 per cent. in weight of silk, if black * * *, 75 cents per pound, and if other than black, 90 cents per pound; if containing more than 30 and not more than 45 per cent. in weight of silk, if black * * *, \$1.10 per pound, and if other than black, \$1.30 per pound; if containing more than 45 per cent. in weight of silk, or if composed wholly of silk, if dyed in the thread or yarn and weighted in the dyeing so as to exceed the original weight of the raw silk, if black * * *, \$1.50 per pound, and if other than black, \$2.25 per pound; if dyed in the thread or yarn, and the weight is not increased by dyeing beyond the original weight of the raw silk, \$3.00 per pound; if in the gum, \$2.50 per pound; if boiled off, or dyed in the piece, or printed, \$3.00 per pound; if weighing less than $1\frac{1}{3}$ ounces and more than $\frac{1}{3}$ of an ounce per square yard, if in the gum, or if dyed in the thread or yarn, \$2.50 per pound; if weighing less than $1\frac{1}{3}$ ounces and more than $\frac{1}{3}$ of an ounce per square yard, if boiled off, \$3.00 per pound, if dyed or printed in the piece, \$3.25 per pound; if weighing not more than $\frac{1}{3}$ of an ounce per square yard, \$4.50 per pound." Held, that the last-named percentage of the silk per yard (more than 45 per cent.) was to be carried forward, and applied to the subdivision relative to fabrics weighing less than $1\frac{1}{3}$ ounces and more than $\frac{1}{3}$ of an ounce per yard, and that where the weight of the fabrics was not more than $\frac{1}{3}$ of an ounce per yard.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon an appeal from a decision of the circuit court, Southern district of New York, reversing a decision of the board of general appraisers which affirmed a decision of the collector of the port of New York touching the classification for duty of certain importations under the tariff act of July 24, 1897.

Frank Lloyd, for the United States.

Everit Brown, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The merchandise in question consists of certain woven fabrics known as "silk mull" and "tinsel gauze," composed in chief value of silk, but in part of other materials; said fabric weighing over $\frac{1}{3}$ of an ounce and under $1\frac{1}{3}$ ounces per square yard, and containing less than 20 per cent. in weight of silk. There is no dispute that unless it is included within the provisions of paragraph 387, under which the collector classified it, the merchandise is dutiable under paragraph 391: "All manufactures of silk, or of which silk is a component material of chief value * * * not specially provided for in this act * * * fifty per centum ad valorem." Paragraph 387 reads as follows:

"387. Woven fabrics in the piece, not specially provided for in this act, weighing not less than one and one-third ounces per square yard and not more than eight ounces per square yard, and containing not more than twenty per centum in weight of silk, if in the gum, fifty cents per pound, and if dyed in the piece, sixty cents per pound; if containing more than twenty per centum and not more than thirty per centum in weight of silk, if in the gum, sixty-five cents per pound, and if dyed in the piece, eighty cents per pound; if containing more than thirty per centum and not more than forty-five per centum in weight of silk, if in the gum, ninety cents per pound, and if dyed in the piece, one dollar and ten cents per pound; if dyed in the thread or yarn and containing not more than thirty per centum in weight of silk, if black (except selvedges), seventy-five cents per pound, and if other than black, ninety cents per pound; if containing more than thirty and not more than forty-five per centum in weight of silk, if black (except selvedges), one dollar and ten cents per pound, and if other than black, one dollar and thirty cents per pound; if containing more than forty-five per centum in weight of silk, or if composed wholly of silk, if dyed in the thread or yarn and weighted in the dyeing so as to exceed the original weight of the raw silk, if black (except selvedges), one dollar and fifty cents per pound, and if other than black, two dollars and twenty-five cents per pound; if dyed in the thread or yarn, and the weight is not increased by dyeing beyond the original weight of the raw silk, three dollars per pound; if in the gum, two dollars and fifty cents per pound; if boiled off, or dyed in the piece, or printed, three dollars per pound; if weighing less than one and one-third ounces and more than one-third of an ounce per square yard, if in the gum, or if dyed in the thread or yarn, two and one-half dollars per pound; if weighing less than one and one-third ounces and more than one-third of an ounce per square yard, if boiled off, three dollars per pound; if dyed or printed in the piece, three dollars and twenty-five cents per pound; if weighing not more than one-third of an ounce per square yard, four dollars and fifty cents per pound; but in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than fifty per centum ad valorem."

This curious illustration of the confusion which may result from undertaking to build up sentences of such inordinate length is susceptible of two constructions. The board of appraisers held that there are three subdivisions of it, in the first of which varying per-

centages of silk in the fabric are covered by varying rates of duty, and in the second and third of which no such variances are provided for. The board paraphrases the section as follows:

First Subdivision.

Fabrics Weighing not Less than $1\frac{1}{3}$ and not More than 8 Ounces, Per Square Yard.

And containing not more than 20% in weight of silk, if in the gum, per lb.....	\$ 50
If dyed in the piece, per lb.....	60
If containing over 20% and not over 30% in weight of silk, if in the gum, per lb.....	65
If dyed in the piece, per lb.....	80
If containing more than 30% and not more than 45% in weight of silk, if in the gum, per lb.....	90
If dyed in the piece, per lb.....	1 10
If containing not more than 30% in weight of silk, dyed in the thread or yarn, if black (except selvedges), per lb.....	75
If other colors, per lb.....	90
If containing more than 30% and not more than 45% in weight of silk, dyed in the thread or yarn, if black (selvedges excepted), per lb.....	1 10
If other than black, per lb.....	1 30
If containing more than 45% in weight of silk, if dyed in the thread or yarn, and weighted in dyeing so as to exceed the weight of the raw silk, if black (selvedges excepted), per lb.....	1 50
If other than black, per lb.....	2 25
Same, if dyed in the thread or yarn, and weighted in dyeing so as not to exceed the weight of the raw silk, per lb.....	3 00
If in the gum, per lb.....	2 50
If boiled off or dyed in the piece, or printed, per lb.....	3 00

Second Subdivision.

If Weighing Less than $1\frac{1}{3}$ Ounces and More than $\frac{1}{3}$ of an Ounce Per Square
Yard.

If in the gum, or if dyed in the thread or yarn, per lb.....	\$2 50
If boiled off, per lb.....	3 00
If dyed or printed in the piece, per lb.....	3 25

Third Subdivision.

If weighing not more than $\frac{1}{3}$ of an ounce, per square yard, per lb..... \$4 50

Provided, that in no case shall any of the foregoing fabrics in this paragraph
pay a less rate of duty than 50% ad valorem.

No reason is assigned for accepting this interpretation. If this was what the draftsman had in mind, he would have expressed his idea with a better conception of English grammar by breaking his overgrown sentence into three. But neither mere awkwardness of expression nor imperfect punctuation are of much weight in the construction of tariff acts.

The importer contends that, since various qualifications of the fabrics in question appear in the paragraph, the logical way of reading it is to bring down each qualification until a new one of the same kind is specified. And, in support of this contention, attention is called to the circumstance that the government concedes "that the specification as to weight mentioned at the beginning, namely, between $1\frac{1}{3}$ and 8 ounces per square yard, affects all the paragraph until a new weight per square yard is mentioned, and that this, in turn, affects succeeding clauses until the third and lowest weight

per square yard is mentioned." It is also "concededly true that the first percentage in weight of silk, namely, under 20%, affects each succeeding clause until a new percentage in silk is mentioned, and that in turn until a new one is specified, and so on down to the point in dispute." The importer contends with much force that the "same system prevails throughout the paragraph," and submits a paraphrase or tabulation as follows:

Woven Fabrics in the Piece, N. S. P. F.

Weight Per Sq. Yd.	Percentage of Silk by Weight.	Condition.	Duty Per Lb.
1½ to 8 oz.	Under 20%	In the gum.	\$ 50
do.	do.	Piece dyed.	60
do.	20% to 30%	In the gum.	65
do.	do.	Piece dyed.	80
do.	30% to 45%	In the gum.	90
do.	do.	Piece dyed.	1 10
do.	Under 30%	Yarn dyed, black.	75
do.	do.	do. not black.	90
do.	30% to 45%	do. black.	1 10
do.	do.	do. not black.	1 30
do.	Over 45%	Yarn dyed, weighted, black.	1 50
do.	do.	Yarn dyed, weighted, not black.	2 25
do.	do.	Yarn dyed, not weighted.	3 00
do.	do.	In the gum.	2 50
do.	do.	Boiled off, or piece dyed, or printed.	3 00
½ to 1½ oz.	do.	In the gum or yarn dyed.	2 50
do.	do.	Boiled off.	3 00
do.	do.	Piece dyed or printed.	3 25
Under ½ oz.	do.	All.	4 50

Provided, that none of the foregoing shall pay less than 50% ad val.

Manifestly, the paragraph is susceptible of this construction, and we are inclined to accept it as the true one. It harmonizes better with all earlier tariff acts, in making the percentage of silk in the article an important factor in determining the duty on all fabrics of the kind covered by the paragraph, instead of making the mere weight of the article per square yard of mixed goods the controlling criterion. It will be observed, also, that before we proceed very far in the paragraph the percentage of silk changes from "under 20%" to between "20%" and "30%", and so on; and nowhere subsequently in the paragraph is there any return, in words, to a percentage "under 20%." Therefore, when the first-named characteristic (as to weight) is carried forward through the first part of the paragraph, it is coupled with a constantly changing percentage of silk; and when the weight changes it must either carry forward with it the last-named percentage, as the importers construe the paragraph, or else must part company with such last-named percentage, as the board of appraisers construe it. The difficulty with this latter construction, however, is that in dropping the percentage we drop the silk; and

we have the result indicated in the paraphrase adopted by the board, viz. that the second subdivision provides for "fabrics weighing less than $1\frac{1}{3}$ ounces and more than $\frac{1}{3}$ of an ounce, per square yard," but does not indicate of what materials such fabrics are composed. And the third subdivision indicates a like result. Of the two suggested interpretations, therefore, we are inclined to accept the one presented by the importer. The decision of the circuit court is affirmed.

ERHARDT v. WINTER.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 123.

CUSTOMS DUTIES—VOLUNTARY PAYMENT.

Where an importer pays the duty estimated by the collector on several packages of merchandise, and receives all but one of the packages, which is sent to the public stores for examination, and executes the usual bond for return thereof if required, payment of the additional duty on all the packages as returned by the appraiser, without which, or a deposit thereof, the importer could not, under treasury regulations of 1884 (article 358), obtain possession of the examined package, is not voluntary.

In Error to the Circuit Court of the United States for the Southern District of New York.

Jas. T. Van Rensselaer, Asst. U. S. Dist. Atty., for plaintiff in error.

W. Wickham Smith, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This is a writ of error to review a judgment of the circuit court for the Southern district of New York in an action at law against the collector of the port of New York, which was entered upon a verdict rendered for the plaintiff by direction of the trial judge. It is conceded that the plaintiff entered at the port of New York, on May 2, 1889, certain merchandise contained in six cases; that the defendant, as collector of the port of New York, estimated the duties upon the merchandise contained in these cases, and such estimated duties were paid by the importer at the time of making the entry; that case No. 6—one of the cases of merchandise—was designated and sent for examination to the public stores on or about the date of the entry, and all the other five cases of merchandise were thereupon delivered to the importer before the payment of any additional duty thereon, the importer executing the usual "ten-day bond"; that the appraiser of the port appraised and returned the goods as flax and jute, at 40 per cent. ad valorem, and returned the invoice to the collector on May 8, 1889; that the entry was liquidated on May 16, 1889, and was subsequently reliquidated on May 21, 1889; that the amount of increased duty was the sum of \$77.25, and this increased duty was paid by the importer May 22, 1889. The importer received from the government, on May 23, 1889, the case No. 6, which had been sent to the public stores for examination.

On May 29, 1889, the importer duly filed with the defendant a protest, claiming the merchandise to be dutiable at 35 per cent. ad valorem. The original classification was subsequently found to have been incorrect, and the invoice was reclassified at the rate claimed in the importer's protest. The aggregate amount due him for principal and interest was \$97.56, for which amount a verdict was directed. The "ten-day bond" is a bond given by the importer to the United States for the return to the collector of the merchandise delivered to the importer, provided he shall be so required, within 10 days after the packages sent to the public stores shall have been appraised and reported upon. The point made by the government is that the payment for increased duties was not made to obtain possession of the merchandise, and was therefore a voluntary payment as to the proportion of the additional duties levied upon the five cases of goods which had been previously delivered to the importer. It is familiar law that the importer cannot recover money paid for duties upon merchandise, unless the payment was made under compulsion in order to obtain possession of the goods. The compulsion which the collector exercised was in regard to the one case in the public store, of which the importer could not have had possession unless by payment of the entire amount claimed by the collector. The course of business in the collector's office is designated in article 358 of the treasury regulations of 1884, which is contained in the record. The portion of the regulations to which attention need be called is as follows: "If the invoice is indorsed 'Correct' by the appraiser, * * *, the collector will issue an order for the delivery of the examined packages. But if advanced by the appraiser, either in value or rate of duty, the package will not be delivered to the importer without an additional deposit for duties, if necessary." Unless the unpaid amount of the duty claimed to be due upon the invoice had been paid, no permit for the delivery of the examined packages would be given, and, in order to obtain possession of this part of his goods, the importer must pay or deposit the required amount. The facts in *Porter v. Beard*, 124 U. S. 429, 8 Sup. Ct. 554, are not analogous to those in this case. The judgment of the circuit court is affirmed.

CENTRAL TRUST CO. OF NEW YORK v. COLUMBUS, H. V. & T. RY.
CO. et al.

(Circuit Court, S. D. Ohio, E. D. March 21, 1899.)

INTERNAL REVENUE—STAMP ACT OF 1898—STAMPS ON DEEDS OF CONVEYANCE.
A deed to real estate, under Schedule A of the war revenue stamp act of 1898, requires stamps in proportion to the "consideration or value" of the interest transferred, and not to the entire value of the property, where it is conveyed subject to incumbrances.

Butler, Joline, Notman & Mynderse, for complainant.
Stetson, Jennings & Russell, for defendants.

TAFT, Circuit Judge. The question is presented to the court whether, under Schedule A of the war revenue stamp act, it is required that the masters of this court, in executing a deed in accordance with the decree of confirmation of this court, shall place upon the instrument of conveyance stamps proportioned to the value of that which is transferred,—that is, the equity of redemption of the railroad,—or the value of the railroad, including the amount of certain prior mortgages, which are not foreclosed, and subject to which the railroad and all the property of the railroad company is now to be transferred. I am advised by counsel that the commissioner of internal revenue has ruled that the words of the statute, "consideration or value," are to be construed as meaning the value of the real estate which is conveyed in fee simple. The language of the statute is as follows:

"* * * conveyance, deed, instrument or writing, whereby any lands, tenements or other realty sold, shall be granted, assigned, transferred, or otherwise conveyed to, or vested in the purchaser or purchasers, or other person or persons, by his, her or their direction, and the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents; and for each additional five hundred dollars or fractional part thereof, in excess of five hundred dollars, fifty cents." 30 Stat. 460.

And the question is presented whether the words, "consideration or value," therein, are to be construed as meaning the entire value of the land, or only the value of that interest in the land which is conveyed by the deed.

I am referred by counsel to the case of *James v. Blauvelt*, 13 Fed. Cas. p. 303, in which Judge Cadwallader, in the Eastern district of Pennsylvania, in passing upon a statute exactly similar in language and purport, held that in the phrase, "consideration or value," the word "consideration" was to be understood as meaning the consideration for the conveyance, and the word "value" as meaning the value of the thing conveyed. The consideration for the conveyance is the price bid, and the thing conveyed is the equity of redemption, the value of which is the price bid. According to the ruling of the learned judge in the case cited, the amount of the stamp should be proportioned to the value of the equity of redemption, and not be based upon the entire value of the lands. I fully concur in his reasoning and conclusion.

I understand the foundation for the ruling of the commissioner to be that, if he does not hold that this is to include the entire value of the land, the next day a mortgagee may be paid off, and may release his mortgage, and that, in consequence, the government will not get as much revenue as it would under his ruling. But the statute must be construed according to the language used, and because congress may not have provided for a case for which, in the opinion of the commissioner, it ought to have made some provision, there is no reason why the language of the statute should be strained to mean something which it does not mean if the words are given their ordinary significance. The masters, therefore, will be authorized to attach stamps only proportioned to the price at which the land is sold, to wit, \$4,000,001.

Should the commissioner desire to contest the question, leave will be granted to him to appear by the district attorney or otherwise, as he may be advised, and to present the question further; and the court retains full power to require the attaching of additional stamps, if subsequently it shall be determined that they ought to be attached.

DUFF MFG. CO. v. NORTON.

(Circuit Court, D. Massachusetts. March 15, 1899.)

No. 1,068.

1. PATENTS—PRELIMINARY INJUNCTION—EFFECT OF PRIOR DECISIONS.

The rule as to the effect, on a motion for a preliminary injunction, of a prior adjudication by a circuit court of appeals of another circuit sustaining the patent in issue, is applicable even when such prior adjudication was itself rendered on an issue as to the propriety of a preliminary injunction, when the court nevertheless fully considered the case on its merits.¹

2. SAME.

On a motion for a preliminary injunction, a prior decision has the same effect on the question of infringement as on the question of validity, where the court fully considered the question of infringement, and gave the patent so broad a construction as to clearly include the device complained of in the subsequent case.

3. SAME.

In considering the effect of a prior decision, rendered after fully considering the merits, the court has a right to rely on the presumption that all defenses, both on the question of validity and infringement, were presented and considered in that litigation.

4. SAME—LIFTING JACK.

A preliminary injunction granted upon the Barrett patent, No. 455,993, for a lifting jack, upon the strength of prior decisions in other circuits.

This was a suit in equity by the Duff Manufacturing Company against Arthur O. Norton for alleged infringement of letters patent No. 455,993, issued July 14, 1891, to Josiah Barrett, for a lifting jack. Only claims 1, 2, and 6 of the patent were in issue. These claims read as follows:

"(1) In a jack, the combination of a bar having teeth on one side thereof, a pivotal lever, two pawls pivoted to said lever, and having fingers rigid therewith, and a yielding tripping plate having lugs thereon adapted to engage with said fingers, and, through the same, draw the pawls from engagement with the toothed bar, substantially as and for the purposes set forth.

"(2) In a jack, the combination of a bar having teeth on one side thereof, a pivotal lever, two pawls pivoted to said lever, and having fingers rigid therewith, and a yielding tripping plate pivoted to the jack frame, and having lugs thereon adapted to engage with said fingers, substantially as and for the purposes set forth."

"(6) In a jack, the combination of a bar having teeth on one side thereof, a pivotal lever, a pawl pivoted to said lever, and having a finger rigid therewith, and a yielding tripping plate mounted on the frame, and having a lug adapted to contact with said finger, and, through the same draw, the pawl from engagement with the toothed bar, substantially as and for the purposes set forth."

¹ As to effect of previous adjudication, see note to National Cash-Register Co. v. American Cash-Register Co., 3 C. C. A. 565.

The cause was heard upon a motion for a preliminary injunction.
James L Kay and Robert D. Totten, for complainant.
Edward S. Beach, for defendant.

PUTNAM, Circuit Judge. This is an application for an ad interim injunction, alleging infringement of claims 1, 2, and 6 of the patent in issue here. The complainant relies on that branch of the law which supports such applications by the results of antecedent litigation, even where the parties are not the same, as explained by the circuit court of appeals for this circuit in *Wilson v. Store-Service Co.*, 31 C. C. A. 533, 88 Fed. 286. The complainant has cited the following decisions which relate to the letters patent now in suit:

Manufacturing Co. v. Forgie, 57 Fed. 748, heard on bill, answer, and proofs, and decided in favor of the complainant by the circuit court in the Third circuit, July 10, 1893. We have not yet been informed that any appeal was taken in that case, and the judgment stands as of full effect on the merits. There was involved in that suit the patent now in issue, besides some other patents, not necessary to detail, but relating to the same subject-matter; and, so far as the patent now in suit is concerned, the same claims were in issue,—the first, second, and sixth. The validity of the claims was sustained, but the question of infringement was entirely unlike that raised here. Therefore that judgment stands in support of the complainant so far only as the question of validity is concerned.

The complainant next refers to *Manufacturing Co. v. Forgie*, 78 Fed. 626, decided by the circuit court in the Third circuit, February 1, 1897. This was an application for an ad interim injunction, based on the first and sixth claims of the patent in issue here, having no reference to the second claim. The result was an injunction as prayed for, which was sustained on appeal, July 19, 1897, in *Forgie v. Manufacturing Co.*, 26 C. C. A. 654, 81 Fed. 865. The case on appeal is also reported under the same title in 55 U. S. App. 27. The circuit court of appeals not only considered the validity of the claims, but determined their construction with reference to the question of infringement, and gave them a broad effect. We do not understand that this case has gone further. We are not advised what efforts have been made to bring it to a hearing on bill, answer, and proofs, or whether or not, notwithstanding the lapse of time since the decision of the circuit court of appeals, there was sufficient reason for not bringing the suit to a final determination.

The same patent came before the circuit court in the Sixth circuit, and its validity was sustained by an opinion rendered August 3, 1898, in *Duff Mfg. Co. v. Kalamazoo Railroad Velocipede & Car Co.*, 94 Fed. 154. The record does not show to what particular claim this case related. The issue was on an application for a preliminary injunction. We are not advised of any further progress in the case, or of any efforts to bring it to a conclusion. Neither are we advised sufficiently about this decision to enable us to determine whether it is of any value for our present purposes.

The effect of such prior adjudications with reference to applications for ad interim injunctions in patent causes was very clearly stated in

this court by Judge Colt, February 18, 1893, in *Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co.*, 54 Fed. 678. The rule was formulated by the circuit court of appeals for the Seventh circuit, May 1, 1894, in *Electric Mfg. Co. v. Edison Electric Light Co.*, 10 C. C. A. 106, 61 Fed. 834, 836; and, as so formulated, it was repeated by the circuit court of appeals for this circuit, February 14, 1896, in *Bresnahan v. Leveller Co.*, 19 C. C. A. 237, 72 Fed. 920, 921. In view of the expressions of this court, October 8, 1897, in *Beach v. Hobbs*, 82 Fed. 916, 918, and sequence, as to the effect to be given generally to decisions of the circuit courts of appeals in the various circuits, which expressions were approved, at least to some extent, by the circuit court of appeals in the same case on appeal, in an opinion passed down February 13, 1899 (92 Fed. 146), it may be that the rule applied to ad interim injunctions may so develop as to affect hearings on the merits on full records. The rule, as stated in the cases referred to, has express relation to prior adjudications after hearings on the merits on bill, answer, and proofs; but our examination of the opinion in *Forgie v. Manufacturing Co.* shows that the circuit court of appeals for the Third circuit fully considered the merits, although the issue related to an ad interim injunction. Moreover, the defendant does not contest the application of the rule to which we have referred. He maintains, however, that, in accordance with *American Pneumatic Tool Co. v. Bigelow Co.*, 23 C. C. A. 603, 77 Fed. 988, the question of infringement is open. *American Pneumatic Tool Co. v. Bigelow Co.*, however, goes only to the extent that, so far as any issues are raised on applications for preliminary injunctions which have not been covered by the prior litigation, they are open to the defendant; and, being so, it of course follows, as stated in *Wilson v. Store-Service Co.*, already referred to, that the issues so open must be made clear in favor of the complainant. The rule, however, has no application to the case at bar, because the circuit court of appeals for the Third circuit, in *Forgie v. Manufacturing Co.*, gave so broad a construction to claims 1 and 6, and laid down so broad a rule, as to cover the issue of infringement in the case at bar. The form of the defendant's device here seems, on this hearing, to be so akin to that presented to the circuit court of appeals for the Third circuit that no essential distinction can be discovered between them.

The defendant maintains, on the issue of infringement, that, on their proper interpretation, the claims in issue are not so broad as to reach the defendant's device, and that, if their construction permits them to be held so broad as this, they have been anticipated, and, perhaps, fail in invention. In other words, while he makes at this hearing no issue of the validity of the claims in issue, he maintains that they are to be narrowly construed, and, being so construed, do not reach his device. The difficulty, however, with reference to this as a general proposition, is, as we have already said, that the prior litigation has determined this issue in favor of the complainant. The defendant, however, urges upon us for our consideration that his device is constructed under a patent issued to him later in date than the patent in suit; that it is, in principle, the same as the device shown by a patent to the same inventor in 1884; and that, if the patent in

suit is to be construed broadly, it was anticipated by a patent to one Alfred. Unfortunately, the reports of *Forgie v. Manufacturing Co.*, decided in the circuit court of appeals for the Third circuit, do not show what alleged anticipatory patents were before the court. It is enough to say, however, that none of these grounds of defense come within the rule stated in the cases cited by us, that the new evidence, in order to avail, must be cogent. Giving to the decision of the circuit court of appeals for the Third circuit the effect which we have given to it,—that is to say, that the claims are sufficiently broad to cover the infringement in this case,—the defendant does not raise a new issue, but he only offers new evidence on an old issue; that is, certain alleged anticipatory matters in the way of other patents, which may or may not have been before the circuit court of appeals for the Third circuit. Where there has been so much litigation as in the case at bar, and the patent has not only been sustained, but held to be of so broad a character as to cover the alleged infringing device shown on a new application for an ad interim injunction, it cannot be expected that the court to whom the application is made will so far delve into the merits as to fully determine the effect of new alleged anticipatory matters, whether relating only to the validity of the patent or to the construction of the claims, and, therefore, to the question of infringement. When there has been a prior, thoroughly considered decision on the question of infringement, the rule necessarily applies with the same effect as to a question of the validity of the patent. Indeed, in many cases one issue is involved in the other. In either case the court to which the later application is made has a right to rely on a presumption that all defenses of value were presented and considered in the earlier litigation. A different practice would deprive an inventor of the substantial advantages of the results of protracted litigation in the first case, and would subject him, on the subsequent application, to all the labor and cost of investigating the merits on every discovery of some supposed anticipatory matter not brought forward in the prior suits; and to the discovery of such matter there is, of course, no end. Therefore, unless on all such issues the court ordinarily accepts the result of the prior litigation, except for some matter which is clear and cogent, the beneficent rule with reference thereto would be substantially lost. The circuit court of appeals for this circuit, February 14, 1896, in *Bresnahan v. Leveller Co.*, already referred to, at page 242, 19 C. C. A., and page 924, 72 Fed., explains this proposition with reference to a prior decision of the same court; and the line of reasoning there employed applies fully to decisions in other circuits, in connection with applications for ad interim injunctions. Giving force to this practice, we perceive nothing sufficient to require us to reinvestigate the merits of the questions passed on by the circuit court of appeals for the Third circuit, and we think that the complainant is entitled to the benefit of that litigation with reference to claims 1 and 6, which alone were there in issue. In reaching this conclusion, we prefer not to make use of the stronger expressions found in the cases through which the practice applied here originated, as we deem it sufficient to say that the defendant does

not offer us any new evidence so cogent on its face as to require us to reinvestigate the merits on this application.

In *Wilson v. Store-Service Co.*, 31 C. C. A. 533, 88 Fed. 286, already cited, the court made some observations to the effect that, inasmuch as ad interim injunctions in patent causes do not ordinarily maintain matters in *statu quo*, the strict rules stated in that case applied. In the case at bar, however, it appears that the effect of the ad interim injunction would be practically to hold matters in *statu quo*. The refusal of the injunction might operate in very great injury to a long-established and extensive business, controlled by the complainant, while it would cause no serious injury to the defendant, whose manufacture of the alleged infringing device has been but lately commenced, is, apparently, not extensive, and has not become one of his principal occupations. Moreover, he must have known of the litigation to which we have referred, and have taken his chances in view of it. Therefore the court, feeling that it can do no substantial injustice thereby, is the more content with its conclusions. Also Judge Colt's line of reasoning in *Patent Co. v. Donallan*, 75 Fed. 287, decided June 25, 1896, supports us in the case at bar, although the issue before him was only as to the validity of the patent.

In relation to the duty of diligence in bringing the cause to a final hearing, we do not fail to appreciate the inevitable embarrassments and delays to which counsel are compelled to submit in patent litigation. Nevertheless, in view of the fact that the case in the Third circuit, referred to, has not been brought to final hearing, so far as we are advised, and that the answer in the pending suit was filed in December last, we feel it our duty to inform the parties that, if the defendant shall hereafter be of the opinion that due diligence is not used in bringing the suit to a hearing on bill, answer, and proofs, we would consider, at the proper time, a motion for a dissolution of the injunction now ordered, based on the want of such diligence.

We deem it proper to remark that, in reaching our conclusions, we have rested entirely upon the results of the prior litigation, and we have endeavored, so far as possible, to form no judicial opinion touching the merits. Let there be a decree, in accordance with rule 21, for an ad interim injunction with reference to claim 1 and claim 6.

PALMER et al. v. JOHN E. BROWN MFG. CO.

(Circuit Court of Appeals, First Circuit. March 16, 1899.)

No. 244.

PATENTS—DISTINCT INVENTIONS—TWO PATENTS HELD NOT FOR SAME INVENTIONS—MACHINE FOR SEWING OR QUILTING FABRICS.

The Palmer patent No. 308,981, for a machine for sewing or quilting fabrics, compared with the earlier patent, No. 304,550, to the same inventor, for a "mechanical movement," and *held* to be for a different, distinct, and patentable invention; and also construed and *held* infringed as to claims 9, 10, 14, 16, 18, 19, 22, and 24.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Edwin H. Brown, for appellants.

James E. Maynadier, for appellee.

Before COLT, Circuit Judge, and BROWN and LOWELL, District Judges.

BROWN, District Judge. This suit is based upon letters patent No. 308,981, granted December 9, 1884, to Frank L. Palmer, and described as for a machine for sewing or quilting fabrics. The circuit court found this patent invalid, on the ground that what was claimed therein was simply an application to an appropriate use of what was claimed in an earlier patent to Palmer (304,550, dated September 2, 1884), without the development of the inventive faculty in making the application. There is no doubt that Palmer was, in fact, the inventor of the quilting machine described in the patent in suit, and that his invention was of great ingenuity, and of great importance in the art of machine quilting. His machine accomplished work that was formerly done only by hand, and the evidence of invention afforded by the result of its application to the practical art is of high order. He was the first to produce by machinery scroll quilting in lines running freely in any and all directions,—an advance of great importance in the art. We agree with the opinion of the circuit court that Palmer's patent, No. 185,954 is not anticipatory, since it lacked the "universal movement in any and all directions," which is the characteristic feature of his patent in suit. Had Palmer been content to take out only the patent in suit, we think there would be no doubt as to its validity. The difficulty in the present case arises from the patent No. 304,550, granted to Palmer about three months earlier than the patent in suit. This patent is for a "mechanical movement," described in the specification as "more particularly intended for producing the change in relative position between an implement or tool (such, for example, as a molding or other cutter or cutting tool, or the needle of a sewing machine) and the article to be operated upon by the implement or tool (such, for example, as a piece of wood or other material to be molded or cut, or a piece of fabric to be sewed, quilted, or embroidered)." Claim 7 is as follows:

"The combination, with a rack or track in pattern form and a positively operating engaging device acting thereon and capable of bodily movement relatively thereto, of carriages supporting said device, movable in directions transverse to each other, and one mounted upon the other, whereby provision is afforded for the movement of said engaging device along the rack or track by its engagement therewith, substantially as herein described."

This "mechanical movement" is employed in the machine of the patent in suit as a part of the claimed combination. Upon Palmer's original application for a patent for a machine for sewing or quilting fabrics this "mechanical movement" was made the subject of a separate claim. The date of this application was November 23, 1883. The other claims of present importance relate to the combination of this "movement" with the mechanism of a quilting machine, including

a sewing machine and work holder of a construction permitting them to co-operate with the "movement." The patent office, however, considered the application to embrace two inventions, and upon the requirement or suggestion of the office, the claim for the "movement" was withdrawn from the application of November 23, 1883, and made the subject of a new application, filed June 21, 1884. Upon the later application was issued the earlier patent, No. 304,550, on September 2, 1884. Upon the earlier application was issued the later patent, No. 308,981, now in suit.

The defendant contends that Palmer made but one invention, namely, a "pattern mechanism," or a feed mechanism which produces a pattern; and that he did not make two inventions, namely, that pattern mechanism, and, in addition, the combination of that pattern mechanism with a sewing machine and its work holder. If it is true that both patents are for the same invention, it follows that Palmer, by taking the patent earlier issued, left nothing which could be made the subject of a second patent. Our inquiry, then, will be: Are the two patents for the same invention? Looking first to the letters patent themselves, and comparing their claims, we are unable to say that the combination claimed in the earlier is identical with that claimed in the later, since the later specifically claims elements not enumerated in the earlier. As the claims are not co-extensive, the fact that a given element is common to both may be of little consequence. Comparing next the functions, we still fail to find identity, since it is the function of one to produce a finished and useful product, while the function of the other stops far short of this, and produces merely motion in a predetermined or pattern form. From inspection of the patents alone we are unable to say that the patent office, by granting patent No. 304,550, exhausted its power to grant No. 308,981. The test of identity afforded by a comparison of the claims of the two patents, however, is not conclusive. We must be satisfied further that there are substantial differences, not merely varying descriptions of one invention, or descriptions of a single invention in different applications to use. As said in *Miller v. Manufacturing Co.*, 151 U. S. 186, 198, 14 Sup. Ct. 310, 315:

"It must distinctly appear that the invention covered by the later patent was a separate invention, distinctly different and independent from that comprehended in the first patent. It must consist in something more than a mere distinction of the breadth and scope of the claims of each patent."

At the date of the application for the patent in suit neither the prior art (represented, so far as appears in evidence, solely by Palmer's earlier patent, No. 185,954, for a machine without the universal movement characteristic of the patents under consideration) nor any prior patent disclosed anything suggestive of the combination of the patent in suit. There is no warrant in the evidence for the claim that the mechanical movement suggested the combination. The "movement" was evolved by Palmer while working in the art of quilting, and as a means subordinate to the purposes of that art. It seems evident that throughout the inventive process which led to the final successful result Palmer's object was to improve the art of

machine quilting, and that the movement was conceived as a sub-combination, or as a member of a combination in which a sewing machine was a necessary element. Complainant's expert, Mr. Park Benjamin, points out—fairly, as we think—the error of the assumption that the invention of the patent in suit was made by adding the sewing machine and work holder to the "movement," and of the erroneous implication that the "movement" was first in the art. Our view as to the error of this implication disposes also of the suggestion that the earlier application was for letters patent for a mere appropriate use of an independent invention. It would be more just to say that Palmer's knowledge of the superiority of the designs of the handwork, and of the comparative imperfections, in design and workmanship, of the former machines, led to the desire for a machine that would overcome the limitations of the earlier machines and the imperfections of their product, and that this desire led to the conception of his sewing machine so reorganized with other elements in a new combination that it could sew lines in any and all directions. The record evidence of the inventor's progress in the art and of his final achievement justifies this view, rather than the view resulting from a tearing down of his structure, and an assumption that the easy process of rebuilding it corresponded to his inventive act. The architect is entitled to credit for more than the skill necessary to build according to his perfected plan. The language of Judge Wallace in *Thomson-Houston Electric Co. v. Elmira & H. Ry. Co.*, 18 C. C. A. 145, 154, 71 Fed. 396, 405, seems especially applicable to this case:

"The test of identity is whether both, when properly construed in the light of the description, define essentially the same thing. When the claims of both cover and control essentially the same subject-matter, both are for the same invention, and the later patent is void. A machine or structure may embody several different inventions. There may be subcombinations in a machine which are new and useful, and operate conjointly to perform some subordinate function. Such a subcombination, if not patented by a claim, might be appropriated by another without infringing a patent for the machine. Being for a different invention, it is the proper subject of a distinct patent. While two or more inventions residing in the same combination or structure may be covered by a corresponding number of claims in a single patent, the law does not require them all to be claimed in the same patent, and the inventions may, at the option of the patentee, be secured by different patents. It is quite immaterial that both inventions originate at the same time, and from a single conception. In *Cochrane v. Deener*, 94 U. S. 780, the court said, 'One invention may include within it many others, and each may be valid at the same time.' In all such cases, if the inventions are truly separable, the inventor is entitled to a monopoly for it, although neither could have been discovered and made available without the other."

The view of the circuit court in the present case is further explained by the opinion in *Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co.* (July 30, 1898) 90 Fed. 201. Speaking of the present case, the learned judge who wrote both opinions said:

"In that case (*Palmer v. Manufacturing Co.*, 84 Fed. 454, 457) each of the two patents was really for a machine, the machine in the earlier patent merely needing well-known connections to accomplish the results of the machine in the later patent; so that the two patents were clearly for the same subject-matter."

We do not think, however, that it is at all obvious that, if the mechanical movement as claimed in the patent first granted were given to one of ordinary mechanical skill, who was familiar with the art of machine quilting, he could have produced the machine of the patent in suit without such a degree of ingenuity in making the application of the "movement" to the art of quilting as would amount to invention. Given a device capable of the production of universal movement, there would be still necessary the perception that this movement could be so applied in the art of quilting as to produce the results of the machine of the patent in suit, and the further perception of such a reorganization of the elements of the machines of the prior art as would require, before a useful result could be produced, changes of a radical nature in the work holder, in the means of holding and presenting the work to the needle, and in the sewing machine; and also the devising of suitable driving mechanism for operating the work holder and sewing machine in proper synchronism. The conception of a mechanism capable merely of producing motion in a predetermined form, and the conception of this mechanism, combined, with other elements, in a machine producing work theretofore done only by hand, are distinct. *Suffolk Co. v. Hayden*, 3 Wall. 315.

We think there is force in the following suggestion of the counsel for the complainant:

"Clearly, the invention of the mechanical movement, being merely a producer or transformer of motion, is not an invention in the art of quilting. Therefore if defendant's contention is true that all of Palmer's invention is embraced in this mechanical movement, he made no invention in a quilting machine, notwithstanding he devised one so important that it revolutionized the art of quilting."

Had the "movement" been in the prior art, we think that Palmer's claims to the protection by letters patent of his quilting machine would be well founded. As he has produced not only a quilting machine, but a part of that machine which may be used in other machines, we see no reason why, by properly seeking protection for all that he has invented, he should be deprived of the protection of letters patent for that which he regards as his chief invention commercially considered. We are, upon the whole, of the opinion that the two patents are for two distinct inventions, and not for one invention; that each describes a true combination; that the combinations differ widely in their elements and in their functions, and that the patent in suit is not for a mere use of the invention covered by No. 304,550, but for uses of which the invention of that patent is incapable; and that a correct expression of the relation of the two patents is that the invention covered by one is merely an element in a combination covered by the other. We therefore hold that the patent in suit is valid.

The question of infringement follows. Claims 9, 10, 14, 16, 18, 19, 22, and 24 are involved. It is satisfactorily established that the defendant's machine performs the same work, and that it has the capacity for scroll quilting that gives the machine of the patent in suit its chief value. In view of our finding that Palmer's two patents,

304,550 and 308,981, are independent, we think that the only question of importance upon the issue of infringement relates to the "movable supports." The defendant's position is set forth in the testimony of its expert, Mr. Metcalf:

"Defendant has discarded the supports described in these patents [304,550, 308,981], namely, the fixed track, the carriage on that track, the second track on that carriage, and the second carriage on that track, and uses instead of them newly-invented mechanism which consists of a simple table on castors, which supports the fabric holder, but has nothing whatever to do with restraining its horizontal movement, and a system of rods and guides which restrains the fabric holder from rotating about a vertical axis, but has nothing to do with supporting it."

We think this is disposed of effectually by the testimony of Mr. Benjamin, as follows:

"That is evidently based on the assumption that movable supports in any machine embodying complainant's invention must, of necessity, in all their parts operate to hold up the fabric holder against the action of gravity. In other words, his contention appears to be that, if any member of the movable support (whereby the fabric holder is permitted, while in the machine, to follow the movements of the pattern) does not somehow actually take the weight, or some part of the weight, of that fabric holder upon itself, then the movable support of 308,981 is not present. All of the supports (according to Mr. Metcalf) must restrain the fabric holder from moving downward towards the earth; but, even if the support does operate to restrain the fabric holder from moving in that direction, if some part of it can be recognized as operating to restrain it also from rotating on a vertical axis, then the complainant's supports are not present. I certainly cannot subscribe to that doctrine. So long as the mechanism which supports the fabric holder permits it to follow the guidance of the pattern, it is immaterial how the subsidiary functions of sustaining the weight of the fabric holder, and of preventing the rotation of that fabric holder about a vertical axis are distributed among the parts which make up that mechanism. Such a distribution will be governed simply by the exigencies of the especial conditions introduced into either machine."

We cannot regard the "supports" of the defendant's machine as the simple table without giving undue prominence to the mere sustaining of weight, and without disregarding the lateral support necessary for the proper operation of the mechanism. The supports of the defendant are the table, with its connections, whereby both vertical and lateral support are given. What the defendant terms "restraining devices" are lateral supports, which support the fabric holder in such a way that only the desired directions of movement are permitted. The inversion of parts, redistribution of weight, and redivision of work among the parts are productive of no advantage, produce no change of result, and are merely colorable changes. A patent of the primary character of that in suit cannot be evaded thereby.

The decree of the circuit court (84 Fed. 454) is reversed, and the cause remanded to that court with a direction to enter a decree in favor of the complainants sustaining the validity of claims 9, 10, 14, 16, 18, 19, 22, and 24 of the complainants' patent in suit, and adjudging that said claims have been infringed by the defendant, and ordering a reference to a master to take an account of profits and damages in respect to such infringement, and awarding to the complainants a perpetual injunction in respect to the claims above

mentioned; and to take such further proceedings as shall be according to law, and not inconsistent with this opinion. The costs of this court are adjudged to the appellants.

THE GUYANDOTTE and THE DELAWARE.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 59.

COLLISION — STEAM VESSELS CROSSING — FAILURE TO CONTINUE MANEUVER AS AGREED BY SIGNALS.

A steamship and a tug, with a tow, exchanged signals for crossing in accordance with the starboard rule, the steamship being the privileged vessel, at a sufficient distance apart to enable the maneuver to be executed with safety, but the master of the tug, which had reversed, fearing collision, interrupted the maneuver, and again started ahead, and a collision resulted, in which the tow was injured. The weight of evidence showed that the steamship held her course after the exchange of signals. *Held*, that the tug was alone in fault for the collision, regardless of any fault in the navigation of either vessel prior to the exchange of signals.¹

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the district court, Southern district of New York, holding both respondents liable for damage done to libelant's car float. The car float was in tow of the tug Delaware, and lashed to her starboard side, and was in collision with the steamer Guyandotte on the afternoon of April 30, 1897, in about the middle of the North river, near the upper White Anchorage Buoy, off the coal docks at Communipaw.

The following is the opinion of the court below (BROWN, District Judge):

A little after 3 o'clock in the afternoon of April 30, 1897, as the libelant's float No. 3, 185 feet long, was going out of the East river in tow of the tug Delaware and on her starboard side and crossing the North river towards Harsimus cove, above the Pennsylvania Railroad ferry in Jersey City, she came in collision with the stern of the steamer Guyandotte going down the North river, which struck the float on her starboard side some 20 or 30 feet from her stern, causing the damage for which the above libel was filed.

The collision was not far from the middle of the river and probably from 100 to 300 yards above the White Anchor Buoy, between Ellis Island and Castle Garden. The tug and float in crossing on the last of the ebb tide were headed a little up river. The Guyandotte, 265 feet long, was outward bound for sea. After leaving her pier at Beach street, she came down in about the middle of the North river. Ahead of her an Annex ferryboat was crossing from Jersey City towards the East river and the Guyandotte changed her course about a couple of points to starboard in order to pass under the stern of the ferryboat, which accordingly crossed the bows of the Guyandotte and passed several hundred feet to the northward of the tug and float below. The mate of the Guyandotte, who was on the bridge of the steamship with the master, observed the tug and tow before the ferryboat crossed their bow. The master did not observe them until the steamship passed behind the ferryboat and was

¹ For signification of signals of meeting vessels, see note to The New York, 30 C. C. A. 630.

in her wake. He then starboarded his wheel in order to straighten his course again, directly down river, and soon after for the first time observed the tug and float a little on his port bow, about two points according to his estimate, more or less. After starboarding more or less he steadied and gave to the tug a signal of one whistle, which was answered by the tug with one whistle. About a half a minute afterwards or less, fearing collision, he hard a-ported and reversed, but struck the float at an angle of about three or four points.

The wheelsman on the tug states that he saw the Guyandotte coming down before the Annex ferryboat crossed her bows, and that she then seemed to be heading towards the stern of his float; and that he supposed the Guyandotte would go astern of him. When afterwards he saw the Guyandotte apparently sheerling to the westward in order to go astern of the ferryboat, he stopped his engines when the ferryboat was between the tug and the Guyandotte, and immediately on answering the signal of the steamship after she had passed the stern of the ferryboat, he reversed full speed. A few moments afterwards the captain of the tug, who had been temporarily absent from the wheel house, returned, and when the Guyandotte was about 400 to 500 feet away and apparently pointing for his midships, so that the float was lapping across her bows, believing collision imminent, he ordered the engines full speed ahead and put the wheel hard a-port hoping the steamer would go under his stern.

All the evidence in the case shows that when the steamer crossed the wake of the ferryboat, she was only about 300 yards from the tug. She was going under one bell at the rate of six or seven knots an hour, and the tug at the rate of about three and one-half knots. It is not denied that the steamship had the right of way and that it was the duty of the tug to keep out of her way. On behalf of the latter, however, it is claimed that the collision was brought about by the starboarding of the steamer after she got astern of the ferryboat, and because the steamer had no lookout forward, and did not see the tug in time, and did not navigate properly in reference to her, either by keeping her original course, or the course two points to westward when she had changed to that course.

I am inclined to the opinion that when the steamer was first seen from the tug she was more nearly directly up river from the tug and tow, and heading more nearly towards them, than might be inferred from some of the testimony of the steamer's witnesses. She was probably but a little to the westward of the tug's place in the river. This is not only the direct testimony of the wheelsman of the tug and the floatman, but seems to be borne out by the testimony of the master of the steamer, that when he first noticed the tug she was only about a couple of points on his port bow, although he had then changed the heading of his steamer by porting on account of the ferryboat, a couple of points to the westward, and as he says had come back but little. All agree that the angle of collision was about three or four points; and considering that reversal by the tug would at first swing her more to the southward and that her porting afterwards was of short duration, and that the steamer's porting and subsequent reversal would both carry her head to the westward, tending to increase the angle of collision, it is difficult to see how the collision could possibly be at so small an angle as three or four points unless the Guyandotte had swung fully back to her original course under the influence of her starboard helm after passing astern of the ferryboat, before she could break her sheer by her port helm. And this agrees with the testimony of the Delaware's witnesses as to the apparent heading of the steamer.

If such was the true situation of the steamer before she crossed astern of the ferryboat, that is, pointing directly down river and being but little to the westward of the tug when from one-third to one-half a mile distant, it was as much the duty of the steamer to keep her course without change, unless something compelled the steamer to change that course, as it was the duty of the tug to keep out of the way; and the proper course of the tug was to keep on and to cross the Guyandotte's bows, as there would evidently be abundant time and space to do so. It does not appear that the steamer might not have avoided the ferryboat sufficiently by slowing or reversing, as well as by changing her course to the westward. If, however, she preferred to change her course to the westward, as that would require the tug to change her course

and go under the Guyandotte's stern, I think it was specially incumbent on the steamer to signify by signal to the tug below that she was intending to go to the right, and to keep that course when once taken, so that the tug could govern herself accordingly. No such signal was given; probably because the master, who was in charge of the navigation, did not at that time notice the tug. The tug, as I have said, when the ferryboat was between her and the steamer, prudently stopped her engines, uncertain apparently from the swing of the steamer to the westward, whether or not she meant to go astern of the tug as it was at first supposed she designed to do. The rule as to signals was designed to prevent just such uncertainties and miscalculations as this. But here the giving of the necessary signals on both sides was delayed until the steamer had crossed the wake of the ferryboat and for about half a minute swung her head, under a starboard wheel, again somewhat to the eastward, towards the line of the tug and tow, when the vessels were perhaps 200 yards apart; so near that although they were both going at moderate speed, yet both being heavily loaded and not capable of quick handling, there was imminent danger of collision. It is possible that collision would have been avoided had the tug continued reversing. But this is doubtful, considering the fact that, as it turned out, the float nearly escaped by going ahead. However this may be, the blame should be ascribed to getting into that situation rather than to any mistake made when the situation became critical. Had timely signals been given by either, it is evident that the embarrassment of the tug would have been avoided, and she would have avoided the steamer.

The primary causes of the collision in my judgment were (1) the failure of both boats to signal, as required by the rules, when at a distance of one-half a mile from each other, a rule which the presence of the ferryboat and the steamer's change of course made it specially necessary to observe; (2) the steamer's lack of timely attention to the tug, and her changes of course, which embarrassed the navigation of the tug; (3) her failure to reverse at the time the signal was given, as she was then not more than 300 yards away, and must have been pointing nearly for the tug and was probably still under some swing to the southward from her previous starboard helm; (4) the failure of the tug to take timely, original and effective measures to avoid collision by giving a signal either of one whistle or of two; and (5) her failure to reverse and give a signal of one whistle at the time when she saw the steamer change her course to the westward, to prevent the steamer from again swinging to the southward.

The libelant is entitled to a decree against both steamers, with costs.

F. D. Sturges, for appellant Old Dominion S. S. Co.

H. Galbraith Ward, for appellant Pennsylvania R. Co.

Le Roy Gove, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The Delaware was on her way from the foot of Rivington street, East river, to Harsimus cove, N. J., North river. Her navigation was temporarily in charge of a deck-hand, McGee, the master having gone below for a few minutes. She was heading for the upper rack of the Communipaw ferry, when McGee first saw the Guyandotte. The steamship left her pier at Beach street, and came down in about the middle of the North river. While passing down she encountered the Brookyn Annex ferryboat, outward bound from the Pennsylvania slip, ported to pass under the ferryboat's stern, and then starboarded to get back on her course. The navigator of the tug saw the Guyandotte, on his starboard hand, when she was opposite Courtlandt Street ferry, as he estimates about one-half to three-quarters of a mile distant. He saw the Annex boat, saw the Guyandotte sheer to starboard, saw her pass under the stern

of the ferryboat, and then swing to port again, till she got back to her original course, when she stopped and steadied, headed down the river about for the forward end of the float. Then, and not till then, as he says, the Guyandotte blew one whistle, he answered with one whistle, and rang two bells, and a jingle to go full speed astern. By this exchange of signals it was agreed that the privileged vessel (the Guyandotte) should pass across the bows of the burdened vessel (the Delaware). At the time the first signal was blown the vessels were 300 yards or more apart. The navigators of both vessels and the counsel for both claimants all insist that had both vessels thereafter navigated in conformity to agreement there would have been no collision, and, in our opinion, the evidence entirely supports their conclusions. The district judge was inclined to doubt this proposition, apparently for the reason that, as it turned out, "the float nearly escaped by going ahead"; but he seems to have overlooked the fact that for a sufficient time before collision to reduce her speed materially below six knots the Guyandotte was reversing at full speed. Inasmuch, therefore, as there was time and room for both vessels to act in accordance with the agreement, and thus avoid collision, the risk of collision, assuming that it theretofore existed, was terminated by the agreement, and it will be wholly unnecessary to discuss the prior navigation, or to determine whether in their earlier maneuvers either vessel had committed any fault. The real question in the case is whether either or both vessels navigated contrary to the agreement, and thus brought about the collision. Indisputably the Delaware did so navigate. As has been seen, McGee, who was at wheel, saw the Guyandotte swing to go under the stern of the Annex boat, saw her swing back to port, and says that she had stopped her swing to port, and had "steadied up, and headed down the river," before she gave the single whistle. He says that he had stopped his engines while the ferryboat was passing between them. There is some dispute as to whether he stopped thus early, but the precise time is immaterial, since, immediately upon replying with the single blast, he reversed at full speed. He was evidently alert, prudent, and careful, and had he been left to complete, undisturbed, the navigation he began, there would have been no collision, the headway of the Delaware, angling up across an ebb tide, would have been checked, if not entirely overcome, and the Guyandotte could have passed safely across her bows. Most unfortunately for the Delaware, however, her master's temporary business below had terminated. He heard the single whistle of the Delaware; also the two bells to back. He thereupon hurried into the pilot house, and "gave bells to stop and go ahead and hook her up at full speed." His reason for so doing, as he says, is that he found the bow of the float had already passed across the line of the Guyandotte's course, so that she was heading for the side of the float about amidships. The vessels were then, as he says, about two float lengths (370 feet) apart. So soon after reversal was his contradictory order given that McGee's effort to conform the Delaware's navigation to her agreement was not continued long enough to have any appreciable effect. Entirely uninformed as to prior movements of the vessels, the

master was in no position to judge whether the Guyandotte was continuing to swing to port,—McGee, who was in a position to know, says she was not,—and, ignorant of the agreement between them (he had not heard the Guyandotte's whistle), his interference with McGee's arrangements was most ill-advised. The result was that, perceiving the Delaware was keeping on her original course with no apparent slackening of speed, the master of the Guyandotte ordered her engines stopped and reversed,—a movement which was continued an appreciable time (the master and engineer say two minutes, probably an over-estimate), and so reduced her headway that she struck the float some 25 to 30 feet from its after end. That the Delaware failed to navigate conformably to agreement is undisputed, and that such failure brought about the collision seems to be entirely clear upon the proofs.

The charge made by the Delaware against the Guyandotte is that she did not hold her course after the exchange of signals, but continued swinging to port, by reason, as is suggested, of her endeavor to return to her original course after the swinging to the westward to pass the Annex boat. The witnesses from the Guyandotte testify that they ported upon the exchange of signals, but, even if we entirely disregard their testimony, we can find no support for the contention that her starboard swing continued after the exchange of signals, in view of the express, distinct, and reiterated statements of McGee, acting pilot of the Delaware, that the Guyandotte had steadied before that time. We have, then, two vessels crossing on courses where the starboard hand rule applies, a proposition by the privileged vessel to cross the other's bows, there being ample room and time for the execution of such maneuver if both co-operate, an acceptance of such proposition, an admitted failure by the burdened vessel to conform her navigation to agreement, with no sufficient proof of a like failure by the other, and a consequent collision. Under such circumstances, the burdened vessel is to be held solely in fault.

The decree of the district court is reversed, and cause remanded, with instructions to decree for full damages to libelant against the Delaware, and costs of this court to the Guyandotte against the Delaware.

THE COLUMBIA.

(District Court, S. D. New York. March 24, 1890.)

No. 77.

1. COLLISION—STEAM FERRYBOAT AND STEAM PROPELLER.

A steam ferryboat collided with a steam propeller in the East river, near the Grand Street Ferry slip on the New York side. The ferryboat gave a signal of two whistles when one-third across from the New York shore, to which the propeller immediately answered with one; and thereafter the ferryboat navigated in disregard of the propeller's signal, and persisted in the effort to cross her bows, though the ferryboat had the propeller on her starboard hand. The ferryboat was not keeping an attentive lookout, and did not see the propeller until more than halfway across the river, and if she had reversed when she saw the propeller, so as to go astern, as it was her duty, the collision would not have occurred. *Held*, that the ferryboat is liable.¹

2. SAME—MUTUAL FAULT.

A steam propeller in the East river, required by law to navigate in mid-river, was going downstream, not more than 200 feet from the New York shore, near the docks, and with lights dim, if not out, when she collided with a ferryboat which was in fault for not keeping a lookout, nor obeying the propeller's signal, nor reversing and going astern, according to the rules of navigation. *Held*, that the propeller contributed to the collision.

This was a libel by the New York & Norwalk Steamboat Company against the steam ferryboat Columbia for a collision. Decree for libellant for one-half damages.

James J. Macklin, for libellant.

Wilcox, Adams & Green, for respondent.

BROWN, District Judge. At about 5:30 a. m., January 19, 1897, the ferryboat Columbia on her trip from South Seventh street, Brooklyn, to Grand street, New York, came in collision just outside of the New York slip with the steam freight propeller Eagle, bound down the East river, striking the port side of the propeller nearly at right angles about two-thirds the distance towards her stern, inflicting the damage for which the above libel was filed. It was one of the coldest mornings of the winter. The night was very clear; the moon was full the day before, and at the time of the collision was about one or two hours high. Before the collision, the ferryboat had given a signal of two whistles twice to the propeller, and the propeller had twice given a signal of one whistle to the ferryboat.

The ferryboat had the propeller on her starboard hand and was bound to keep out of the way. The propeller was coming down near the New York shore, probably to get the benefit of the slacker tide, which had then been running flood about an hour. The defense of the ferryboat in substance is that the propeller showed no lights of any kind; that she was close by the shore and in its shadows, and could not be seen in time to avoid her. The propeller's witnesses asserted that her lights were all burning. Fifteen witnesses for the ferryboat

¹ As to signification of signals of meeting vessels, see note to The New York, 30 C. C. A. 630.

say that no lights were visible up to the moment of collision. The chief part of the litigation was upon that point, and the testimony of at least one-half of the witnesses for the ferryboat on this subject, I consider of little value. Many of them did not notice the propeller until she was already so far past the bows of the ferryboat that the propeller's head light and colored light would not be visible. Several did not know what high lights were required to be carried, and evidently did not look for the high pole light. Others swear that no light whatever was to be seen, while others show that there was a light in the galley, and a light used in launching the small boat to examine the damage to the propeller immediately after the collision, and while the boats were near each other; so that practically there are but four or five of the ferryboat's witnesses whose testimony I regard as of much weight on the question of lights. These were, however, competent persons, and considering their evidence as well as the evidence on the part of the propeller, I think the probability is that the propeller's lights, though they may not have been wholly extinguished, were burning only quite dimly. In the extreme cold weather they may have required some trimming during the night, which was not attended to; and in a very bright night like this they would naturally show still more dimly.

But even if the propeller's four lights were all out, which is scarcely probable, in such a night as this the propeller would have been readily seen if any proper watch had been kept from the ferryboat. There was no lookout attending to his duties. But notwithstanding this fact, I am satisfied that the propeller was seen by the pilot of the ferryboat in time to avoid her, had he reversed at once, as was his duty in the situation presented. There was nothing on the west shore of the river to cast such long shadows as to prevent a clear vision of the moving propeller. She was at least 200 feet from the docks, and the docks were not covered. The ferryboat did not reverse, according to her own testimony, until within 50 or 100 feet of the propeller, and for this delay the evidence shows no excuse. Though ferryboats are entitled to a reasonable freedom for entrance and egress to their slips, the rules of navigation are not all abolished in their favor. The evidence leaves no doubt that notwithstanding a poor lookout, the propeller was seen when she was off the upper dock at Broome street, and at collision her bow was 75 feet below the ferryboat, off the middle slip at Grand street. It follows that the propeller moved at least 300 feet from the time she was seen at Broome street. As her engines were stopped for part of that time, and she was moving against the tide, not more than 3 or 4 knots by land, plainly the ferryboat in the same time must have traversed twice that distance or more, i. e., at least 600 feet. Three hundred or 400 feet was a sufficient space in which to come to a dead stop by reversing. The collision probably happened about 100 feet outside of the line of the dock at Grand street, although by the motion of the ferryboat the stern of the propeller was carried in considerably, so that several of the witnesses described the collision as being inside of the line of the dock. When the propeller was first seen by the ferryboat,

the ferryboat was, therefore, about 700 feet from the New York shore, that is between one-third and one-half way across the river, which is there about 1,800 feet wide. The witness, Downing, whom I regard as one of the most trustworthy on the part of the respondent, places the ferryboat at that time as one-third across the river, which would be nearly 600 feet from the New York docks.

I find the ferryboat to blame, first, for an inattentive lookout, in consequence of which the propeller was not seen until the ferryboat was more than halfway across the river; secondly, for not heeding the signal of one whistle given by the propeller; thirdly, for not reversing at once when the propeller was seen, so as to go astern of her as was her duty in that situation, instead of claiming and attempting to enforce a superior right of way (a claim which is also set up in the answer) with a signal of two whistles given twice, contrary to the rules of navigation, when it was manifest that that course involved danger of collision. The ferryboat bases that claim upon the contention that she was then near to her New York slip, whereas at her first signal that certainly was not the fact. Nothing at that time prevented her from reversing and going astern of the propeller.

2. The account of the navigation given by the pilot of the propeller is substantially in accord with that given by the pilot of the ferryboat. From South Seventh street there are three ferries, one to Twenty-Third street, New York, one to Grand street, New York, and one to Roosevelt street, New York. The Columbia left her slip under a port wheel in order to give abundant room to the incoming boat to the southward. This carried her up river at first, to counteract which she soon swung down so much that the pilot of the propeller believed she was going to Roosevelt street. When after that she began to haul more toward New York, being about one-half way across the river, the pilot of the propeller was first able to make out that she was going to the Grand Street Ferry. He then properly gave one whistle and ported his helm a little. This whistle was not answered at once, and according to the testimony of the witnesses for the ferryboat, was not observed; but shortly afterwards the ferryboat's first signal of two whistles was improperly given to the propeller when, as I find, she was at least one-third the way across from the New York shore. The propeller immediately answered with one. The pilot of the propeller testified that he ported his wheel only three spokes, but that it was enough to work in somewhat to the New York shore. During the short time that intervened I am persuaded that this change towards the New York shore could not have been more than 100 feet, and I consequently find as above stated that she was going down not more than 200 feet from the New York shore, if so much. The propeller was required by law to navigate in mid-river. Her position so near to the docks and with lights dim, if not out, involves the propeller also so directly in fault contributing to the collision, that she can recover but one-half her damages.

Decree accordingly.

THE COLUMBIA.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 77.

COLLISION BETWEEN STEAMBOATS.

The right of a ferryboat to an unobstructed ingress and egress to and from her slip does not absolve her from observing the rules of navigation when out in the river, and free to maneuver.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District court, Southern district of New York (92 Fed. 936), holding both vessels in fault for a collision between the steam ferryboat Columbia and the steam propeller Eagle in the East river, near the Grand Street Ferry slip on the New York side. The Eagle was condemned for keeping too close to the docks, and for dim lights; the Columbia for inattentive lookout, for not heeding the signal of one whistle given by the propeller, and for not reversing soon enough. The Eagle did not appeal.

Le Roy S. Gove, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The various issues of fact appear to have been most vigorously disputed upon the testimony of many witnesses who were examined in the presence of the district judge; and we do not find sufficient ground for rejecting his finding of fact, that the ferryboat gave a signal of two whistles when at least one-third of the way across from the New York shore, to which the propeller immediately answered with one, and that thereafter the ferryboat navigated in disregard of the propeller's signal, and persisted in the effort to cross her bows, although she (the Columbia) had the Eagle on her starboard hand. The claimant relies upon the numerous decisions sustaining the right of a ferryboat to an unobstructed ingress and egress to and from her slip. For obstructing such ingress the Eagle was condemned; but we concur with the district judge in the conclusion that these authorities do not absolve ferryboats from observing the rules of navigation when they are out in the river, and free to maneuver. However improper it may have been for the Eagle to get between the Columbia and her slip, the latter saw she was there, while she herself was yet at a safe distance (indeed, the district judge finds that, if her lookout had been attentive, she would have discovered this even sooner), and was advised by the Eagle's signal that she meant to stay there. Under these circumstances, we must concur with the district judge that it was improper navigation for the Columbia to keep on without reversing until she was in the very jaws of collision. The decree of the district court is affirmed, with interest and costs.

THE PAOLI.

(District Court, S. D. New York. November 5, 1897.)

COLLISION—STEAM AND SAIL—YAWING—LUFFING CLOSE—SHAVING—BOTH VESSELS AT FAULT.

When a tug was a mile from a schooner, going in opposite directions at night, the master of the tug saw the schooner's red light a little on his port bow and changed his course a little to starboard; he kept that course, with the schooner's red light at all times on his port bow, until he was within 400 or 500 feet from it, when the schooner luffed from three to four points across his bow, and was struck by the tug at an angle, between the main and mizzen chains, and sunk immediately. The schooner was without a lookout forward, and the evidence tended to show that she was continually yawing to windward, and that her master had either not seen the tug when he gave the order to luff, or supposed her ahead, or on her port bow. *Held*, that the tug was guilty of negligent navigation in attempting to pass too near to the schooner, and that the schooner was also negligent in not maintaining a proper lookout and in luffing, and that both vessels contributed to the collision, and that the damages should therefore be divided.

In Admiralty. Collision.

Robinson, Biddle & Ward, for libelants.

Cowen, Wing, Putnam & Burlingham, for claimant.

BROWN, District Judge. The above libel was filed to recover for the loss of the three-masted schooner A. E. Rudolph by a collision with the tug Paoli off Cape Cod, a little before 3 o'clock in the morning of May 9, 1897. The weather was clear and dark, but with starlight; the wind, about W. S. W. The vessels were on opposite courses, the schooner sailing nearly due north; the tug, with three barges in tow on long hawsers, going nearly due south. The schooner was struck by the stem of the tug on her starboard side, between her main and mizzen chains, and sank in about one minute in 12 fathoms of water. The master and all the rest of the crew, except the wheelsman, and the steward who was below, were lost. The tug ascribes the disaster to a sharp luff made by the schooner just before collision. The wheelsman of the schooner denies any luff, except about half a point, which he says was partially corrected by putting the wheel hard up with the master's help just before the collision. The libelants in aid of their case have called three witnesses from the schooner Knowles, which is alleged to have been near by. The respondent contends that the Knowles was not at the time in the neighborhood of the disaster.

I do not see any sufficient reason to doubt the near presence of the schooner Knowles as testified to by three of her crew. In one respect their testimony confirms the claimant's contention, namely, that the Rudolph did not keep a steady course to the northward, but was occasionally yawing or luffing. The Knowles, sailing about north, was being overhauled by the Rudolph, which was coming up on a course a little to the eastward of the Knowles and upon her starboard quarter. The men on board of her say the Rudolph was sometimes showing both lights, sometimes the green only, and some-

times the red only. When the wheelsman last noticed her she was showing her red light only, and this is the light that would at the same time be exposed to the Paoli, which was coming down in the opposite direction from the northward a little to the eastward of the Knowles' course. The mate of the Knowles says that not long before the collision, the Rudolph luffed so as to show both her lights to him, and that he changed the course of his own vessel a little, so as to show her cabin light to the Rudolph. It is not necessary to determine the precise moment when these changes were made.

The story of Johnson, the wheelsman of the Rudolph, as given in his testimony on the trial and in his sworn statement soon after the disaster, admits a luff of half a point only, a few moments before the collision, and he swears to an immediate endeavor of the master to counteract that luff by putting the wheel hard up. There was no lookout forward; and it is evident that the master had not seen the tug prior to the time when the order to "luff a little" was given; and whether he saw it then or not is not known. The wheelsman saw the tug a moment before collision just after the order "hard up" was given.

From these circumstances it might be inferred that the tug was coming down on the starboard bow of the schooner and that her lights were hidden by the schooner's sails, which were broad off to starboard.

The master of the tug, however, testifies positively that he had the port light of the Knowles on his port bow from the time the vessels were a mile apart; that he navigated the tug accordingly, and at that distance ported his wheel so as to bring the schooner's red light a point on his port bow; that he kept that course and had the schooner's red light all the time on his port bow until a few moments before collision, when the schooner being not over 400 or 500 feet away was seen to luff sharply, whereupon he ordered the engine reversed strong and put his helm to starboard. The Paoli a few moments after struck the Rudolph at an angle of three or four points on her starboard side, between her main and mizzen chains causing her to sink almost immediately as above stated.

It is evident that these accounts give no explanation of the collision except upon the gross fault of one or both of the vessels. They were originally upon nearly opposite courses and nearly head and head. If the tug a mile away had the schooner's red light a point on her port bow, she should and would have passed the schooner at a distance of 600 feet from her, unless the schooner decreased that distance by constant yawing or luffing. It could only be by the grossest carelessness of the schooner that the master, who was directing her navigation and walking athwart ships aft, should not have perceived any of the lights of the tug, had they been well on his port bow, as they must have been if the story of the tug is correct, that the schooner showed only her red light until very near. If the tug, however, was on his starboard bow, her lights might have been obscured by the schooner's sails, which were on the starboard side. Had the master seen the tug and perceived that she was on

his port bow, he would not have given the order to "luff a little"; and had he seen the tug on his starboard bow, he would have luffed earlier, if there was reason for luffing at all. I have no doubt therefore, that when the master gave the order to luff he either had not seen the lights of the tug at all, or supposed her ahead or on his starboard bow.

Notwithstanding the improbability that the master of the schooner should not have noticed the tug, if on his port bow, I feel constrained to accept the story of the pilot of the Paoli in that regard, in as much as no explanation of the agreed angle of collision seems possible except through the luff of the schooner, and also because of the partial confirmation of this by the Knowles' crew. For if the tug's course lay to the eastward of the schooner, that is, on the schooner's starboard side, so as to have the schooner's green light all the time in view instead of her red light, it is altogether incredible that the tug should have turned to the westward some three or four points so as to run directly into the schooner at such an angle. No possible motive or reason for such navigation can be conceived. I must find, therefore, that a luff of three or four points was made by the schooner; and that this finding is to some extent further confirmed by the proved heading of the schooner after she had sunk; although the possibility of some variation in her heading while going down prevents her position on the bottom from being regarded as conclusive, or more than confirmatory of other testimony.

While the schooner must, therefore, be held in fault for this luff, occasioned probably by the want of a proper lookout, the tug I am satisfied must also be held to blame for unreasonable and unnecessary close-shaving of the schooner.

I have already observed that if the pilot of the tug had set his course when a mile distant so as to have the schooner's red light a point off his port bow, he must have passed 600 feet to the westward of her, unless the schooner diminished that distance either by yawing or by intentional luffing. If the schooner kept thus hauling towards the tug, her pilot should have noticed the proof of it in the failure of the red light to draw off constantly more to port, long before the vessels had approached near each other. The only luff observed or complained of is stated by the pilot to have been when the vessels were not over 400 or 500 feet apart, and when the schooner bore about 2 or 3 points (probably less than that) off the tug's port bow. This must have been less than half a minute before collision. The pilot of the tug immediately ordered to reverse strong. Her witnesses estimate this at about a half minute before collision; but the second engineer who was in charge of the engine, says he got no more than 15 or 20 revolutions backward, which would occupy less than a quarter of a minute; and the first engineer, who was awokened by the signals to reverse, did not have time to get on his overalls before the collision occurred. These circumstances show that the vessels must have been very near each other, probably at no greater distance than that stated by the pilot of the tug, when the luff referred to took place; and that the schooner, therefore, could

not have gone more than 200 feet between that time and the collision. Assuming that in going so short a distance, she was able to luff as much as three or four points, a drawing of the curve of her course in making such a change in that distance, will show that she could not have gone more than 50 to 75 feet to the westward of the line of her previous course by such a luff; and yet so small a change in the schooner's position to the westward must have brought the tug from the schooner's port side, where the tug was intending to pass, to the schooner's starboard side where the collision occurred. This shows that the schooner when she luffed must have been less than two points on the tug's port bow. It also shows that the course of the tug must have been in fact directed extremely close to the port side of the schooner, constituting a case of extreme close-shaving, which has been repeatedly condemned as unjustifiable and blamable navigation. It is the duty of the steamer says Waite, C. J., in *The Farnley*, 8 Fed. 629, 637, "to give a passing vessel a wide berth when it can be done and to run no risks of errors or miscalculations." The same duty was stated by Mr. Justice Grier in *Haney v. Packet Co.*, 23 How. 292; *The Virginia Ehrman*, 97 U. S. 316. In the case of *The Benefactor*, 14 Blatchf. 254, 256, Fed. Cas. No. 1,298, a cable's length for a steamer going ten knots an hour was held too close. In *The Zodiac*, 9 Ben. 171, 176, Fed. Cas. No. 18,217, Blatchford, J., said "starboarding a point was not enough." And see *The Laura V. Rose*, 28 Fed. 104, 109; *The City of St. Augustine*, 52 Fed. 237; *The Dorian*, 68 Fed. 1018; *The Chatham*, 3 C. C. A. 161, 52 Fed. 396.

From the testimony of the witnesses from the tug and the Knowles, I have no doubt that the schooner was continually working to the westward of her intended course by yawing, as the wind was considerably aft of her beam; and this was sure to result, unless constantly counteracted by a port helm. But the steamer was bound to guard against this well-known liability, by not making any close shave and by keeping away by a reasonably safe margin. A proper attention to the schooner's approach would have shown that the tug was drawing away from her too slowly. It is possible that the master's order to "luff a little" may have been given when he suddenly saw the tug near, and from lack of previous observation erroneously supposed that she was going to the eastward of him. As he was lost, the real explanation is unknown.

If the schooner had previously maintained a proper lookout forward, evidently no such change of course as was caused by this luff would have been made; or if it was induced at the last moment by fear, through the very close approach of the tug, the whole blame might have been put on the latter. But the absence of any previous lookout and the distance of the tug when the schooner luffed, preclude the schooner from receiving this advantage. It is certain, however, that if the tug had kept away at a reasonable distance to the westward, no collision could have occurred.

As both vessels thus contributed to the collision, the damages should be divided, as in the cases above cited.

Decree accordingly.

THE PAOLI.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 67.

COLLISION—BOTH VESSELS AT FAULT—DAMAGES—DIVISION.

Where the evidence in an action for collision showed that both vessels were in fault, a decree dividing the damages between them was proper.

Appeal from the District Court of the United States for the Southern District of New York.

H. Galbraith Ward, for libelants.

Charles C. Burlingham, for claimant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This is an appeal by both parties from a decree of the district court for the Southern district of New York in a collision case, in which the court held that both vessels were in fault and divided the damages. 92 Fed. 940. The collision occurred off Cape Cod, at about 3 o'clock on the morning of May 9, 1897, between the small schooner, Annie E. Rudolph, laden with a cargo of iron pipe on and under deck, bound to Boston, and sailing nearly due north, and the steam tug Paoli, a powerful vessel, with three barges in tow on long hawsers, bound to South Amboy, and going nearly due south, and provided, as was also each vessel of the tow, with proper lights. The night was dark, with clear starlight, the wind was about W. S. W., and the schooner was on her port tack. She was struck on her starboard side, between her main and mizzen chains, and sank forthwith. The master and the crew, except the wheelsman and the steward, were lost. The libel was filed by the owners of the schooner.

The questions in the case are entirely of fact, and within a narrow compass. The testimony is clearly stated, and is carefully commented upon by the district judge, and need not be repeated here; for we entirely concur in his conclusions, both as to negligence of the tug and of the schooner, although we place less reliance than the district judge apparently did upon the evidence as to the extent of the schooner's luff, which was derived from her heading after she sank. The decree of the district court is affirmed, but, as both parties appealed, without interest or costs of this court.

REJALL v. GREENHOOD et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1899.)

No. 433.

1. JUDGMENT AS ADJUDICATION — PARTIES CONCLUDED — JUDGMENT AGAINST TRUSTEE.

In a suit to set aside an assignment for the benefit of creditors, the assignee represents all the beneficiaries of the trust; and a judgment against him is binding upon such beneficiaries, though they were not parties to the suit.

2. EQUITY—EFFECT OF SUSTAINING PLEA IN BAR.

Where a plea in bar meets all the claims made in the bill, and is sustained on issue joined, the defendant is entitled to the benefit of such finding, in a decree dismissing the bill; and the complainant cannot insist that it should have been retained for the purpose of granting him relief not prayed for, and inconsistent with the theory upon which the suit was brought.

Appeal from the Circuit Court of the United States for the District of Montana.

This action was instituted by the appellant against the appellees for an accounting as to certain goods and property alleged to have been wrongfully taken from an assignee, in which goods and property appellant claims to have had an interest or equity. The facts leading to this action were the following: Isaac Greenhood and Ferdinand Bohm, doing business under the firm name of Greenhood, Bohm & Co., in the city of Helena, Mont., and in the city of New York, on the 12th day of February, 1892, executed and delivered a deed of assignment, for the benefit of all their creditors, to one Max Kahn, as assignee (one of the defendants in this action), who accepted the assignment, took possession of the assigned property, and proceeded with the execution of the trust. There were a number of preferred creditors, among whom was the appellant herein. The defendant National Bank of Helena, also a preferred creditor under the assignment, on the 13th day of February, 1892, commenced an action in the district court of Lewis and Clarke county, Mont., against the defendants Greenhood, Bohm & Co., to recover judgment for the sum of about \$35,000. A writ of attachment was issued, and delivered to the sheriff, who seized and levied upon the property formerly assigned to Kahn. On April 8, 1892, the defendant bank recovered a judgment for the amount of its claim; and on the 18th day of April, 1892, execution was issued upon this judgment, and delivered to the sheriff, who then had in his possession the stock of goods and property before attached. The sheriff returned the execution unsatisfied; stating that he could find no property in Lewis and Clarke county out of which to satisfy said execution, except the property attached, and which was included in the assignment to the defendant Kahn. On the 21st day of April, 1892, the defendant bank commenced an action in equity in the same court against Isaac Greenhood, Ferdinand Bohm, and Max Kahn for the purpose of setting aside the assignment of Greenhood, Bohm & Co. to Kahn, on the following grounds: (1) Want of sufficient description of the property pretended to be conveyed; (2) because said pretended assignment was made and executed with the intent and for the purpose of hindering, delaying, and defrauding the plaintiff herein, and the other creditors of the firm of Greenhood, Bohm & Co.; (3) because said pretended assignment was not executed by all the members of the firm of Greenhood, Bohm & Co., and all the owners of the property thereby pretended to be conveyed. In its bill of complaint the defendant bank alleged that it sued for the benefit of all creditors, and asked for the appointment of a receiver of all the assets and property described in the said assignment. The court on the 27th day of April, 1892, appointed William Muth receiver of the assets of Greenhood, Bohm & Co., whether in the hands of the sheriff, or of said Kahn, as assignee. Immediately thereafter all of said property was delivered over to the said receiver, and was disposed of by him under the order of the state court. On July 19,

1892, and during the pendency of the case in the state court, the appellant herein filed his bill in the United States circuit court, claiming that he was a beneficiary under the trust of Kahn, and that the defendant bank, the receiver, the sheriff, Jefferis, and the two Hershfields, fraudulently conspired to, and did, seize all of the assigned property; and they were asked to account therefor to the appellant, and pay over the income and profits in satisfaction of his debt. He proceeded upon the theory that he had an equitable interest in the property under the assignment, and was entitled to an accounting for all the property received by the defendants under the proceedings in the state court, and to a distribution of the proceeds of the same to him and the other beneficiaries under the assignment. The case of the defendant bank against Greenhood, Bohm, and Kahn in the state court proceeded to trial without any other creditor of Greenhood, Bohm & Co. joining in its prosecution; and, as to the Merchants' National Bank, it was decreed that the assignment was executed and delivered with the intent to hinder, delay, and defraud the creditors of said firm of Greenhood, Bohm & Co., and was void as to the bank and the other creditors not assenting thereto. Thereupon, in this case in the circuit court, by permission granted by the court (60 Fed. 784), pleas in bar were presented and filed by defendants, setting forth that the suit in the state court had been determined, and that it had been adjudicated that the assignment was fraudulent and void. Replications to the pleas in bar were filed by appellant. The pleas were referred to a master in chancery, who heard testimony, and found, among other things, that the court had jurisdiction of the subject-matter of the action in the district court wherein the Merchants' National Bank of Helena was plaintiff, and Greenhood, Bohm, and Kahn were defendants, and of the parties thereto; that the appellant herein, Ernst Rejall, was a beneficiary under the deed of assignment made by said Greenhood, Bohm & Co. to Max Kahn; that a trial of said action was duly had, and judgment entered therein declaring the said deed of assignment fraudulent and void; that an appeal was duly had from said judgment to the supreme court of the state of Montana; that the said judgment was by the said supreme court duly affirmed (41 Pac. 250), and was then in full force and effect. Exceptions were filed to the report of the master by both parties, which were by the court overruled. Thereupon the case came on to be heard, and the court sustained the plea. Thereafter, on July 1, 1897, a final decree was entered dismissing complainant's bill.

Chas. H. Cooper and Sanders & Sanders, for appellant.

McConnell, Clayberg & Gunn, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The principal question to be determined is whether the appellant, upon the facts stated in his bill, is bound by the judgment recovered in the action in the state court, declaring the assignment of Greenhood, Bohm & Co. to Max Kahn fraudulent and void, and canceling and setting aside the same. The general rule is that a judgment or decree is not evidence against one who is a stranger to the proceeding; but to this rule there is at least one exception, and that is, in an action brought in hostility to a trust,—to set aside a deed or other instrument by which the trust was created, and to procure it to be declared a nullity,—the suit may be maintained without the presence of the beneficiaries, since the trustee represents all, and defends for all. A decree rendered in the suit binds them as effectually as if they had been made parties, and is conclusive against them. Pom. Code Pl. § 357; Russell v. Lasher, 4 Barb. 232; Scudder v. Voorhis, 5 Sandf. 271; Rogers v. Rogers, 3 Paige, 379; Wakeman v. Grover, 4 Paige, 23; Winslow v. Railroad Co., 4 Minn. 313 (Gil. 230);

Chew v. Brumagen, 13 Wall. 497; **Kerrison v. Stewart**, 93 U. S. 155; **Vetterlein v. Barnes**, 124 U. S. 169, 8 Sup. Ct. 441; 2 Enc. Pl. & Prac. § 904. The pleas of the defendants in this case set up a judgment of this character affirmed by the highest court in the state, and the plaintiff, being a beneficiary under the assignment, was bound by it.

It is unnecessary to inquire into the regularity of the attachment proceedings in that case, since that question is disposed of by the judgment.

The appellant claims further that the judgment of the state court only operated to set aside the assignment as to the bank "and other creditors not assenting thereto," and that, claiming under the assignment, he has an interest in the surplus remaining after the satisfaction of the bank's claim, and that such interest entitles him to maintain this suit. The appellant's bill of complaint does not, however, proceed upon that theory. It does not seek to enforce appellant's claim against the surplus. It charges that certain acts of the defendants were in violation of his rights under the assignment. These acts were the proceedings taken in the state court which resulted in the judgment set up in the plea. The complainant joined issue upon this plea, and the facts were found in favor of the defendants. The plea having met and satisfied all the claims of the bill, the defendants were entitled to the benefit of the finding in a decree dismissing the bill. **Horn v. Dock Co.**, 150 U. S. 610, 14 Sup. Ct. 214. The decree of the circuit court dismissing the bill of complaint is therefore affirmed.

PECK, STOW & WILCOX CO. v. FRAY et al.

(Circuit Court, D. Connecticut. February 27, 1899.)

COSTS—EQUITY—DOCKET FEE.

Only one attorney's docket fee is taxable in an equity case, and that only on the final disposition of the case, unless upon motion for rehearing allowed, when an attorney's docket fee is taxable in favor of the prevailing party upon each hearing.

On Motion to Retax Costs.

This was a patent suit, brought for infringement of United States letters patent to Robert O. Ellrich, February 19, 1884, for improvement in pawls and ratchets, in which a motion for injunction pendente lite was argued July 19, 1898, before the circuit court, which on July 22d filed an opinion (88 Fed. 784) granting the motion as to claims 2 and 3 of the patent. From the decree authorized by this opinion an appeal was taken to the circuit court of appeals for the second circuit, which on the 15th of November, 1898, rendered a decision reversing the decree of the circuit court, with costs of the appeal. 92 Fed. 1021. Upon the entry of the decree for costs in pursuance of the mandate of the court of appeals, the clerk of the circuit court taxed costs in favor of the appellants as follows, viz.: (1) Defendants' costs of appeal transcript to court of appeals; (2) appellants' costs in court of appeals, as indorsed on the mandate; (3) clerk's costs in the circuit court for filing and recording mandate of the court of appeals, and the decree thereon; (4) attorney's docket fee in the circuit court for the district of Connecticut, on the ground that a judgment for costs had been arrived at, which might be final. From this taxation complainant's solicitor appealed as to the last item, and the parties were heard on briefs.

Wm. E. Simonds, for plaintiff.
A. M. Wooster, for defendants.

PER CURIAM. An attorney's docket fee, under section 824, Rev. St. U. S., is only taxable upon final hearing, or upon a rehearing allowed upon the merits of the case, on demurrer to pleadings, and then only when such hearing disposes of the case. The decree in this case, although for costs, and authorizing execution, is final only as to an interlocutory motion.

DE ROUX et al. v. GIRARD et al.
(Circuit Court, E. D. Pennsylvania. April 5, 1890.)

No. 55.

COSTS—FINAL HEARING IN EQUITY—DOCKET FEE.

Where defendant demurred to a bill in equity on the ground that it did not connect her with the cause of action, and plaintiff filed a replication, and, before the issue of law was argued, plaintiff discontinued the suit pursuant to a stipulation whereby defendant agreed to such a course, there was no "final hearing," within Rev. St. § 824, entitling defendant to a docket fee of \$20.

Appeal from Taxation of Costs.

Carrie B. Kilgore, for complainants.
H. A. Ingram, for respondents.

McPHERSON, District Judge. Among other defendants, this bill in equity was brought against Caroline G. Hunsworth, who demurred upon the ground that the bill did not connect her with the plaintiffs' cause of action. The plaintiffs filed a replication, but the issue of law thus formed was neither argued nor decided; for within a few weeks the plaintiffs discontinued the bill against Mrs. Hunsworth. Her counsel regards this disposition of the case as a "final hearing," within the meaning of section 824 of the Revised Statutes, and asks to be allowed the docket fee of \$20. The decisions are not in complete harmony upon the question what constitutes a final hearing; but we need not examine them now, for it further appears that Mrs. Hunsworth signed the following stipulation: "I hereby agree to the above discontinuance;" and this, as it seems to us, relieves the pending controversy of all difficulty. We think that the case was disposed of by consent of parties, and not by any action that could be construed as "a hearing," either final or otherwise. So far as the docket fee of \$20 is concerned, the appeal is sustained.

EASTERN OREGON LAND CO. v. COLE et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1899.)

No. 453.

1. EJECTMENT—DEFENSES—ADVERSE POSSESSION—NOTORIOUS OWNERSHIP—EVIDENCE.

Where, in ejectment, defendant's possession of the land in controversy was admitted, evidence that his grantor had been uniformly considered the owner, in the community where the land was situated, for a period sufficient to establish defendant's claim of title by adverse possession, was admissible to show the character of plaintiff's possession.

2. SAME—INSTRUCTIONS—ADVERSE POSSESSION—DEFINITION—COLOR OF TITLE.

A charge that if plaintiff and his predecessors in interest had held "adverse, actual, open, and continuous possession of the premises in controversy for a period of 10 years, a complete title was thereby acquired," correctly defines "adverse possession," since the word "adverse," is a general term, and includes a claim under color of title.

3. REVIEW — OMISSION TO CHARGE — FAILURE TO REQUEST INSTRUCTIONS — EFFECT.

Where no requests to charge are made, an omission to charge on a particular point, or an objection that a particular instruction was not sufficiently definite, cannot be assigned as error on appeal.

In Error to the Circuit Court of the United States for the District of Oregon.

This was an action of ejectment commenced by the plaintiff in error in the circuit court of the United States for the district of Oregon on the 26th day of September, 1896, against T. J. Cole, J. L. Cole, and Emory Cole, to recover the possession of certain lands in Malheur county, Or., within what is known as the "Dalles Military Road Land Grant," and for damages in the sum of \$3,600 for withholding the same. The plaintiff alleged ownership of the land in fee simple, derived under an act of congress entitled "An act granting lands to the state of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia river, to Fort Boise, on the Snake river," approved February 25, 1867. 14 Stat. 409. It was further alleged: That the act of congress granted to the state of Oregon certain lands to aid in the construction of a military wagon road from Dallas City, on the Columbia river, by way of Watson, Canyon City, and Mormon or Humboldt Basin, to a point on Snake river opposite Ft. Boise, in Idaho territory. That these lands consisted of alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road. That the lands thereby granted to the state should be disposed of only in the following manner: "That is to say, that the governor of said state shall certify to the secretary of the interior that ten consecutive miles of said road are completed, then a quantity of land hereby granted, not to exceed thirty sections, shall be sold, and so on from time to time until the road shall be completed." That on the 20th day of October, 1868, the legislative assembly of the state of Oregon passed, and the governor of the state approved, an act entitled "An act dedicating certain lands to the Dalles Military Road Company." That this act set forth the act of congress, and granted to the Dalles Military Road Company all lands, right of way, rights, privileges, and immunities granted or pledged to the state of Oregon by said act of congress, and also granted and pledged to said the Dalles Military Road Company all moneys, lands, rights, privileges, and immunities which might thereafter be granted to the state of Oregon to aid in the construction of said road. That prior to the 23d day of June, 1869, the Dalles Military Road Company surveyed and definitely located the line of its said wagon road between the points and upon the route designated in said act of congress and in the said act of the legislative assembly of the state of Oregon, and had fully constructed and completed said road, and filed in the executive office of the governor of the state of Oregon a plat or map of the said Dalles Military Road, upon which was traced and,

shown the definite location of said wagon road from its terminus in the city of Dalles, Or., to its terminus on Snake river, and the lands of the grant of land in place made to the state of Oregon by said act of congress. That on the 23d day of June, 1869, the governor of the state of Oregon certified that the plat or map of said Dalles Military Road had been duly filed in the executive office; that it showed the location of the line of the route upon which said road was constructed, in accordance with the requirements of the act of congress, and with the act of the legislative assembly of the state of Oregon; that he had made a careful examination of said road since its completion, and that the same was built in all respects as required. That the Dalles Military Road Company forthwith filed in the office of the secretary of the interior of the United States a map or plat of the said military road, showing the definite location thereof with reference to the public surveys so far as then made, and the said certificate of the governor of the state of Oregon certifying to the construction of said road, and that on the 13th day of December, 1869, the commissioner of the general land office of the United States, by an order of the secretary of the interior, withdrew from sale the odd-numbered sections within three miles from each side of said wagon road, as delineated and shown by said map, in favor of the Dalles Military Road Company. That the lands described in the complaint are situated within three miles of the line of said road, as located and constructed and as shown upon said map. That they are parts of odd-numbered sections, as shown by the public surveys, and are part of the lands granted to the state of Oregon by the act of congress of February 25, 1867. That the Dalles Military Road Company during the year 1896, and prior to the commencement of the action, duly selected, as part of its land in place, the lands described in the complaint. That the plaintiff, by virtue of mesne conveyances from the Dalles Military Road Company, has succeeded to all the right, title, and interest of said the Dalles Military Road Company in and to said lands, and is now the owner thereof in fee simple, and is entitled to the immediate possession of the same. That the defendants are in possession of the premises, and wrongfully withhold the same from the plaintiff, and have wrongfully withheld the possession thereof from plaintiff for six years last past. In the defendants' amended answer, the defendants T. J. Cole and J. L. Cole deny that they are in possession of the premises, and disclaim any interest therein. The defendant Emory Cole alleges that he was, and for a long time prior to the filing of the amended answer had been, the owner in fee and in possession of the land in controversy, through mesne conveyances from the state of Oregon; that the defendant and his predecessors in interest have held actual, open, notorious, continuous, adverse, and exclusive possession of said lands, under claim of ownership and color of title, at all times since July 1, 1869; that he and his predecessors in interest have made lasting and valuable improvements on said premises, and that the plaintiff has not been seized or possessed of said premises, or any portion thereof, within a period of more than 10 years last past before the commencement of this action. For a second defense the defendant Emory Cole alleges that the land in controversy was granted to the state of Oregon by virtue of the provisions of the swamp-land grant made by congress March 12, 1860, entitled "An act to extend the provisions of an act to enable the state of Arkansas, and other states, to reclaim the swamp lands within their limits, to Minnesota and Oregon, and for other purposes," and that the state of Oregon sold said lands to defendant J. L. Cole under the provisions of the state swamp-land act approved October 26, 1870, entitled "An act providing for the selection and sale of the swamp and overflowed lands belonging to the state of Oregon," by making, executing, and delivering to said J. L. Cole a deed dated March 8, 1883, a copy of which deed is set out in the amended answer. The amended answer was filed during the progress of the trial, and it was stipulated that plaintiff's reply to the original answer should be taken and deemed as a reply to the amended answer. In this reply, plaintiff admits that the defendant Emory Cole, at the time of the commencement of the action, and for six years prior thereto, had been in possession of the lands in dispute, but alleges that the possession was wrongful and unlawful, and that the defendant wrongfully and unlawfully withheld the same from plaintiff. Plaintiff further denies that the lands were granted to the state of Oregon by virtue of the provisions of the swamp-land grant, and denies that the state of Oregon sold said lands

to the defendant J. L. Cole under the provisions of the state swamp-land act, or otherwise, by making, executing, or delivering to the said J. L. Cole a deed, a copy of which is set forth in defendants' answer. Plaintiff also denies knowledge, or information sufficient to form a belief, as to whether or not the state of Oregon ever pretended to make, execute, or deliver to the said J. L. Cole a deed, a copy of which is set forth in the answer, or whether J. L. Cole ever conveyed all or any of his alleged right, title, or interest in or to said lands to the defendant Emory Cole. The cause was tried before a jury, and resulted in a verdict and judgment for the defendant Emory Cole.

Nixon & Dolph and Dolph, Mallory & Simon, for plaintiff in error.
King & Saxton and S. T. Jeffreys, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts of the case as above, delivered the opinion of the court.

The errors assigned are nine in number. The first four relate to the admission of testimony on behalf of the defendant as to reputed ownership of the land in question from the year 1872 to the commencement of this action. Three witnesses were asked, in slightly different form, who was considered the owner of the land in the community in which the land was situated, between the years 1872 and 1895 or 1896. To these questions the witnesses answered, "J. L. Cole." The title of the defendant, so far as the questions now before the court are concerned, is founded upon the adverse possession of himself, and parties through whom he derived his interest, for a period exceeding the statutory time which bars an action for the recovery of land in the state of Oregon. It is provided in sections 3 and 4 of the Code of Civil Procedure of the State of Oregon that actions at law shall only be commenced within the period prescribed after the cause of action shall have accrued:

"Within ten years, action for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within ten years before the commencement of the said action." Hill's Ann. Laws Or. pp. 131, 132.

Adverse possession of real property for the period mentioned in the statute is a bar to an action by the owner to recover possession; but such possession by the defendant must be actual, hostile, exclusive, open, notorious, and continuous for the whole period of 10 years. If any of these constituents is wanting, the possession will not effect a bar of the legal title. *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720; *Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. 230. The evidence of reputed ownership of the land in controversy, standing alone, did not tend to establish either one of these elements of possession; but where the possession of the defendant has been admitted by the plaintiff, as in this case, the evidence was admissible to prove the character of that possession. In *Land-Grant Co. v. Dawson*, 151 U. S. 586, 14 Sup. Ct. 458, the defendant pleaded adverse possession of the lands claimed by him for more than 10 years next before the commencement of the suit, and that the plaintiff's right to sue for the same accrued more than 10 years prior thereto. The lower court admitted testimony to the effect that the land claimed by the defendant was gen-

erally reputed to belong to him; and the supreme court held that, claiming as the defendant did by open, notorious, and adverse possession, it was competent to prove that it was generally understood in the neighborhood, not only that the defendant pastured his cattle upon these lands, but that he did so under a claim of ownership, and that his claim and the character of his possession were such that he was generally reputed to be the owner. The court said further that, while this testimony would be irrelevant in support of a paper title, it had an important bearing upon the notoriety of the defendant's possession. In other words, it was not admissible as tending to prove possession, but to show that the possession otherwise established was open and notorious. In the record before us, the defendants' reputed ownership of the land does not stand alone. It was alleged by the plaintiff in its complaint that the defendant was in possession of the land at the time of the commencement of the suit, and it was admitted in its reply to the defendants' amended answer that he had been in possession for six years prior thereto. It must be presumed that the testimony was admitted for the purpose of explaining that possession, and not to establish an admitted fact. For this purpose it was clearly admissible.

The remaining errors assigned relate to instructions to the jury. The court instructed the jury as follows:

"If, during any of the time after January 1, 1872 (the date, as I understand it, when the company's legal title became so far perfected that it might have brought its action for ejectment), until the commencement of this action, Emory Cole and his predecessors in interest, or either of them, have held adverse, actual, open, continuous, and exclusive possession of the premises in controversy for a period of ten years, a complete title was acquired, as against the plaintiff and its predecessors in interest."

It is objected to this instruction that it does not correctly define "adverse possession." Plaintiff contends that the jury should have been further instructed that such possession, to be effective, must have been hostile, notorious, and under a claim or color of title. The court did instruct the jury that the possession must be "adverse." The word "adverse," as used in this connection, is a general term, and, in legal signification, involves the element of hostility under a claim or color of title; and this would be the reasonable and natural interpretation given to the instruction by the jury. But if the plaintiff deemed the word too general, or not sufficiently definite and clear, it was its duty to point out the omission, and request an instruction that would clearly and distinctly indicate to the jury all the necessary elements of adverse possession. Without such a request, the omission cannot be assigned as error.

In *Express Co. v. Kountze*, 8 Wall. 353, the court said:

"It is the usual practice for the presiding judge at a nisi prius trial, in his charge to the jury, to take up the facts and circumstances in proof, explain their bearing on the controverted points, and declare what are the legal rights of the parties arising out of them. If the charge does not go far enough, it is the privilege of counsel to call the attention of the court to any question that has been omitted, and to request an instruction upon it, which, if not given, can be brought to the notice of this court, if an exception is taken. But the mere omission to charge the jury on some one of the points in a case, when it does not appear that the party feeling himself aggrieved made any request of the court on the subject, cannot be assigned for error."

So, in Tweed's Case, 16 Wall. 504, where exceptions were taken to the giving of certain instructions to the jury, and refusal of the court to give certain others, it is said by Mr. Justice Clifford:

"Reasonably viewed, it is clear that the instruction given covered every allegation of the claim, and every ground of defense set up both in the preliminary exception and in the amended answer. Instructions given by the court at the trial are entitled to a reasonable interpretation, and, if the propositions as stated are correct, they are not, as a general rule, to be regarded as the subject of error on account of omissions not pointed out by the excepting party, as the party aggrieved, if he supposes the instructions given are either indefinite or not sufficiently comprehensive, is always at liberty to ask that further and more explicit instructions may be given; and, if he does not do so, he is not entitled to claim a reversal of the judgment for any such supposed error. Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the court to the jury, where it appears that the complaining party made no effort at the trial to have the point explained."

To the same effect are Insurance Co. v. Snyder, 93 U. S. 393; Shutte v. Thompson, 15 Wall. 164; Carter v. Carusi, 112 U. S. 484, 5 Sup. Ct. 281; Railway Co. v. Volk, 151 U. S. 78, 14 Sup. Ct. 239.

The remaining errors assigned relate to instructions of the court, to which further objections are made that they do not correctly state all the elements constituting adverse possession. What has been said concerning the objections to the preceding instruction is equally applicable to these objections, and for the same reason we are of the opinion that they cannot be assigned as errors. We find no error in the record. The judgment of the circuit court for the district of Oregon is therefore affirmed.

TEXAS & P. RY. CO. v. WILDER et al.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1899.)

No. 722.

1. DEATH BY WRONGFUL ACT—ACTION BY PARENTS—MEASURE OF DAMAGES.

In an action by parents, under the statute of Texas, to recover for the death of their minor son, alleged to have been due to the negligence of defendant, it is proper for the jury, in assessing the damages, to consider what reasonable expectations the plaintiffs had of pecuniary benefits to be received by them from their son after he had reached his majority, as the statute provides for full pecuniary compensation to the parents for the loss of their son, and the damages are not restricted to the loss of benefits to which the plaintiffs had a legal right.

2. DEPOSITIONS TAKEN IN STATE COURT—USE IN FEDERAL COURT AFTER REMOVAL.

Depositions taken in a cause before its removal from a state court cannot be used on the trial in the federal court, where testimony taken in such court, under Rev. St. U. S. § 863, could not be read under the same circumstances, as where the witnesses are living within 100 miles of the place of trial and their oral testimony can be obtained.

Boarman, District Judge, dissenting, on the facts shown in this case.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Joseph H. Wilder and his wife filed suit in the district court of Harrison county, Tex., against the Texas & Pacific Railway Co., for damages resulting

from the killing of their son, Frank G. Wilder. The son of the plaintiffs was in the employ of the defendant corporation as fireman on a switch engine. The plaintiffs alleged that, while their son was standing upon the apron that covers the space between the engine and tender, where they are joined together, and while he was performing his work as fireman, the apparatus which was used for coupling the engine and tender together gave way and broke, thus separating the engine from the tender, and causing their son to suddenly fall between the engine and tender, upon the railway track, where he was crushed to death by the tender and several cars which were attached to the engine. The petition further alleged that Frank G. Wilder was 18 years and 5 months old at the time of his death; that he was the only son of the plaintiffs, and was earning, at the date of his death, \$60 per month, all of which he contributed to plaintiffs for their support; that he was sober, healthy, robust, and industrious; that his capacity to earn money would have rapidly increased from the day of his death up to the age of 21 years, and that he would have earned, for the last two years of his minority, the sum of \$150 per month, which he would have contributed to the support of plaintiffs, all of which earnings were relied upon by plaintiffs as a help for their support; that the capacity of Frank G. Wilder to earn money after majority would have increased to the sum of from \$150 to \$250 per month for a period of at least 30 years, and that he would have contributed that amount to their support as long as they and he lived; that the plaintiff Joseph H. Wilder is 52 years of age, and his wife is 46 years of age, and that they relied upon their son to contribute his earnings after he attained the age of 21 to help support them in their old age, when they should become unfitted to earn a livelihood; that the locomotive and tender were in bad repair, and unfit for the use to which they were being applied, in this: that the coupling apparatus was defective and out of repair, and that the safety chains were unfit for the use to which they were applied,—all of which was known to the defendant corporation, or could have been known to it by the exercise of ordinary care, and was unknown to Frank G. Wilder. Certain defects in the engine and the air brake were also averred. The defendant corporation applied to the state court for the removal of the cause to the federal court. The application was at first refused by the state court, but subsequently, and some months after the filing of the suit, the application for the removal was granted, and the cause was removed to the federal court. Before the determination by the state court of the application for the removal, the defendant corporation filed a general denial and answer in the state court. As special defenses, the defendant corporation pleaded that Frank G. Wilder knew, or could have known, of the defects in the engine and coupling, and therefore assumed the risk which might result from those defects; also that the plaintiffs consented to the employment of their son, and released all claim to his wages in consideration of his obtaining the employment; also that Frank G. Wilder was injured by the negligence of his fellow servant, the engineer on the switch engine, by the rough manner in which the engine was handled, and by the failure of the engineer to see that the engine was in good working order. The case was tried in the federal court, and resulted in a verdict of \$3,000 against the defendant corporation, apportioned as follows: \$2,000 for Mrs. Lurena Wilder, the mother of the decedent, and \$1,000 for Joseph H. Wilder, the father.

There are four specifications of error. The first sets out that the court erred in permitting the depositions of three witnesses to be read in evidence. These were depositions which were taken in the state court before the removal. The second specification of error complains that the court, in substance, charged the jury that the plaintiffs could recover damages for the loss of prospective benefits to them after their son should have reached his majority. The third specification of error complains that the court refused, at the request of the defendant corporation, to give the following special charge: "In this case you cannot allow any damages for what Frank Wilder might have contributed to his parents after he became 21 years old; that would be too speculative and uncertain. You can only allow the present value of the amount Frank Wilder would have earned during his minority, after deducting the expenses of the support of said Frank Wilder during minority." The fourth specification of error addresses itself to the refusal of the court to give the following special charge: "In this case there is no

direct evidence as to whether the deceased, Frank Wilder, knew of the condition of the coupling between the engine and tender. Now, if you believe it was a part of said Wilder's duty to examine and inspect said engine, then, in the absence of other evidence, he would be presumed to know of the actual condition of said engine and the coupling appliances."

T. J. Freeman and F. H. Prendergast, for plaintiff in error.

W. C. Lane and W. H. Pope, for defendant in error.

Before McCORMICK, Circuit Judge, and BOARMAN and PARLANGE, District Judges.

PARLANGE, District Judge, after stating the case, delivered the opinion of the court.

There is no merit in the second and third specifications of error, which are founded upon the false assumption that the damages in the cause were restricted to the benefits which the plaintiffs might have derived from the services of their son up to the time of his majority. We are clearly of opinion that the damages should not have been so restricted, and that in this cause it was proper for the trial judge to charge the jury that, in assessing the damages, they had a right to consider what reasonable expectations the plaintiff's had of pecuniary benefits to be received by them from their son after he should have reached the age of majority. The statutes of the state of Texas which give a right of action in cases like the one at bar provide, among other matters, that a suit may be brought for actual damages on account of injuries causing the death of any person by the negligence or carelessness of the owner of any railroad, or of any person in charge or control of any railroad, or of their servants or agents. The right of action is also given "when the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another." The action is declared by the statutes to be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the decedent. The statutes provide, further, that, in the actions just stated, "the jury may give such damages as they may think proportioned to the injury resulting from such death." Rev. St. arts. 2899, 2909. There is nothing in the statutes just referred to which limits the right of the parents in the present cause to the recovery of compensation for the services of their son during his minority. On the contrary, those statutes, as applied to the present cause, provide for full pecuniary compensation to the parents for the loss of their son. This is shown both by the language conferring the right of action and by the power given the jury in assessing the damages.

It has often been held, in similar cases, that the damages are not restricted to the loss of benefits to which the plaintiff had a legal right. It is plain that the compensation to the parents, under the statutes, would not be adequate if it was limited to the loss of the minor's services up to the time of his majority. If the objection be that it is difficult to ascertain the amount of the damages caused by loss of benefits after majority, it should be noted that this objection might also be made, although perhaps with less force, to the damages for loss of services before majority. There can be no certainty that a child will live to majority and perform services for his parents. If he

lives, he may sicken, and become a burden to his parents. Still, it is not contended, as to damages up to a child's majority, that the difficulty in ascertaining them is a sufficient ground for rejecting a claim for them. It is evident that there is much difficulty in assessing damages resulting from loss of life, and that strict accuracy cannot be expected in a matter involving so much uncertainty. Yet the right of recovery for injuries resulting from death being plainly given, the courts, availing themselves of all the circumstances which may assist them in reaching a proper conclusion, must, whenever possible, afford the relief which the lawmaker intends to give.

The counsel for the plaintiff in error state in their brief that there is a conflict of authority on the point which we are now examining. It is plain to us that a number of cases which seem to hold in opposition to our views in this matter were founded upon statutes which restricted the right of recovery. In 3 Suth. Dam. §§ 1273, 1274, it is said that:

"In several states, the damages for the death of a child have been limited to the pecuniary benefits the parents had a legal right to claim for the child's services, and therefore the courts have confined the estimate to the period of minority. This restriction is believed to be contrary to the general principle on which pecuniary damages are allowed in favor of all classes who are next of kin to the deceased. That principle is that the jury should calculate the damages, in reference to the reasonable expectation of benefits as of right or otherwise, from the continuance of the life. Legal ability alone is not the test of the injury in respect of which damages may be recovered under the statutes, but the reasonable expectation of pecuniary advantage by the relative remaining alive may be taken into account. * * * Statutes which give the right to recover for the benefit of the next of kin permit the parents to recover for the death of adult children, on the principle just stated. Why, therefore, when a minor is killed, should the estimate of damages stop arbitrarily at majority?"

In some jurisdictions, the parent has, by statute, an action against the child for support. But, apart from any such statute, there certainly is an indisputable natural obligation on the part of the child to support his necessitous parents. The plain dictate of nature requires a child, grown up to manhood, to relieve the wants of his destitute parents, and the obligation is one which men ordinarily fulfill. Why, then, should parents who have been deprived of their child by the fault of another be debarred from compensation for the full benefits which they reasonably expected from the child? In *Railway Co. v. Compton*, 75 Tex. 667, 13 S. W. 667; and in *Railway Co. v. Sciacca*, 80 Tex. 350, 16 S. W. 31, it was said that the parents' right of recovery is not limited to the services of the child up to majority. In the case at bar the son was over 18 years of age. He was strong, healthy, sober, and hard-working. He was dutiful, and evinced his willingness to assist his parents by freely giving his earnings to his mother. It was plainly proper in this cause for the trial judge to instruct the jury that they could consider whether the parents had a reasonable expectation that their son would continue to assist them after his majority.

The fourth specification of error, which complains of the refusal of the trial court to give a special charge, is without force. The trial judge, in his general charge, instructed the jury "that if deceased knew of the condition of the engine, or by the use of ordinary care could have

known it, plaintiffs cannot recover." This was sufficient on the matter which is the subject of the special charge refused.

We find that the error complained of by the first specification of error is well founded, and compels the reversal of the judgment of the lower court. While this cause was pending in the state court, the depositions of certain witnesses were taken under the practice of the state of Texas. When these depositions were offered in evidence on the trial in the federal court, they were objected to on the ground that the witnesses were accessible, and resided within 100 miles of the place where this cause was tried, and that there was no proof of facts permitting the depositions to be read. We have carefully examined the point, and have reached the conclusion that the depositions should have been rejected. The court admitted them on the ground that they were taken and returned into court while the case was pending in the state court, and before its removal. Act March 3, 1875, § 4, provides that, upon the removal of a cause from a state court, "all injunctions, orders and other proceedings had in such court prior to its removal, shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed." We understand that it is upon this statute that the court based its action in admitting the depositions. To sustain the admission of the depositions, the counsel for the defendants in error cite, in addition to the act of March 3, 1875, the act of March 9, 1892, entitled "An act to provide an additional mode of taking depositions of witnesses in causes pending in the courts of the United States." It is evident that neither statute had the effect of making the depositions admissible, under the circumstances of this cause. There are but two cases cited by the counsel for the defendants in error in support of the admissibility of the depositions, viz.: *Fogg v. Fisk*, 19 Fed. 235, and *Davis v. Railway Co.*, 25 Fed. 786. In *Fogg v. Fisk*, Judge Wallace held that an order to examine the defendant in the state court, made prior to the removal, was an "order or proceeding" which was removed to the federal court with the cause, under the act of 1875, and that the order should be carried out in the federal court. But the supreme court reversed Judge Wallace. 113 U. S. 713, 5 Sup. Ct. 724. In *Davis v. Railway Co.*, just cited, Judge (now Justice) Brewer did not deal with the question of depositions. The point involved was whether a demurrer which was overruled in the state court prior to the removal should still be considered as overruled after the removal. Judge Brewer very correctly held that the overruling of the demurrer was an order or proceeding which, under the act of 1875, was removed with the cause. It is thus seen that the only two cases cited to support the admission of the depositions in this case do not in fact sustain the contention of the counsel who cited them. In *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, already cited, and in *Railway Co. v. Botsford*, 141 U. S. 256, 11 Sup. Ct. 1000, the supreme court made it clear that in the federal courts, regardless of state practice or statutes, the testimony must be oral. When a deposition is taken *de bene esse*, under Rev. St. U. S. § 863, it is not final, and, under the express terms of *Id.* § 865, it cannot be read on the trial, unless "it appears to the satisfaction of the

court that the witness is then dead or gone out of the United States or to a greater distance than 100 miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, he is unable to travel and appear at court." See Insurance Co. v. Southgate, 5 Pet. 604; Harris v. Wall, 7 How. 693. In Shellabarger v. Oliver, 64 Fed. 306, it was held that the act of March 9, 1892, does not allow depositions taken under the state law to be read in the federal court unless they could be read under Rev. St. U. S. § 865. In Seeley v. Kansas City Star Co., 71 Fed. 555, Judge Phillips said that he knew of no instance in which the deposition taken in the state court was allowed to be read in the federal court. In Register Co. v. Leland, 77 Fed. 242, it was held that the act of March 9, 1892, only applies to the mode of taking depositions, and not to the use to which they are to be put. In Despeaux v. Railroad Co., 81 Fed. 897, Judge Dallas said that the act of March 9, 1892, applies only to the mode of taking depositions. He quoted, with approval, Shellabarger v. Oliver and Register Co. v. Leland, *supra*, and said that it would be unfortunate if the act of March 9, 1892, had been differently construed. In Whitford v. Clark Co., 119 U. S. 522, 7 Sup. Ct. 308, the supreme court reversed the case because depositions taken *de bene esse*, under Rev. St. U. S. § 863, had been admitted, though the witnesses were present and able to testify orally. It is plain that depositions taken under the federal statute cannot be read, if at the trial the witnesses can be obtained. It is not to be presumed that congress intended that depositions taken in the mode prescribed by the state law should be read in evidence, even though at the trial the witness could be had, and yet that testimony taken under Rev. St. U. S. § 863, could not be read under the same circumstances. It is plain to us that no such discrimination against the federal statute was intended by congress, and that the act of March 9, 1892, refers only, as appears from its plain reading, to the mode and manner of taking testimony, and not to its effect after it is taken, nor to the conditions under which it may be read. The bulk, if not the entirety, of the evidence of the plaintiffs below is contained in the depositions, and we are constrained to remand the cause. It is therefore ordered that the judgment of the lower court be reversed, and this cause is remanded to that court, with the instruction to grant a new trial.

BOARMAN, District Judge (dissenting). I concur in the order reversing the judgment of the lower court. I express no opinion on the ruling of the court as to the admissibility of the depositions discussed in this opinion. I do not concur in the opinion expressed by the court on the refusal of the circuit court to give the charge requested by the plaintiff in error, which charge is numbered 4, and is as follows:

"In this case you cannot allow any damages for what Frank Wilder might have contributed to his parents after he became 21 years old. That would be too speculative and uncertain. You can only allow the present value of the amount Frank Wilder would have earned during his minority, after deducting the expenses for the support of said Frank Wilder during minority."

As the evidence on the estimate of damages is short, and given by only two witnesses, the father and another, I quote all of it:

"That was our only son. He was eighteen years old at the time he met his death. His habits were good, as far as I know. He lived with us, and had always lived with us. I don't know whether I had occasion to observe his habits, as I was away every day and home at nights, and he worked a great deal of the time at nights,—most of the time. I have understood that his wages at the time of his death were \$1.85 a day, as fireman on a switch engine. He used to give his money to his mother. I don't think he dissipated any. I don't know of his doing it at all. He was industrious and willing to work. His health was very good. He had been sick a month or two before this accident perhaps. His general health and physical constitution were very good. He was as intelligent as most any boy you could find. At the time of his death he had been working for the Texas & Pacific, the last time about a year. He had worked for them once before that, and he quit or was discharged, I don't know which. At the time he met his death he was firing the switch engine. After a man has been firing a road engine, the natural promotion is from a locomotive fireman to an engineer. I am a locomotive engineer, and have been in that business about 27 years. I have worked for the Texas & Pacific Railway Co. nearly 21 years. When a fireman finishes his work as a fireman, the next step is to be an engineer. The position of engineer pays more wages than that of a fireman; the engineer gets over one-third more than a fireman. The average wages of a locomotive fireman on the road will average about \$75 a month, passenger and freight, taking the two. A fireman generally starts in his occupation as a switch-engine fireman, and works on up. My son used to be at home nights pretty regularly, and on Sundays he would not work, but used to go to church with his sisters, and he did not seem to have any bad habits that I know of. At the time he was killed he was working two weeks on duty at night, and two weeks on in the daytime. He lived at home, and gave his money to his mother. When he wanted clothing he used to go to his mother, and she would give him the money. She handled his earnings. He went to his mother for money, and if she thought he needed it she gave it to him. My occupation kept me away in the daytime. His mother handled his money for him; I did not do it. He was 18 years and 5 months old at the time of his death. The last time my son went to work for the company in Texarkana I think he worked about a year. He was in Bonham I think for two months. I don't think he had a regular engine all the time, but at the time of his death was regular fireman on the switch engine. I don't know how long he had been at that particular place. I don't know whether he worked at the roundhouse in Texarkana during the twelve months before his death. Each switch engine has a regular fireman, just as they have on the road. My wages as engineer ran over \$155 per month."

"I had known Frank Wilder since he had been in Texarkana,—ever since he was a child, you might say. I believe he was the best boy I ever knew in my life. I have got two boys, and I think he was a better boy than mine. His habits were good; as good as they could be."

Having in view the evidence "in this case," I think that charge should have been given by the circuit judge. The plaintiffs ground their cause of action on article 2899, Rev. St. Tex. Under that article they are authorized to sue, and, on sufficient allegations and evidence, they may recover actual damages on account of injuries causing the deceased son's death. It will be seen that the purpose of the charge refused by the lower court was to forbid the jury to allow actual damages estimated on the probable earnings of the son, and the probable amount thereof which, after his majority, he would have contributed to the support of his parents. The plaintiff in error seems to concede that, under the Texas law, the parents have a legal right, at their will, to become the beneficiaries of the son's

earnings during the period of his minority. In the court's opinion, it will be seen that it is conceded that the parents have no legal right to any benefits from the son's earnings after his minority ceased. It follows, from the reasoning of the court, in which the concession suggested is apparent, that, the parents' legal right to such a benefit having ceased with the minority of the deceased son, their cause of action, in a case like this, can be to recover damages only for the loss of a moral expectancy which they had in the life of the son after his minority, to the effect that the deceased son, had he not been killed by the negligence of the railroad company, would have, with reasonable certainty, in response to the natural or moral obligation inhering in a son's filial duty, contributed his earnings, voluntarily, from time to time, to the support of his parents. On such a cause of action the court is of the opinion that the law of Texas, as well as the jurisprudence of the courts of the several states of the Union, authorizes an allowance for compensatory damages for the parents' loss of such an expectancy; that the value of such a lost expectancy may be commuted into such a cash sum as a jury might conclude from the evidence, which can at best be only speculative, to be adequately compensatory. Of course, this sum would have to be based on the jury's knowledge, if any such knowledge may be had from the evidence, which in the nature of things can be, at best, only speculative as to probabilities or eventualities of the future. Among such probabilities, inhering in the material issues of fact, the jury would have to consider the probability as to when, and in what degree, the parents would be, if ever or at all, in necessitous circumstances, so that Frank G., had he lived to be an adult, would have, in response to natural obligations to support his parents, contributed to the relief of their necessities; the probable length of their lives; the probable health, habits, and earning capacity of the son, and the probable length, too, of the son's life; the probabilities of the son remaining free from obligations which, in social ethics, would impose on him natural obligations superior to the demands of plaintiffs. All of such probabilities would have to be commuted into some degree of certainty, from the evidence, before anything like a just conclusion, as to the amount of compensatory damages, could be reached by the jury. Conditions such as are shown to be in esse in the petition, and in the limited evidence on behalf of the plaintiffs, as to the future, could not enable, even the speculative mind of a jury, "to look into the seeds of time, and say which grain will grow and which will not." Much less would such conditions as are established by the evidence enable a jury to make even a reasonable conjecture as to what the boy who was killed, had he lived on to the time of the necessitous circumstances of the parents, would have done in the discharge of such a natural obligation.

I think the authorities of the Texas courts cited, as well as all the others I have been able to examine, fail to support the views of the court in refusing the charge requested "in this case." Under the views laid down in the authorities I have examined, I think the limited evidence offered in this case, to illustrate the several probabilities herein mentioned, fails to show to a judicial mind a prepon-

derance one way or the other on the probabilities suggested herein, as inhering in the material issues of fact. And this failure, I think, suggests readily that the jury, in their speculative inquiry, should have been limited "in this case" to the purpose set forth in the charge. But, admitting the liberal view held by the court is well founded on the jurisprudence of the several courts of the Union, it follows only therefrom that there may be given cases in which the pleadings and evidence would authorize a jury, on the matter of allowing damages to parents of a deceased son after minority, estimated on the amount and value of the earnings which a dutiful son, in response to such natural obligations as inheres in filial and parental relations, would, after his minority, when the parents are shown to be in necessitous circumstances, because of old age or other infirmities, voluntarily contribute to their support. Into such a field of speculation a jury would not go with authorization of the court, unless in a case where the court was moved to allow such an inquiry by competent allegations in plaintiff's petition, and by material illustrative evidence thereon.

Recurring to the charge refused, it is well established in practice that a charge should not always be refused, even though it may state a rule not abstractly sound, or state a general rule which is sound, but not free in all cases from exceptions; because the charge requested may state a rule which is well founded in law, when applied to a stated or pending case. Just now it is not necessary to contend that the rule sought to be laid down by the attorney for the railroad company, to limit the time for the allowance of damages to the minority of the son, is a sound rule, either abstractly or generally, though I think the rule is founded in sound reasoning, and should apply, on the trial of all suits, when the result in favor of the plaintiffs can be reached only by a jury finding damages on such prospective eventualities as are discussed in the opinion of the court. I suggest, further, that when a court finds it necessary, in a state of case, from the very nature of the matters involved, to deal with speculations into, and eventualities of, the future, and the forum has the "coign of vantage," or point d'apui, only for the most favored judicial inquiry from which to look into and measure probabilities, and resolve doubts into reasonable or practicable certainties, it might often be profitable, in the interest of just conclusions, to apply a rule like the one refused.

Keeping in line with the views of the counsel for the plaintiff in error, it will be seen that he does not contend that there may not be a case stated in which the parents can recover damages for the death of their adult son. His contention is that, when a minor is killed, the parents are deprived of his services from the date of his death until he becomes 21 years of age; that they are not entitled as of right, or as a matter of course, to his services or earnings after he becomes of age; that a recovery, not being, when the negligence and death are shown, a matter of course, would depend on the evidence illustrating the present conditions of his parents, those of the son, and their respective probable conditions and relations inter se in the future. On or from such illustrative evidence, applying the

every-day experience of men familiar with human things, a jury, with some degree of certainty, might say that a dutiful adult son would respond to such an obligation in a beneficial way to necessitous parents. It is in the line of our experience that some sons do contribute to the support of necessitous parents, after they become of age, and in a speculative way we might say that some of the sons who are killed by negligence of railway companies would have so contributed after they became of age; but nothing further along this line, on the evidence in this case, can be projected with any degree of certainty from the every-day experience of men.

The counsel contends that it is not that the law forbids a recovery in such cases, but the obstacle in the way of recovery is the impossibility of proving such damages; and adds "that there is no way by which we can read the future, or give the jury a just standard on which to fix the amount. Before recovery can be had, the loss must be proved like any other fact. There can be no possible proof as to what the minor would have done with his earnings after he became of age. However dutiful a son he may have been, and however readily he may have allowed his parents to be the beneficiaries of his earnings during his minority, there is nothing in the proof to show, in a legal way, what he would have done with his earnings when he became his own man." The moral promise which may have been trustfully expressed, daily, in the son's dutiful and generous actions towards his parents during his minority, might not have been more binding on him to support his necessitous parents, after he became an adult, than a promise made in authentic form during his minority would have legally bound him after his majority. During his minority he might have, by domestic conditions or parental authority, been coerced to comply with the moral obligation. Even though he had made a promise in authentic form to continue on after his minority, in dutiful response to such influences, the law would not have compelled him to comply with such an obligation. Nor would he have in any way been amenable to the law if, when his minority ceased, he had refused to contribute anything to the support of his parents, however necessitous they may have been.

The question as to whether the parents can recover damages in such a case as this, beyond the period of the son's minority, must depend upon our view of the general law. It seems that in England, as well as in many of the states of the Union, there are statutes very similar in object and import. Counsel, in support of the charge requested, cites a number of authorities founded on the jurisprudence of the several states. In *Harris, Dam. Corp.* § 339, it is said:

"In an action for damages for the death of a minor, the rule would seem to be the probable value of his services from the date of the injury to the time he reaches his majority, less the probable costs of supporting him during that period." *Railroad Co. v. Delaney*, 82 Ill. 188.

To the same effect is *Field, Dam.* § 640; 3 *Lawson, Rights, Rem. & Prac.* § 1022; 5 *Am. & Eng. Enc. Law*, pp. 45, 46.

In *State v. Baltimore & O. R. Co.*, 24 Md. 106, the court said:

"According to appellant's theory, the mother and son are supposed to live on together to an indefinite age,—one craving sympathy and support; the other rendering reverence, obedience, and protection. Such pictures of filial piety are inestimable moral examples, beautiful to contemplate, but the law

has no standard by which to measure the loss." Sedg. Meas. Dam. p. 697, and note; Patt. Ry. Acc. Law, § 204.

He supplements these authorities by a quotation at length, as follows, from *Potter v. Railroad Co.*, 21 Wis. 379. In that suit, which was for the killing of a minor daughter, the court says:

"It was for the jury to determine what was the extent, under the proof in this case, of such reasonable expectation. The verdict must, however, be based upon evidence. The statute is peculiar, and much must be left to the sound judgment and discretion of the jury. We do not think it was intended they should find a verdict for damages without evidence of pecuniary loss. What is the testimony as to such loss to the parents in this case? It is that the deceased was aged 11 years and 3 months; that she was a bright, intelligent girl, strong and healthy; had been to school and Sunday school; was a good child to work, and accustomed to help her mother. This is all; and it is sufficient on which to base a verdict for any reasonable sum for loss of services of the deceased during her minority. But we are unable to see anything in the evidence proving, or tending to prove, a reasonable expectation of pecuniary benefit to the parents from the continuance of the life of their daughter beyond her minority. If it had been proved that the pecuniary circumstances and health of the parents were such as to render it probable they might need the services of the deceased, or aid from her, after she was 21 years of age, a foundation would have been laid for damages other than those resulting from the loss of her services during her minority. On the other hand, if the proof had shown that the parents were wealthy, there would have ordinarily been, it appears to us, no reasonable expectation to them of pecuniary benefit from the continuance of the life of the deceased beyond her minority. It is clear that the estate and condition of the parents might have much to do with the question of damages. So far as we have examined in suits like this, for the benefit of the parents, where damages have been recovered, other than the value of the services of the deceased during minority, there has been testimony showing the condition of such parents or tending to prove it. * * * Is there any reasonable expectation of pecuniary benefit to wealthy parents, or even those in moderate circumstances, between the extremes of poverty and wealth, from their children after they arrive at their majority? In the natural course of events, the children of such parents receive far more pecuniary aid or benefit from their parents than the parents from them. It appears to us, unless the condition of the parents is in evidence, the damages should be limited to the services during minority."

Applying these authorities, it will be seen that the petition in this pending case is fatally deficient in not showing that the parents would, at a time proximately stated, be entitled, because of their necessitous circumstances, from old age or other causes, to demand from the son, Frank G., a fulfillment of the natural obligation inhering in his filial relations to them. The petition does not, as it should, allege the degree, value, or extent of the natural obligation, nor does it show what time, in the nature of things, this natural obligation would begin to run in favor of the parents. These suggestions as to the petition will appear better founded if it is remembered that the court recognizes that the natural obligation would be only a nominal one; such a one as might, in good conscience, be discharged by dutifully observing the sacred injunction to "honor thy father and mother," unless the parents should become, by old age or other infirmities, dependent on the son for support. Then, I suggest, though the parents were in necessitous circumstances, the extent of the son's natural obligation might depend much, if not entirely, on whether or not the son was free from parental obligations of his own which might, in social ethics, be held to be a stronger demand on his support than the demand of even a necessitous father and mother. In

this case it may be, so far as the plaintiffs' allegations show, or evidence, that the parents were, and would probably remain for some years, abundantly able to earn a satisfactory living, as they were when the son was killed. The father then was earning \$155 a month, and the mother still not an old woman. This discussion of the deficiency of the petition I confess would become gratuitous, in the face of the suggestion that the defendant company went to trial without making any objections to the insufficiency of the petition to show a cause of action. But my purpose, in referring to the deficiency in the petition, is to call attention to the fact that no evidence was administered by the plaintiffs to show such essential facts as would authorize a jury to go into the inquiry as to such probabilities, speculations, and eventualities (some of which I have referred to) upon which the reasonable estimate would have to be made as to the sum which would be adequately compensatory to the parent for the loss of such an expectancy. It follows, I think, that the charge which sought in its effect to limit the findings to the pleadings and evidence should have, "in this case," been given to the jury.

The law, in a given case, may give the plaintiff a cause of action to recover for such a lost expectancy, on sufficient evidence. The plaintiffs are seeking relief in a judicial forum. Such relief as they may be entitled to must be measured by the law and by well-established rules of practice, and the recovery must rest upon substantial evidence, showing the value, nature, extent, and demand for and on which plaintiffs seek relief. If the legal right ceased when the dutiful son would become an adult, there is no judicial authority, I think, which can safely award damages in any amount for the loss of an expectancy inhering in such a natural obligation, which, under the plaintiffs' pleadings, and the strongest and most illustrative evidence, must, in the nature and vicissitudes of human things, remain a speculative and variable quantity. I am of the opinion, under the pleadings and evidence "in this case," there was nothing in the evidence upon which the jury could, with any degree of accuracy, estimate the damage, if there was any pecuniary loss incurred by plaintiffs in the loss of such an expectancy.

Considering the meager, vague character of the evidence which seems to be relied on to illustrate and vindicate the plaintiffs' claim for damages, estimated on the probable gratuitous benefactions which the adult son would, out of his own earnings, have in response to continuing filial duty bestowed on the parents, it occurs to me that the effect of the court's opinion in this case will be substantially to make the defendant railway company assume towards the parents of its employés the assuring relations of a guaranty company, and to compel it by operation of law, and much as a matter of course, to do for and pay to such parents, by way of gracious indemnity, favors and benefactions of much pecuniary value, which they could not, so far as we are advised by the evidence, have expected from the most dutiful sons in response to a moral obligation.

The evidence, I think, fails to show anything, by way of suggestion or fact, by or from which the jury could have been advised, in a reasonable way, in their purpose to allow damages in any sum, estimated on the gratuities of the son to his parents after he should have be-

come his own man. It follows from this view that, as to allowing damages beyond the son's minority, the court below should have directed a verdict for the defendant. It occurs to me, further, that a judicial or just weighing or estimate of the speculative evidence, showing the strength of probabilities upon which the jury based their finding, would show that the plaintiffs will, in the enjoyment of the sum of money into which these probabilities and eventualities have been commuted by the jury, be much better off than they would have been had the "mother and son lived on together, to an indefinite age, one craving sympathy and support, the other rendering obedience and protection."

PERSON v. FIDELITY & CASUALTY CO.

(Circuit Court of Appeals, Sixth Circuit. March 31, 1899.)

No. 631.

PARTIES—SUBSTITUTION OF PLAINTIFFS.

Under the statute of Tennessee (Shannon's Code, § 4589) which provides that no civil suit shall be dismissed for want of necessary parties, but the court shall have power to strike out or insert in the writ and pleadings the names, either plaintiffs or defendants, so as to have the proper parties before it, a court may substitute as plaintiff, in a suit brought in behalf of an estate, the name of an administrator duly appointed; and the suit will continue, although the original plaintiff, who sued as administrator, had never qualified as such, and not only had no authority to bring the suit, but his doing so was a misdemeanor, under the statute.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

This was an action at law, on certain accident insurance contracts, brought originally in the circuit court of Shelby county, state of Tennessee, by Robert E. Lee, as administrator of the estate of P. P. Hudson, deceased, and afterwards removed by the defendant to the United States circuit court for the Western division of the Western district of Tennessee. January 6, 1896, Hudson died intestate. February 26, 1896, an order was made by the probate court of Shelby county, Tenn., appointing Lee administrator. June 25, 1896, Lee, as such administrator, brought this action. July 31, 1896, Lee tendered his resignation as administrator, which was accepted, and his appointment canceled. The entry of the probate court canceling the appointment recites: "In this cause, it appearing that Robert E. Lee applied to be appointed administrator of P. P. Hudson, deceased, and gave bond as such, but was never qualified, and he has applied by petition, and duly asked to be discharged, and to have the action touching his appointment canceled and set aside, and it appearing to the court that he has received no assets of the estate, the court is pleased to cancel the action touching the appointment of the said Robert E. Lee, and the same is accordingly canceled and set aside, and the bond heretofore executed by said Lee is hereby canceled." And on the same day Person, the plaintiff, was appointed administrator of Hudson, and duly qualified. September 26, 1896, the circuit court of Shelby county, Tenn., substituted Person for Lee as plaintiff in this action; placing upon its journals the following entry: "In this cause Robert E. Lee, administrator, having resigned as such, upon motion of plaintiff's attorney the suit is amended by making Solon A. Person, administrator of the estate of P. P. Hudson, plaintiff." And Person on the same day, as such plaintiff, filed the declaration, and on the same day the defendant removed the cause to the United States court. October 17, 1896, defendant filed in the United States court a transcript of the record in the state court. November 4, 1896, the cause was continued to the next term. November 23, 1896, the defendant filed a demurrer to the declaration, assigning the following causes of demurrer: "(1) It fails to state

that the injuries so received were the direct and necessary result of such travel. (2) The statement that he received, without fault, fatal injuries, from which he died in a few hours thereafter, as averred in the declaration, is no sufficient ground; and these might have been received, under the contract, without any liability whatever to the company thereunder. (3) It does not state how or in what manner the injuries were received. (4) Defendant demurs because plaintiff does not make profer of his letters of administration. (5) Because plaintiff does not make profer of the contract of insurance sued on in the case." The fourth and fifth assignments were added, by way of amendment, December 24, 1896. On the same day (that is, November 23, 1896) by "consent of the parties," "the making up of the pleadings" was postponed for 20 days. December 14, 1896, by "consent of the parties," the time within which the defendant was "required to plead to the declaration" was extended to January 1, 1897. December 24, 1896, the following entry was made: "In this cause, upon motion of defendant, by counsel, and for satisfactory reasons, defendant is permitted to demur as follows, to wit: (1) Defendant demurs because plaintiff does not make profer of his letters of administration, wherefore," etc. "(2) Because plaintiff does not make profer of the contract of insurance sued on in this cause, wherefore," etc.; "and this defendant may do, by adding on the margin the words embraced in this order." April 21, 1897, the cause was continued until the next term. April 23, 1897, the demurrer was heard and sustained, and leave was given the plaintiff to amend his declaration within 10 days. May 18, 1897, the cause was continued until the next term. May 24, 1897, plaintiff was required to file copies of the letters of administration issued to Lee and to himself, within five days. June 4, 1897, plaintiff amended his declaration, the entry upon the journal being: "Comes the plaintiff, leave of the court having first been had and obtained, and amends his declaration in words and figures as follows: 'Plaintiff's letters of administration, and the policy of insurance on which he sues, are here to the court shown.' They are filed as of May 31, 1897, and made part of the declaration; and the same is, by permission of court, entered on the margins of the original declaration." And on the same day the defendant filed a motion to dismiss for the following reasons: "First. The defendant, by counsel, moves the court to set aside and vacate the order of September 26, 1896, amending this suit by making Solon A. Person, administrator of the estate of P. P. Hudson, plaintiff, for the following reasons: (1) Solon A. Person, administrator of P. P. Hudson, is not, and never was, the successor in interest of Robert E. Lee, administrator of P. P. Hudson. (2) The act of Robert E. Lee, administrator of P. P. Hudson, in instituting the suit versus defendant, was illegal and void. Never having qualified, nor having letters of administration, he was not administrator, and could do no valid act, because prohibited by law. (3) Person, administrator, was not added, and did not intervene, as a new party. He was merely substituted as plaintiff. (4) This order was *ex parte*, without notice, without affidavit, without petition, without letters. (5) Solon A. Person, as the letters show, is administrator. Second. The defendant, by counsel, moves, upon the admission of counsel in open court that no letters ever issued to Robert E. Lee, upon the affidavit of Wm. N. Ransom, and the transcript of the administration of Hudson's estate in the probate court, thereto attached, and upon the letters of Solon A. Person, administrator of P. P. Hudson, all showing the suit was instituted by one having no authority, and also prohibited by law, to dismiss this suit. Third. Defendant, by counsel, moves to dismiss this suit for that on the face of the record it appears that the death of the intestate occurred on the 6th of January, 1896; that this suit, if plaintiff, Solon A. Person, has any standing in this suit, commenced on September 26, 1896, and the contract of insurance sued on, and made a part of the declaration, in its fifth condition expressly provides as follows: 'Legal proceedings for recovery hereunder may not be brought until after three months from the date of filing proofs at this company's home office, nor brought at all unless begun within six months from time of death.'" And on the same day a transcript of the record of the probate court was filed, together with an affidavit of Wm. N. Ransom, stating that he examined the records of the probate court, and found that no bond was executed by Lee, or approved by the court; that he never qualified, and letters were never issued to him. August 28, 1897, the cause was continued until the next term. December 22, 1897, the motion to dismiss was sustained, and the action was dismissed at the plain-

tiff's costs, for which there was judgment. 84 Fed. 759. March 23, 1898, the plaintiff moved for a new trial, but his motion was overruled. May 21, 1898, the plaintiff filed his petition in error in this court, the assignments of which are, in substance, that the court below erred (1) in permitting the introduction of evidence of facts dehors the record in support of the motion to dismiss; (2) in vacating and in assuming the power to vacate, the order of the state court substituting Person for Lee as plaintiff; (3) in holding that the state court had no power to substitute Person for Lee as plaintiff; (4) in not holding that the defendant in error was estopped to move for the dismissal of the case by reason of its voluntary submission to the jurisdiction of the United States circuit court.

H. C. Warinner, for plaintiff in error.

Luke N. Finlay, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and THOMPSON, District Judge.

THOMPSON, District Judge (after stating the facts as above). It is only necessary to consider the third assignment. It is clear that the state court had power to substitute Person for Lee as the plaintiff in the case. The power is conferred by the statute law of the state, found in section 4589 of Shannon's Tennessee Code, which reads as follows:

"No civil suit shall be dismissed for want of necessary parties, or on account of the form of action, or want of proper averment in the pleadings, but the courts shall have the power to change the form of action, strike out or insert in the writ and pleadings the names of either plaintiffs or defendants, so as to have the proper parties before the court, and to allow all proper averments to be supplied, upon such terms, as to continuances, as the court in its sound discretion may see proper to impose."

The construction which we give to this statute is in accordance with the decision of the supreme court of Tennessee in *Flatley v. Railroad Co.*, 9 Heisk. 230. In that case Mary Flatley, widow, for the use of herself and children, brought suit against the railroad company for damages for wrongfully causing the death of her husband, William Flatley. Afterwards E. A. Flatley, the administrator of the estate of William Flatley, was substituted for the widow, and the action proceeded. The court say:

"It is a general principle that where a right is given by statute, and a remedy provided in the same act, the right can be pursued in no other mode. Therefore it results that the action, as originally brought in the name of Mary Flatley, could not have been successfully maintained. It could not be maintained otherwise than in the name of the personal representative. Previous to the enactment of our statutes upon the subject of amendment, embodied in the Code, the result of this mistake would have been to compel an abandonment of this action, and a resort to a new suit; but this is obviated by the provisions before referred to, which allow the name of the new plaintiff to be substituted. The defendant being in court for particular cause of action, it is not required that the expense and delay shall be incurred of new process," etc.

See *Hodges v. Kimball*, 91 Fed. 845.

It is sought, however, to distinguish the Flatley Case from the case at bar on the ground that the act of Lee in bringing the suit was illegal, and conferred no jurisdiction upon the court, while the act of Mrs. Flatley was only a mistake, which the court could correct by substituting the proper party. But we find no warrant in the statute for such a distinction, nor any reason for it. The question is not

whether the suit could have been maintained in Lee's name, nor whether Lee was guilty of a misdemeanor in bringing the suit, but whether it should abate because of Lee's want of authority to prosecute it. The command of the statute is that "no civil suit shall be dismissed for want of necessary parties." The defendant was in court to answer to a cause of action in favor of the estate of Hudson, which could only be prosecuted by the administrator of the estate; and Person having been appointed and qualified as such administrator, in the place and stead of Lee, who failed to qualify, the court substituted him for Lee as plaintiff in the case. This it might do without prejudice to the right or duty to prosecute Lee for meddling with the estate by assuming to act as administrator, in bringing the suit, when he had never qualified as such. The statute making it an offense for Lee to assume to act as administrator without having been appointed and qualified as such is not in conflict with the statute which authorized the court to dismiss him from the cause, and substitute in his stead the duly-authorized administrator. We think there was reversible error in the proceedings of the court below, and its judgment will be reversed, and the cause remanded for further proceedings consistent with this opinion. It is so ordered.

CHICAGO, M. & ST. P. RY. CO. v. CLARK.

(Circuit Court of Appeals, Second Circuit. March 15, 1899.)

No. 51.

1. APPEAL—REVIEW OF JUDGMENT BASED ON FINDINGS OF REFEREE.

On the review of a judgment ordered on confirmation of the report of a referee, containing his full findings of fact and conclusions of law, only those assignments of error can be considered which present the question whether the judgment is justified by the facts found by the referee.

2. ACCORD AND SATISFACTION—CONSIDERATION—PAYMENT OF LIQUIDATED DEMANDS.

Payment by a debtor of a liquidated amount, presently due, and to which he has no defense that can be urged in good faith or with color of right, is not, by itself, a sufficient consideration to sustain a release by the creditor of other unliquidated claims against the debtor. *Per Lacombe, Circuit Judge.*

3. SAME.

Defendant, a railroad company, which was indebted to plaintiff in amounts which were due and liquidated and undisputed, rendered him a statement of account, in which he was credited with such amounts only, and was charged with certain cross demands, which were unliquidated and open to dispute. It tendered payment of the balance shown by the statement to be due, on the execution by him of a receipt in full, which accompanied the statement. *Held*, that the execution of the receipt, and the making and acceptance of the payment, did not constitute an accord and satisfaction; there being no consideration for the release of the remainder of plaintiff's demand.

4. ACCOUNT STATED—CONCLUSIVENESS—EFFECT OF ACQUIESCENCE.

A party to whom an account is rendered is not concluded by acquiescence therein, or even by a settlement in accordance therewith, from proving the incorrectness of the account, unless the statute of limitations has barred his right, or the case is brought within the principles of an estoppel in pais or of an obligatory agreement between the parties. *Per Wallace, Circuit Judge.*

5. APPEAL—REVIEW OF RULINGS ON MOTIONS FOR NEW TRIAL.

Rulings on motions for new trial are not reviewable in the federal courts.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the circuit court, Southern district of New York, entered April 6, 1898, in favor of defendant in error, who was plaintiff below, for \$88,084.86, against the Chicago, Milwaukee & St. Paul Railway Company, defendant below. The judgment was entered upon the report of Hon. George Hoadley, as referee. The complaint set forth six separate causes of action. The referee found in favor of the plaintiff as to part of the claim declared upon in the first and as to the fifth cause of action. He found in favor of the defendant as to all the remaining causes of action. Inasmuch as the plaintiff has not sued out writ of error, it will be unnecessary to discuss any causes of action other than the first and fifth. The facts sufficiently appear in the opinion.

C. W. Bangs and Burton Hanson, for plaintiff in error.

L. Lafflin Kellogg, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). In March, 1886, a written contract was entered into between the parties, whereby Clark agreed to construct a line of railroad from Ottumwa, Iowa, to Harlem Station (afterwards changed to Randolph's Bluff), Mo., a total distance of about 202 miles, and the defendant agreed to pay therefor the lump sum of \$3,954,600. The contract is an elaborate one, containing many detailed provisions, which it will be unnecessary to recite. It provided that the work should be done in accordance with the regulations of the chief engineer, "and in all respects to his satisfaction and acceptance," that the company would pay monthly installments from time to time as the work progressed, and make final payment whenever the said chief engineer should furnish "his certificate that all the stipulations and covenants in this agreement contained, to be by the said second party kept and performed, have been by said party well and truly observed and carried out, and that the said first party's railroad * * * has been by said second party constructed, built, completed, and finished, in all respects, in full conformity with the covenants and agreements hereinabove in that behalf made by said second party." As to extra work, it was provided that the second party should do such as might be required in writing by the chief engineer, and should "receive from said first party such just and reasonable compensation for such [extra material and work] as the said chief engineer shall fix and determine."

The entire work was completed to the satisfaction of the chief engineer, who furnished his certificate to that effect, in conformity with the terms of the contract. He also certified to certain extra work and materials, and fixed and determined the just and reasonable compensation therefor at \$40,226.70. He also determined the amount of certain rebates, arising by reason of the fact that the company had made changes in its plan, had decided not to build six station houses and five sheds, and had itself done some of the contractor's work, such as track surfacing, fencing, etc. No one sug-

gests that there is any question of the power of chief engineer to adjust the amount of such rebate. Before the giving of the final receipt hereinafter referred to, it was settled, as against the company, by the decision of their own officer, by them selected for that purpose, that the plaintiff, by proper completion of his contract, and by doing the extra work and furnishing the extra materials required by the chief engineer, had earned the sum of \$3,895,798.79. As to the work covered by this sum, not only was there no dispute, and never had been, that the work was done, and done in proper manner, but the price had been settled by agreement of the parties when the contract was entered into,—a lump sum for the regular work, and the prices to be fixed by the engineer for the extras. The claim for payment for such work was absolutely and finally liquidated.

There remained, however, some matters of dispute between the parties, of which two only need be considered, since for these two only did the referee find in plaintiff's favor. These are a claim for nut-locks charged to contractor, \$9,558.63; and a claim for overtime penalty, \$40,000.

As to the nut-locks. A nut-lock is a small iron or steel springing washer. It is a patented article. Soon after the contract began, the defendant made a shipment of them to plaintiff's superintendent in charge of the work, insisting that they should be used in bolting the rails. A controversy thereupon arose; the plaintiff, through his superintendent, denying that he was bound to supply nut-locks in building the road, and the company insisting that he was. Such controversy was temporarily disposed of in this way: Defendant furnished all the nut-locks required, and plaintiff put them in wherever directed, and the question who was to pay for them was postponed until final adjustment. When that time came, the sum of \$9,558.63, the cost of the nut-locks, had been charged against plaintiff as a payment on account, and the question presented was whether he should be credited with a like sum. That question had been referred by defendant to the chief engineer, who had himself referred it to counsel for the road. The referee found these facts, and further found that "there are no provisions in the contract which require that the plaintiff, and the plaintiff never agreed that he, should use, in the construction of the railroad under said contract, any patented nut-locks." Inasmuch as the referee included the full text of the contract in his findings, it may be looked at to see whether it contains any such provisions. The only provisions which it is contended support this contention are these:

Article 1, § 1: "[Clark agrees] to furnish all the material for, and also to execute, construct, and finish in every respect in the most substantial and workmanlike manner, all the work hereinafter specified," etc. As to this, it is sufficient to say that the question whether nut-locks are essential to a substantial and workmanlike construction is a question of fact, and the referee has not found an affirmative answer to such question, but has expressly refused so to find.

Article 1, § 3: "Materials and workmanship required by said first party to be furnished or performed for, in, or about the work here-

inbefore mentioned, and hereinafter particularly specified and set forth, shall be furnished and performed in strict accordance with the rules, regulations, and specifications therefor now made, or hereafter to be made, by said chief engineer, and in all respects to his satisfaction and acceptance." The nut-locks are nowhere mentioned in the contract, nor particularly specified and set forth therein, unless they are to be included in the phrase, "most substantial and workmanlike manner," already referred to, or in one or other of the phrases, "splices and bolts of the J. T. Clark pattern," and "place and well bolt the splices in the most approved manner," which are next to be considered.

Article 6, § 1: "[Clark further agrees] to furnish and lay in place all the track material required, * * * including steel rails of sixty pounds per yard, splices and bolts of the J. T. Clark pattern, and spikes and ties, and all said material shall be of the said first party's standard and size." Article 6, § 4: "To place and well bolt the splices thereof, and do all work of laying said tracks, in the most-approved manner." Whether a nut-lock is an essential, or even a usual or frequent, component of the "J. T. Clark pattern" of splice and bolt; whether it is included within defendant's "standard" of track-laying; whether the "most-approved manner" of track-laying makes use of nut-locks,—are all questions of fact, and there is no finding of an affirmative answer to any one of them.

There is nothing in the record, therefore, to sustain the contention of plaintiff in error as to the nut-locks being required by the provisions of the contract. The briefs contain references to the testimony, but no alleged errors in the findings of fact are before the appellate court for review or correction. The practice in cases heard by referee is laid down by the supreme court as follows:

"As the court in its judgment ordered his findings to stand as the findings of the court, the only questions before this court are whether the facts found by the referee sustain the judgment. As the case was not tried by the circuit court upon a waiver in writing of a trial by jury, this court cannot review exceptions to the admission or exclusion of evidence, or to findings of fact by the referee, or to his refusal to find facts as requested." *Shipman v. Mining Co.*, 158 U. S. 361, 15 Sup. Ct. 886.

There is no error, therefore, in the conclusion of the referee that the defendant was not entitled to charge the cost of the nut-locks against the plaintiff as a payment on account.

As to overtime penalty. The defendant insisted that, by reason of some delay of the contractor in completing the work, it became entitled to offset against whatever he had earned under the contract the sum of \$40,000. The findings of the referee on this branch of the case are as follows:

"(6) That the plaintiff made and entered into a supplemental contract whereby he agreed with the defendant to complete his performance of said contract on or before June 1, 1887, and to allow the said defendant, by way of forfeiture, in case the said railway were not so completed by the 1st of June, 1887, the sum of \$40,000. (7) That the defendant failed to furnish the plaintiff with rights of way, as by said contract it had agreed to do, in time to enable the plaintiff to complete his contract prior to the 1st of June, 1887, or prior to the 1st of August, 1887, but, on the contrary, delayed the plaintiff in the performance of said contract at a point upon the said road known as Minneville until October 27, 1887, by reason of the neglect, failure, and omis-

sion of the defendant to obtain the necessary right of way at said point so as to permit the construction of the road and completion of the contract at said point. (8) That the plaintiff was thereby prevented from completing his contract on or prior to August 1, 1887, and also on or prior to June 1, 1887, by the negligence, omission, and fault of the defendant."

Upon these findings there seems to be nothing left to be said. Indeed, the argument of plaintiff in error is really to the effect that the findings of fact are incorrect; that rights of way were acquired at Minneville earlier than October 27, 1887, or that delay as to securing rights of way did not prevent plaintiff from completing his contract. But, under the authority above cited, these are matters which the appellate court will not consider. There is no error, therefore, in the referee's conclusion that the defendant was not entitled to charge this item of \$40,000 against plaintiff as a payment on account. It is not understood, however, that the referee has held, nor is it intended in this opinion to hold, that there was any bad faith on the part of the company in advancing these claims for the nut-locks and overtime penalty. Both items were legitimate matters of dispute, and, unless settled by agreement of the parties, might fairly be brought by either party into court.

Out of the moneys earned under the contract for specified and for extra work, the defendant has retained these two sums of \$9,558.63 and \$40,000. To that extent (\$49,558.63) it has not paid the amount earned, certified by the engineer, and included in the final estimate, and for those items the referee has reported, and the court has adjudged, in favor of the plaintiff. Error is assigned in that the referee found facts showing, as is contended, an accord and satisfaction which operated to release all claims for these items, but nevertheless found, as a conclusion of law, that no such defense was established. This is the real question in the case, and, indeed, the only question presented upon this review.

It will be remembered that when the work had been completed it appeared by the certificate of the chief engineer, and by the final estimate, that plaintiff had earned \$3,895,798.79. The certificate, taken in connection with the contract, liquidated his earnings at that amount, and the railroad was in no position to litigate in good faith as to the amount of those earnings. As is usual, however, in works of this character, plaintiff had been paid certain sums in cash upon monthly estimates, and there were also charged against him, as payments, various sums expended by the company for materials, and various charges for labor and transportation furnished by it. These various credits to the company aggregated \$3,626,865.20, and, except as to the nut-locks, there was not, and apparently never had been, any controversy between the parties touching this amount. In this condition of affairs, and on March 9, 1888, the plaintiff signed and delivered to a representative of defendant a paper writing or receipt presented to him by the defendant for signature (a copy will be found *infra*), and on the same day received from the defendant a check for the sum of \$173,532.49, which he retained and cashed. There is nothing in the findings to show that plaintiff signed this receipt improvidently, or without due consideration, nor that it fails in any way to set forth accurately the agreement entered into between the parties on that day, nor that the plaintiff was under any

pecuniary stress pressing him to accept a smaller sum than was due. The receipt reads as follows:

"Whereas, a final estimate has been made by D. J. Whittemore, chief engineer of the Chicago, Milwaukee and St. Paul Railway Company, of all the work done, and material furnished, under the contract made between said railway company and Heman Clark, bearing date March 8, 1886, for the construction of the railroad from Ottumwa, in Iowa, to the Missouri river, including all extra work performed, and material furnished, of every kind and description, which estimate, with the prior monthly estimates, less deductions made for work not done and work assumed by said company, amounts to \$3,895,798.79; and whereas, the further sum of \$34,598.90 should be credited to said Clark for materials sold by him to said company, and certain rebates and other matters of that description, making, with the amount of said estimates, the sum of \$3,930,397.69; and whereas, the said Chicago, Milwaukee and St. Paul Railway Company has paid the said Clark, to apply on said contract, in money, material, labor, and transportation, the sum of \$3,626,865.20; and whereas, by the terms of section 4, art. 13, of said contract, said Clark was to be charged, in addition, for transportation, the sum of \$50,000, and by a supplemental contract was to allow the said railway company, by way of forfeiture, in case said railway was not completed by the first day of June, 1887, the further sum of \$40,000, making the amount paid on said contract, together with the allowance of said transportation and the allowance of said forfeiture, the sum of \$3,716,865.20, leaving the amount still due said Clark on said contract the sum of \$213,532.49; and whereas, in and by said contract, it was provided that the said Heman Clark, party of the first part, should save the said railway company free and harmless from all claims that might be made against said railway company for liens of workmen and claims of subcontractors, and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for cattle or other domestic animals killed or injured, and from all damages suffered by said subcontractors and employés while engaged upon said work, of which said class of claims about \$40,000 in amount have been made upon and are now pending in courts by divers claimants against said railway company, and the sum of \$40,000 of the amount so due as aforesaid, under said contract to the said Heman Clark, has been reserved and set aside by said railway company as indemnity or security for the payment of said claims and of such other claims of the same class as may hereafter be made, in case said claimants, or any of them, recover judgments against said railway company, and the said \$40,000, or the balance thereof, after paying and settling such claims as may be established against said railway company, is to be paid over to the said Heman Clark as soon as said claims are satisfied or said railway company suitably indemnified from any loss on account of the same, which \$40,000, deducted from the sum of \$213,532.49, so as aforesaid due said Clark, leaves due and owing by said railway company, and now payable on said contract, to said Heman Clark, the sum of \$173,532.49: Now, therefore, be it known that I, the said Heman Clark, have received of and from the said Chicago, Milwaukee and St. Paul Railway Company the sum of one hundred and seventy-three thousand five hundred and thirty-two and $\frac{49}{100}$ dollars (\$173,532.49), in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands, of every kind, name, and nature, arising from, or growing out of, said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of said railway company to account for said forty thousand dollars, as hereinbefore provided.

Heman Clark.

"Wm. C. Edwards."

This document was prepared by defendant, and sent to plaintiff, with the information that, upon its signature and return, a check would be delivered to him for the sum named. It will be noted that by the terms of this receipt the disputed items, nut-locks and overtime penalty, are both disposed of, according to defendant's conten-

tion,—the penalty in an item by itself, and the nut-locks by inclusion (as the referee finds) of the \$9,558.63 in the item of \$3,626,865.20 "paid on account." The referee held that this transaction of March 9, 1898, did not constitute an accord and satisfaction, for the reason that the agreement whereby Clark undertook to give up his claims against the company for the nut-locks and overtime penalty was "without consideration of any kind, but was a simple uncompensated surrender of lawful rights on his part." The referee's opinion states his conclusion as follows:

"The claim of Clark against the company, for the sum of \$3,930,397.69, was a liquidated sum,—liquidated by the umpirage of the chief engineer, as proved by the final certificate and estimate and by this receipt prepared by the company. * * * It could not be discharged by the payment of a smaller sum. Had it been an unliquidated or disputed claim, or a claim upon a quantum meruit, requiring a valuation of worth or material, different considerations might arise; but these are, properly speaking, undisputed claims. These are claims which the company had no right to dispute, and the written concession contained in this receipt by Clark was based upon no consideration whatever."

The agreement between parties which is known to the law as "accord and satisfaction" is a contract, and, like all other contracts, it needs a consideration to make it valid. Without consideration, it is nudum pactum. The consideration may present itself in many different shapes. It may be found in premature payment; in payment in some manner different from that bargained for in the original contract; in the giving of some desired article in place of money; in the giving of further security or of different security for the reduced amount; in mutuality of concession; in abandonment of a right to litigate or to appeal. But in some form or other a consideration must be found. There must be some advantage, or presumed or assumed advantage, accruing to the party who yields his claim. "The accord and satisfaction must be advantageous to the creditor. He must receive from it a distinct benefit, which otherwise he would not have had. Thus, to an action for wrongfully taking cattle, it is no plea that it was agreed plaintiff might have them, for this the law would have given him." 2 Pars. Cont. (8th Ed.) p. 804. "In order to establish a defense of this character, there must be present in the transaction upon which it rests all the elements of a complete contract,—a lawful subject-matter, a sufficient consideration, and the aggregatio mentium, or mutual assent, of the parties." Fuller v. Kemp (1893) 138 N. Y. 236, 33 N. E. 1034. "A creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being nudum pactum. But if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient." Goddard v. O'Brien, 9 Q. B. Div. 37. "All that is necessary * * * is a sufficient consideration to support the substituted agreement. The doctrine is fully sustained in Allison v. Abendroth, 108 N. Y. 470, 15 N. E. 606 (Andrews, J.): 'Where there is an independent consideration, or the creditor receives any benefit, or is put in a better position,' etc." Jaffray v. Davis (1891) 124 N. Y. 164, 26 N. E. 351.

"An accord and satisfaction * * * must be an executed contract, founded upon a new consideration." *Nassoy v. Tomlinson* (1896) 148 N. Y. 326, 42 N. E. 715. The adequacy of the consideration will not be gone into by the court, if it be what is known to the law as a "valuable consideration."

This principle that there must be some benefit, or possibility of benefit, to the creditor, fundamental though it be, seems not to have been always kept in mind. There are reported cases in which accord and satisfaction is found by the court where it is impossible to determine from the opinion and the statement of facts whether or not the creditor received any consideration whatever. See *Palmerston v. Huxford* (1847) 4 Denio, 166; *Preston v. Grant* (1861) 34 Vt. 201. There are others in which a like decision is reached, although a careful analysis of the facts as reported would seem to indicate the entire absence of any consideration. See *Lestienne v. Ernst* (1896) 5 App. Div. 373, 39 N. Y. Supp. 199; *Lumber Co. v. Brown* (1896) 68 Vt. 239, 35 Atl. 56; *Hills v. Sommer*, 53 Hun, 392, 6 N. Y. Supp. 469. In neither of these groups of cases does the precise point under discussion appear to have been brought to the attention of the court. There are other cases in which the question of consideration is not discussed, but so much is said as to the tender of the money or a draft by one party being clogged with a condition, which will operate to bind the other party if he accepts it, that it might almost be thought the defense was being upheld on some principle of estoppel.

The referee was sound in holding that a receipt in full, and payment of balance stated therein, cannot be sustained as an accord and satisfaction, unless some benefit was thereby secured to the creditor which but for the settlement he would not have had. This is the rule laid down, in terse and precise terms, in a case repeatedly cited on the brief of plaintiff in error, where "accord and satisfaction" is defined as "something of legal value, to which the creditor before had no right, received in full satisfaction of the debt, without regard to the magnitude of the satisfaction." *Bull v. Bull* (1876) 43 Conn. 455. Where, upon settlement, the only items in dispute are resolved in the debtor's favor, no consideration passes unless the creditor's claim is "unliquidated"; using that word as meaning that, as to the items which he receives upon the settlement, he would be compelled, but for a settlement, to bear some further burden in order to have their amount so fixed that the debtor would be bound thereby. This is always the case where the creditor's claim rests upon a quantum meruit. Thus, where a physician charged \$5 a visit for 126 visits, and \$10 each for 4 consultations, no agreement having been made in advance as to the rate to be charged, the court said: "The original contract, which the law implied, was an agreement on the part of the defendant to pay the plaintiff what his services were reasonably worth. From the very nature of the case, a further agreement must be reached by the parties, fixing the value of the services, or else resort must be had to a judicial determination for that purpose." *Fuller v. Kemp* (1893) 138 N. Y. 236, 33 N. E. 1034. In that case the consideration on which accord and satisfaction was sustained was the giving up by the debtor of his

right to compel the plaintiff to resort to judicial determination to fix the quantum meruit of the visits he did make, even if there were no dispute as to their number. And it is manifest that it makes no difference, when such a claim is being adjusted, that the creditor agrees to a quantum meruit which he was always willing to pay; because, so long as the fixation of the amount rested merely on his good will, he was still in a position to change his mind. He could still, in perfect good faith, verify an answer which would make it necessary for the creditor to "liquidate" his claim by a lawsuit. In such a case, it may nevertheless be said that the amount finally paid was "not disputed," using these words without technical precision; and thus we find many cases in the reports in which it would appear, on a casual inspection, as if the payment of an undisputed indebtedness were held sufficient to sustain an accord and satisfaction. And in some cases the terms "liquidated" and "unliquidated" are used without any very exact attention to the real distinction between them; indeed, in most of the reported cases it was wholly unnecessary to note such distinction, since the presence of a valuable consideration is entirely plain. The rule of law as to accord and satisfaction is usually stated thus: "Payment by a debtor of a part of his liquidated debt is not a satisfaction of the whole, unless made and accepted upon some new consideration, but where the debt is unliquidated the rule does not apply." When, however, a creditor's claim is made up in part of an amount so adjusted by agreement of the parties that the debtor cannot in good faith contest it, and in part of an amount not thus adjusted, and the debtor pays only the adjusted portion of the claim, and insists on a release of the entire or unadjusted portion, without any new consideration moving to the creditor, reason and principle would require a decision that there has been no accord and satisfaction, and, except for the few cases referred to above where the point was not discussed, the authorities are in harmony with such a decision. The rule might be more accurately stated: "Payment by a debtor of a liquidated amount, presently due, and to which he has no defense that can be urged in good faith or with color of right, is not, by itself, a sufficient consideration to sustain a release by the creditor of other unliquidated claims against the debtor." Of course, it makes no difference that eventually it turns out that some supposed legal defense of the debtor is held to be insufficient. If he is in a position to litigate in good faith, and with some color of right, and gives up his right to throw the claim into court, he gives a valuable consideration for any settlement, and no claim to which such a defense may be interposed can be fairly called a "liquidated claim," even to the extent to which the debtor may have theretofore expressed his willingness to pay. "If it appears that the claim furnished opportunity for controversy, although a favorable result could not have been safely predicted, * * * sufficiency of consideration would be established." *Zoebisch v. Von Minden* (1890) 120 N. Y. 406, 24 N. E. 795. And see *Nassoyi v. Tomlinson* (1896) 148 N. Y. 326, 42 N. E. 715; *Bank v. Blair* (1865) 44 Barb. 641; *Lumber Co. v. Brown* (1896) 68 Vt. 239, 35 Atl. 56; *Fuller v. Kemp*, *supra*.

Analysis of the leading reported cases will show that, although it is not always discussed in the opinion, a valuable consideration is found to be present wherever a defense of accord and satisfaction has been sustained. The brief filed by the learned counsel for plaintiff in error presents such a comprehensive selection of authorities that it will be sufficient to refer to its citations.

First to be considered is a group of decisions of the United States supreme court, where claimants for supplies furnished to the government were held foreclosed by receipt in full and acceptance of part of their original claims. It should be remembered that the United States treasury pays only out of appropriations and upon audit. There being many claims for military stores furnished during the Civil War, congress created a special board to pass upon their validity and amount. No one was required to bring his claim before such board, but, if he did, payment was at once secured to him of whatever amount the board might find due, out of a special appropriation made for the purpose. Payment on all these claims out of the ordinary appropriations had been suspended by order of the treasury department. "From the time the secretary issued his order, suspending the payment, * * * they must be regarded as claims disputed [i. e. the whole claim] by the government, and, unless the board had been constituted, could have been adjusted only by congress or the court of claims." U. S. v. Adams (1868) 7 Wall. 463. In all these cases the amounts paid in settlement were unliquidated, since, but for the finding of the board, the government could have litigated them all in good faith; and in giving up resort to the court, at the same time going to the expense of constituting a special tribunal to adjust the claims, and securing the more expeditious payment of what might be found due, there was certainly abundant consideration to sustain the settlements. Id.; U. S. v. Child (1870) 12 Wall. 232; U. S. v. Justice (1871) 14 Wall. 535.

In Sweeny v. U. S. (1872) 17 Wall. 77, the claim was clearly unliquidated as to every part of it, involving the question of reasonable compensation,—a circumstance which appears from the opinion: "Enough appears to satisfy the court that the charter party was superseded, and that the claim in fact was for a quantum meruit, and as such that it was a proper subject of compromise."

In U. S. v. Martin (1876) 94 U. S. 400, plaintiff, a laborer, claimed extra pay under some construction of the eight-hour law. He presented his claim to the auditor in 1873, and received \$205, giving a receipt in full. He subsequently brought suit for the balance in the court of claims. The payment of the \$205 was a sufficient consideration, since the entire claim was fairly disputable in the courts.

In Baird v. U. S. (1877) 96 U. S. 430, plaintiff had a contract with the government to furnish certain locomotives. The stipulated price was—First, a fixed sum for each locomotive; second, any advance there might be after a certain date in cost of labor and materials; and, third, any damages resulting from giving the government's order preference over others. The fixed price had been paid, and the damages recovered by suit. Plaintiff presented a claim for \$151,588 for entire cost, which was audited and allowed for \$97,507, and

plaintiff informed of the principles upon which the adjustment was made. He took draft for the amount, and collected it. Held an accord and satisfaction. Manifestly, every dollar of the claim of \$151,588 was unliquidated, and susceptible of liquidation only by consent of the government or by the courts. Assent to an adjustment at \$97,507 was a valuable consideration. *Pray v. U. S.* (1883) 106 U. S. 594, 1 Sup. Ct. 483, is not in point; and in *Boffinger v. Tuyes* (1887) 120 U. S. 198, 7 Sup. Ct. 529, there was abundant consideration in the abandonment of a right to appeal. In *Association v. Wickham*, 141 U. S. 579, 12 Sup. Ct. 84, premature payment was held a good consideration.

In *Battle v. McArthur*, 49 Fed. 715, plaintiff had a contract for grading a railroad, and compensation was at fixed prices for the units of different kinds of work done. There had been a long dispute as to the classification of hardpan by the engineers, i. e. as to how many units of rock and earth excavation, respectively, should be paid for. After the work was done, and the amount of final estimate was being settled on, a conference was had, of which Thayer, J., says: "The percentage of loose rock excavation thus demanded was not allowed, but it caused the chief engineer to raise the classification some 20 per cent., and that increase entered into the final estimate." Here was a concession and payment, which certainly constituted a good consideration.

In *Davenport v. Wheeler* (1827) 7 Cow. 231, there was no agreed price for the salt, the claim was for a quantum meruit, and consideration is found in the agreement as to price per pound of the salt paid for; defendant waiving his right to compel plaintiff to go into court to secure a "liquidation" of his claim as to any part of the salt delivered.

Vedder v. Vedder (1845) 1 Denio, 257, involved mutual claims for damages for trespass. Defendant's liquidation of plaintiff's claim against him at an amount satisfactory to the plaintiff was a good consideration for his agreement to accept it in full.

In *Ryan v. Ward* (1872) 48 N. Y. 204, and *Bunge v. Koop*, Id. 225, the defense of accord and satisfaction was not sustained.

Gray v. Barton (1873) 55 N. Y. 71, was decided upon the principles of law governing "gifts."

In *Ludington v. Bell* (1879) 77 N. Y. 143, the court found, in the giving of a promissory note of a single partner, a good consideration for accord and satisfaction of a larger claim against the firm.

Coulter v. Board, 63 N. Y. 365, is not in point. The cause was decided upon the peculiar language of a clause in the contract under which the work was done.

The claim in *People v. Board* (1884) 96 N. Y. 640, was for a quantum meruit.

In *Wahl v. Barnum* (1889) 116 N. Y. 87, 22 N. E. 280, the court found consideration in the recognition, by the party claiming the benefits of the compromise, of the existence of a partnership, which the other party might have found it difficult to establish by suit. There was vigorous dissent, and the consideration is rather vague and shadowy, but the court clearly recognized the principle here.

contended for, since it sought for a valid consideration to support the contract.

In Zoebisch v. Von Minden (1890) 120 N. Y. 406, 24 N. E. 795, the defendant gave up his right to litigate defenses.

In Jaffray v. Davis (1891) 124 N. Y. 164, 26 N. E. 351, the claim was liquidated, and the defense of accord and satisfaction was not sustained. The opinion contains an interesting review of the authorities.

Fuller v. Kemp (1893) 138 N. Y. 236, 33 N. E. 1034, has already been discussed supra.

In Nassoiy v. Tomlinson (1896) 148 N. Y. 326, 42 N. E. 715, an action for commissions on sale of real estate, neither fixed sum nor rate per cent. had been agreed upon by the parties in the original contract. When the service was rendered, therefore, the compensation to be paid was wholly undetermined. This case well illustrates the distinction between the words "undisputed" and "liquidated." The real estate sold for \$30,000. Plaintiff claimed 5 per cent.,—\$1,500. Defendants resisted such claim, but were always ready and willing to pay 1 per cent.,—\$300. This was the sum eventually paid, and receipt in full given, which the court held to be an accord and satisfaction. Now, it might be said that a claim for \$300 was "undisputed," since up to the time of payment defendants had not in fact disputed it; but it was not "liquidated," because its amount had not been fixed by agreement of the parties or by litigation or otherwise. Their prior "willingness not to dispute" did not bind the defendants to remain in the same frame of mind; non constat but they might at any time, by refusing to agree to any precise amount, throw the plaintiff into court. Their final liquidation of the claim at \$300, and payment thereof, cut off absolutely their right to litigate as to the value of the services, and was a good consideration.

Hills v. Sommer (1889) 53 Hun, 392, 6 N. Y. Supp. 469; Palmerton v. Huxford (1847) 4 Denio, 166; Lestienne v. Ernst (1896) 5 App. Div. 373, 39 N. Y. Supp. 199; Preston v. Grant (1861) 34 Vt. 201; Lumber Co. v. Brown (1896) 68 Vt. 239, 35 Atl. 56,—have been referred to supra.

In Bank v. Blair (1865) 44 Barb. 641, the defendants had interposed defenses to an action on the notes which, if sustained, would prevent recovery. "There is," says the court, "nothing before us indicating that the defenses were unsubstantial or fictitious; they were solemnly interposed and insisted on." Their withdrawal was held a good consideration.

In Green v. Manufacturing Co. (1873) 1 Thomp. & C. 5, the court says: "There was, so far as appears, a bona fide dispute by the defendants as to whether they were bound to pay the plaintiff anything for what was claimed as extra work; and, at all events, it is not disputed but that whatsoever the plaintiff was entitled to for extra work was upon a quantum meruit."

In Pardee v. Wood (1876) 8 Hun, 584, the debtor, in addition to paying \$1,500 on a \$2,000 claim, agreed to make no claim for certain machinery then held by the plaintiff as collateral to an indebtedness from a third person. "This," says the court, "was a distinct

consideration, and sufficient to sustain the receipt as a final accord and satisfaction."

In *Looby v. Village of West Troy* (1881) 24 Hun, 78, the whole claim was disputed on the ground that under its charter the village could not incur liability in excess of appropriation. The abandonment of this defense as to the part paid in settlement was a sufficient consideration.

In *Donohue v. Woodbury* (1850) 6 Cush. 148, Shaw, C. J., says: "Originally, the present was a claim for services, and was for unliquidated damages. Some services were admitted to have been rendered, but the amount was denied, and an offer was made of a less sum than that claimed. The case was open to two inquiries: First, as to the time of service; and, second, as to the rate."

In *Bull v. Bull* (1876) 43 Conn. 455, certain "pictures" were taken as part of the consideration.

In *McDaniels v. Lapham* (1849) 21 Vt. 222, the sum really due plaintiff was entirely unliquidated, and could only be ascertained by having an account taken of the rents and profits, and "the whole matter had been involved in protracted litigation for several years."

In *Potter v. Douglass* (1877) 44 Conn. 541, "there was no special agreement between the parties in relation to the amount the plaintiff was to receive for his services, and he was therefore entitled to receive only what they were reasonably worth. * * * Doubtless the object which defendant had in view in making the offer was to avoid the present controversy. He would rather buy his peace by paying a sum of money that he did not owe than possibly defeat plaintiff at the end of an expensive and irritating lawsuit."

In *Tanner v. Merrill* (Mich.) 65 N. W. 564, the decision, rendered by a bare majority, entirely sustains the contentions of plaintiff in error; but the reasoning is not persuasive, nor the conclusion in harmony with the best authorities.

The next question to be considered is whether the referee properly applied the rules of law above enunciated to the facts found in the case at bar. It appears, as has been already shown, that at the time the receipt in full, or proposed "accord," was prepared and submitted to plaintiff for his acceptance, the amount earned under the contract (\$3,895,798.79) was a claim against the defendant, "liquidated," in the strictest meaning of the term. Not only was it undisputed, in the sense that defendant was willing to pay it, but it was no longer open to dispute, even if it wished to dispute it. As to the work called for by the contract, that instrument bound the defendant to pay the sum shown by the final estimate to be due whenever the chief engineer should certify to proper completion, and he had so certified. The price for such work was fixed by the contract itself. As to the extra work, the chief engineer had certified that he had ordered it, that it was done, and had fixed and determined the price for it, and the contract bound the company to pay the price so fixed. Therefore, except for the single defense of payment, the company was wholly without defense to the claim for that sum (\$3,895,798.79). It could not contest it in court "with good faith," nor with "any color of right." Had plaintiff before

March 9, 1888, brought suit for the balance of such sum remaining unpaid, after crediting defendant with all the items of payment it asserted it was entitled to charge, the railroad company could not, assuming that its officers were conscientious, even have verified an answer which could have raised any issue or delayed plaintiff's entry of judgment beyond the time necessary to notice a motion for judgment upon the answer as frivolous. As to the items of payment which the company insisted upon, all were, and always had been, conceded by plaintiff, except the cost of the nut-locks and the overtime penalty. When, therefore, both these items were credited to defendant in the receipt, it parted with nothing—not even a right to litigate—in agreeing to pay, and in actually paying, the balance remaining of the liquidated amount earned under the contract, after deducting all alleged credits for payment. Hence there was no consideration moving to the plaintiff by reason of the payment of this sum on March 9, 1888, and, unless some other benefit to plaintiff can be found to support it, his agreement, implied by receipt in full, to abandon all claim to the cost of nut-locks and overtime charge, was without consideration and nudum pactum.

By reference to the receipt in full, which is set forth in the thirteenth finding of fact, it will be found that the instrument disposed of another item, not hereinbefore referred to, in these terms: "And whereas, the further sum of \$34,598.90 should be credited to said Clark for materials sold by him to said company, and certain rebates and other matters of that description," etc. This sum is, by the statement of account set forth in such receipt, credited to Clark, and is included in the \$173,532.49 paid to him upon his signing such receipt. From what has been said before, it is plain that if, at the time of the transactions relied upon as showing accord and satisfaction, this sum of \$34,598.90, so allowed to Clark, represented an unliquidated item, the amount of which he would have to establish by evidence in case he had sued to recover it, its allowance to him upon the settlement of March 9, 1888, would be a sufficient consideration to uphold that settlement against him as an accord and satisfaction of all his claims.

The findings of fact do not give much information as to the details of this item. It is suggested that the testimony in the case shows that it covers surplus materials, such as rails, spikes, bolts, etc., which Clark had brought on the line of work, but had not needed; that, it being more advantageous to sell them where they lay than to transport them elsewhere, plaintiff had agreed with defendant that it would take them off his hands,—had made "a trade outside of the contract." But with the testimony this court has nothing to do. It sufficiently appears from the findings that part, at least, of this sum was for "materials sold by [Clark] to said company." From the engineer's certificate, which is included in the findings, it appears that this item represented no part of the work specified under the contract, and no part of the extra work and materials ordered by him; that it was not included in his certificate, nor in the final estimate; that he made no decision about it one way or the other; and apparently that he never undertook to pass upon it. Therefore it

was not liquidated by the original contract, nor by any action of the chief engineer thereunder. Indeed, it is plain to a demonstration, from the findings, that the item in question was not included either in the original contract or in the extra work, and must represent an additional and independent contract of sale. What the terms of that contract of sale were the findings do not disclose. If they were of such a character as to leave the price of the articles sold open to future adjustment, and if no binding agreement of the parties had subsequently adjusted such price,—in other words, if on March 9, 1888, the situation was such that the plaintiff, put to his suit, could have recovered this item only by proof of amount furnished or of reasonable value, or of both,—then it was an unliquidated item, and its allowance to the plaintiff on settlement would be a good consideration to support the contract of accord and satisfaction. If, on the contrary, before that time, either when the independent contract was made or later, the parties had settled upon the quantities delivered, and had agreed upon the price, not by some mere expression of willingness to pay a particular amount, but in such way as to preclude further litigation “in good faith” or “with any color of right,” then the allowance and payment of the \$34,598.90 would not constitute good consideration.

The only light we have upon this question is found in a single clause—indeed, practically in a single word—of the fourteenth finding of fact: “That said receipt and paper contained an accurate, truthful, and undisputed account of all dealings between said parties, except in the matter of the forfeiture,” etc. It is quite manifest, from the findings and conclusions, that the referee uses this word “undisputed” as synonymous with “liquidated.” He was evidently satisfied from the testimony that the prior transactions between the parties were such that this sum was no more open to dispute than was the sum of \$3,895,798.79 to which the chief engineer had certified. By what process it was so liquidated does not appear in the findings, and no one seems to have asked the referee to find the facts more specifically. We must take his finding, therefore, as conclusive upon the question, and assume that either by agreeing for a price in advance, or subsequently, by entering into some binding agreement as to the sum to be paid, the defendant had lost its right to throw the plaintiff into court as to that item. Its allowance and payment, therefore, could not constitute a good consideration for the alleged accord and satisfaction.

It will be perceived that upon the settlement the railroad company retained \$40,000 to meet claims. As to this, the referee has found that:

“The defendant railway company has duly accounted for the expenditure of the said sum of \$40,000 so reserved as aforesaid to meet, or as an indemnity against, claims which were made against said company for liens of workmen and claims of subcontractors, and other claims for damages, paid by the defendant railway company, and for the expenditure of \$521.75 in addition thereto, which sum the defendant railway company is entitled to recover from the plaintiff, with interest.”

No one disputes the correctness of this conclusion.

As to the fifth cause of action, the referee found as follows:

"(19) That, in or about the months of March and April, 1888, the plaintiff was the owner of 97,000 feet, B. M., bridge timber, then in the yard of the defendant at Chillicothe, and along the line of the railroad. (20) That the said lumber did not conform to the standard of the defendant, and was not purchased by the defendant from the plaintiff, or allowed in the final certificate of the chief engineer, under the contract in this section, to the plaintiff. (21) That, in and about the month of June, 1888, the defendant took possession of the said lumber, and converted the same to its own use, without assent or knowledge of the plaintiff. (22) That the value of the said lumber at the time of the taking, in June, 1888, was \$2,425."

Having waived the tort, and elected to sue on implied contract, plaintiff could quite properly include this cause of action in his complaint. This transaction out of which it arose took place after the making of the engineer's final certificate, and after the signing of the receipt in full. It would therefore be in no way affected thereby, whether such receipt in full be held to constitute an accord and satisfaction or not. Upon these findings, the conclusion of law that "plaintiff is entitled to recover from the defendant the sum of \$2,425, with interest from June 1, 1888, for the conversion by the defendant of lumber belonging to the plaintiff," is manifestly correct. Indeed, the only objection urged by plaintiff in error is that there was not competent evidence to sustain the findings of fact; but that question is not reviewable here.

It seems proper to call attention to the fact that the court has been greatly hampered and embarrassed by the inordinate size of the record in this case. In view of the well-settled limitations which confine the reviewing court, in such cases, strictly to questions of law, it would seem desirable that the record should be restricted to the presentation of such questions only.

The judgment of the circuit court is affirmed.

WALLACE, Circuit Judge (concurring). This is a writ of error brought by the defendant in the court below to review a judgment for the plaintiff ordered by the court upon the confirmation of the report of a referee before whom the action was tried by the stipulation of the parties. The report contains a full finding of the facts by the referee, and sets forth his legal conclusions thereon. Only those assignments of error can be considered which present the question whether, upon the facts found by the referee, the judgment is wrong. *Roberts v. Benjamin*, 124 U. S. 64, 8 Sup. Ct. 393; *Shipman v. Mining Co.*, 158 U. S. 356, 15 Sup. Ct. 886.

Most of the assignments of error present the question whether the defense of accord and satisfaction set up in the defendant's answer should not have been sustained and adjudged to preclude any recovery by the plaintiff. The material facts bearing on this question, which appear in the findings of the referee, may be summarized as follows: The plaintiff had contracted with the defendant to construct a certain railway, and, by the terms of the written contract between the parties, the defendant, among other things, undertook that, whenever its chief engineer should furnish it his certificate

that the railway had been finished, and all the conditions of the contract been fully performed, and his final estimate of the amount due the plaintiff therefor, the defendant would pay the amount of the estimate, less such payments as should have been already made. The contract provided that the estimate of the engineer should be final and conclusive between the parties.

The parties had also entered into a supplemental contract, whereby the plaintiff agreed to complete his performance of the original contract on or before June 1, 1887, and, in case of failure so to do, to allow the defendant, by way of forfeiture, the sum of \$40,000.

The railroad was completed, and the chief engineer of the defendant furnished the certificate and final estimate, pursuant to the contract. The certificate was given March 3, 1888. It stated the sum earned by the plaintiff under the contract, including deductions and additions for deviations, at \$3,895,798.79. At that time the defendant had made payments to the plaintiff in money and materials amounting to \$3,615,306.57, and, if certain nut-locks were included, amounting to \$3,626,865.20.

During the performance of the contract, the defendant supplied the plaintiff with certain nut-locks, and desired him to use them in constructing the tracks. The plaintiff insisted that the contract did not require him to use them. Thereupon it was arranged that he should use them, and the question whether they were to be used at his expense, or that of the defendant, should remain open until the completion of the railway.

The plaintiff did not complete the contract by June 1, 1887, but his delay was wholly owing to his inability to do so, by reason of the failure of the defendant to acquire certain rights of way which, by the contract, it had agreed to acquire.

Upon a matter of account outside the contract, the defendant was indebted to the plaintiff for materials bought of him, etc., in the sum of \$34,598.90.

March 9, 1888, the defendant rendered to the plaintiff a statement of account, crediting the plaintiff with the sum of \$3,895,798.79, according to the engineer's estimate, and with the further sum of \$34,598.90, for materials, etc., and debiting him with payments amounting to \$3,626,865.20, including \$9,558.63 for the nut-locks, and also debiting him with the sum of \$40,000 for failure to complete the contract by June 1, 1887. As thus rendered, the account stated as the balance due plaintiff the sum of \$173,532.49. Annexed to the statement was a receipt, which recited that the plaintiff had received \$173,532.49 in full satisfaction of the amount due him upon the estimate, and of all claims and items of every kind, name, and nature arising from, or growing out of, the said contract, and of the construction of the said railroad. The plaintiff signed the receipt, and thereupon the defendant paid the plaintiff \$173,532.49.

The referee found that the statement rendered by the defendant "contained an accurate, truthful, and undisputed account of all dealings between the said parties," except in respect to the \$40,000 debited for time forfeiture, the \$9,558.63 for nut-locks embraced

in the \$3,626,865.20, and another small item which accrued subsequently, to which reference is unnecessary.

The referee found, as conclusions of law: (1) That at the time of signing the receipt the plaintiff was not indebted to the defendant upon the item for nut-locks; (2) that the plaintiff was not liable for the item of \$40,000 debited to him for failure to complete the railroad by June 1, 1887; (3) that when it rendered the statement of account the defendant was indebted to the plaintiff in the sum of \$49,558.63 in addition to the sum of \$173,532.49 paid by it upon receiving the receipt; (4) that the delivery of the receipt, and the acceptance of the payment, by the plaintiff, did not constitute a valid payment or accord and satisfaction of the said sums of \$9,558.63 and \$40,000, or either of them, or any part of them; and that the plaintiff was entitled to recover the sum of \$49,558.63, with interest from March 9, 1888.

The assignments of error thus raise the question whether the acceptance of \$173,532.49 by the plaintiff, upon a promise to receive it in full of all his demands, was a settlement and satisfaction of his demands against the defendant, which amounted to \$49,558.63 more than that sum. If there was no consideration for his promise, the conclusion of the referee was correct; if there was a sufficient consideration for it, the assignments of error are good.

A promise by a creditor having a liquidated and undisputed demand against his debtor, which is wholly due and payable, to discharge the residue upon receiving payment of a part, is, according to all authorities, nudum pactum, and totally inoperative, because the debtor is under legal obligation to pay the whole demand. A demand is not a disputed demand, merely because the debtor refuses to pay or recognize it; for, if this were true, no case would ever arise for the application of the rule. It is disputed, within the meaning of the rule, only when it is so far disputable as to present a "proper case for litigation." *Tuttle v. Tuttle*, 12 Metc. (Mass.) 551; *Zoebisch v. Von Minden*, 120 N. Y. 406, 24 N. E. 795; *Honeyman v. Jarvis*, 79 Ill. 318. A demand is a liquidated demand when it is of such nature that its exact pecuniary amount is either ascertained or ascertainable by simple computation.

It is conceded that, as to the part of the plaintiff's demand established by the certificate of the engineer, it was a "liquidated" and "undisputed" demand against the defendant, in the sense in which these terms are used in considering the validity of a promise to accept a part payment in satisfaction of the whole demand. The other part of the plaintiff's demand, that for the materials, etc., purchased of plaintiff by defendant, was, according to the referee's finding, undisputed in fact between the parties; and, this being so, it is quite unnecessary to inquire whether it was originally one in respect to which there might have been a fair difference of opinion between the parties as to the amount due. The statement of account rendered by the defendant is evidence, as against the defendant, not only that it was an undisputed demand, but one the amount of which had been ascertained by the parties. If the amount had been ascertained, it was

a liquidated demand. As no facts appear in the findings of the referee to the contrary, it is to be concluded that this part of the plaintiff's demand was also liquidated, as well as undisputed by the defendant.

The case is not precisely one where the debtor refuses to pay the whole of an undisputed and liquidated demand, and exacts a promise from his creditor to receive part in satisfaction of the whole. Strictly, it is one where the creditor having two undisputed and liquidated demands against the debtor, and the latter, claiming to have cross demands or counter demands against the creditor, refuses to pay the creditor's demands, unless the validity of the cross demands is acknowledged, and their amount allowed to him by the creditor. By the statement of account and the receipt annexed to it, the defendant in fact took this position, and notified the plaintiff that, as a condition to paying the demands which it conceded to be due the plaintiff, the latter must allow and deduct the debited items for the nut-locks and the forfeiture. Upon this state of facts, a promise to allow the whole amount of the cross demands has no consideration to sustain it, because, in contemplation of the law, no benefit could accrue to the promisor and no injury to the promisee. The promisor derives no benefit, because he allows the whole; the promisee is not injured, because he relinquishes nothing.

The authorities are not altogether in accord upon the question whether, in order that there may exist a valid consideration for a compromise, both parties must concur in supposing the demand to be doubtful in point of right or amount, or whether it suffices if the claimant only entertains this belief, and honestly supposes that he has a valid demand. If the claimant, knowing his demand to be groundless, coerces a compromise, the compromise is uniformly declared to be without consideration. On the other hand, it is well settled that there is a sufficient consideration when both parties regard the demand as possibly capable of enforcement. In *Bank v. Geary*, 5 Pet. 99, the court said: "It is enough that the bank considered it a doubtful question, and that they supposed they were getting some benefit by foreclosing all inquiry on the subject, and the complainant, by precluding herself from setting up the defense, waived what she supposed might have been of some material benefit to her." See, also, *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 549; *Keefe v. Vogle*, 36 Iowa, 87; *Flannagan v. Kilcome*, 58 N. H. 443; *Clark v. Turnbull*, 47 N. J. Law, 265; *Lumber Co. v. Brown*, 68 Vt. 239, 35 Atl. 56; *Wahl v. Barnum*, 116 N. Y. 87, 22 N. E. 280; *McKinley v. Watkins*, 13 Ill. 140. As in the present case no concession was made by the defendant, and the allowance of its demands in full was exacted as a condition of paying the demands of the plaintiff, there was no compromise; and it is immaterial that the defendant may have asserted its demands in good faith, when it appears that they were in fact and in law without foundation. We conclude that the assignments of error which have been considered are not well taken.

By signing the receipt, and acquiescing for a considerable period in the correctness of the account rendered by the defendant, the plaintiff was not precluded from recovery. An account stated is an ad-

mission that the account is correct, and, if the party to whom it is rendered omits to communicate objections to the other party within a reasonable time, an inference may be drawn that he was satisfied with it. But there is no arbitrary rule of law which renders the omission to object in a given time equivalent to an actual agreement or a consent to the correctness of the account. An account settled is stronger evidence, and requires more proof to overcome it, than a mere account stated. But the parties are never concluded, except by the statutes of limitation, from proving the incorrectness of the account, unless the case is brought within the principles of an estoppel in pais or of an obligatory agreement between them. Lockwood v. Thorne, 18 N. Y. 285; Perkins v. Hart, 11 Wheat. 237.

Other assignments of error impugn the conclusions of the referee in disallowing the demands of the defendant for the nut-locks and for the forfeiture. There are no provisions in the contract which, expressly or by implication, required the plaintiff, in constructing the railroad, to use the nut-locks, unless found in that provision by which he undertakes to "finish, in every respect, in the most substantial and workmahlke manner, all the work hereinafter specified." The referee did not find that this provision had not been complied with. Nor is there any finding or any evidential facts in the report to authorize the conclusion that the parties, at the completion of the work, had come to an understanding by which the expense of these articles was to be borne by the plaintiff. It is too plain to require discussion that, if the failure of the plaintiff to complete performance of the contract on or before June 1, 1887, was caused wholly by the default of the defendant in failing to acquire the rights of way necessary to be acquired before the work could be completed, the claim of the defendant for the \$40,000 was without foundation.

The fifteenth and sixteenth assignments of error relate to that part of the recovery which proceeds upon the conversion by the defendant of certain bridge timber belonging to the plaintiff,—a cause of action which arose subsequently to the settlement between the parties of March 9, 1888. Neither of these assignments can be considered,—the first because it impugns a ruling of the referee made during the progress of the trial, and the second because the decision of a motion for a new trial is not reviewable.

We find no error in the record, and conclude that the judgment was correct.

It is therefore affirmed, with costs.

In re PRICE et al.

(District Court, S. D. New York. April 5, 1899.)

BANKRUPTCY—COLLECTION OF ASSETS—PROPERTY IN CUSTODY OF RECEIVER OF STATE COURT.

Where a state court, in a suit between insolvent partners for dissolution of the partnership and settlement of its affairs, had appointed a receiver pendente lite, who had collected the assets, but no distribution to creditors could be made, for the reason that no answer had been filed in the suit or decree made therein, and meanwhile both partners were

adjudged bankrupt and a trustee was appointed, *held*, that the court of bankruptcy could not order the receiver to surrender the property to the trustee, but that the latter would be authorized to apply to the state court to be substituted as plaintiff in the action, and to move that court for the entry of a decree in the case, and for an order directing the receiver to transfer the assets to him.

In Bankruptcy.

Mark Ash, for trustee.

Gibson Putzel, for receiver.

BROWN, District Judge. This is an application by the trustee in bankruptcy of the co-partnership firm of B. L. Price & Co., for an order directing William R. Rose, a receiver appointed in the supreme court of the state, to turn over to the trustee certain assets of that firm in the receiver's possession.

The two co-partners composing the firm were adjudged bankrupts on their own petition on December 2, 1898, pursuant to the provisions of the bankrupt law. On January 12, 1899, the petitioner was appointed trustee at a meeting of the creditors and thereafter duly qualified as such. The creditors have proved their claims and are awaiting distribution of assets.

The property and assets which the trustee asks to have turned over to him amount to \$2,245.87, as stated in the petition, being the proceeds of sales of property of the bankrupts and of the collection of debts belonging to them. Mr. Rose was appointed receiver *pendente lite* by consent of the parties in an action in the supreme court of the state, on October 6, 1896, three days after the commencement of the action, which was brought by one partner against the other, on a complaint alleging the insolvency of the firm, and asking for a decree of dissolution, the appointment of a receiver, and the distribution of the effects among its creditors. No answer was put in, and no decree in that suit has ever been entered. The receiver by the order appointing him was authorized to take immediate possession of all the partnership property, to collect the outstanding debts, and to sell the merchandise of the firm; and the parties to that action were directed to execute all necessary transfers to complete the receiver's title to all the firm property.

In November, 1896, J. L. Baily & Co. recovered a judgment against B. L. Price & Co., and in supplementary proceedings upon that judgment they obtained on December 12, 1896, the appointment of William L. Lawrence as receiver in behalf of those judgment creditors alone. In February, 1897, the receiver last named made a motion to supersede the appointment of Rose and that the property in his hands be delivered to Lawrence, as receiver in supplementary proceedings. The effect of this motion, if successful, would have been to give the judgment creditors a preference in the payment of their debts out of the partnership assets. On appeal to the appellate division the motion in November, 1897, was denied, upon condition that the partnership suit should not be discontinued or the partnership receiver discharged "except upon notice to the respondents." 21 App. Div. 597, 599, 47 N. Y. Supp. 772.

The proceeds of the partnership property have now been long in the receiver's hands without any further steps taken towards their distribution among creditors. The state court is not in condition to make such distribution until after a decree in the suit is entered adjudging the insolvency of the firm, and the consequent authority of the court to call on the partnership creditors to make proof of their claims, adjudicate thereon, and distribute the proceeds as equity may require. Before decree the court does not act the part of a litigant, *ex proprio motu*; nor before decree do creditors at large have any status in an ordinary partnership suit for carrying on effective litigation; and owing to the differences between the partners, no progress in that action has been made for upwards of two years; so that while the assets are there impounded, the object of the suit so far as respects distribution is at present thwarted.

In the meantime an adjudication of bankruptcy has been had in this court against both partners; all the creditors have appeared and proved their claims according to law; the trustee has been appointed and qualified, and nothing remains to be done for the immediate distribution of the assets among creditors, *pro rata*, without further delay, litigation or expense, except turning over those assets to the trustee for that purpose.

This court, however, can make no order requiring the receiver in a state court to transfer the assets in his custody to the trustee in bankruptcy. The receiver is an officer of the state court; that court had full jurisdiction of the action to dissolve the partnership, and under its authority the receiver became vested with the title for the purpose of that action, which included a distribution of the property among creditors. The bankruptcy act does, indeed, vest in the trustee the title to all the bankrupt's property and rights of action whether legal or equitable (30 Stat. 565, § 70); but this does not authorize an interference by one court with the property lawfully in possession of another court of competent jurisdiction (Clark v. Bininger, 3 N. B. R. 518, 528, and cases there cited, s. c. 38 How. Prac. 341; Sedgwick v. Menck, 1 N. B. R. 675, Fed. Cas. No. 12,616).

The application for the order asked for must therefore be denied. The application should be made to the state court.

As the trustee in bankruptcy, however, represents creditors in the collection of assets or moneys of the estate for purposes of distribution; and as he also represents the bankrupts as regards any rights of action in reference thereto, and under section 11 may be "permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication" (30 Stat. 549), an order may be entered authorizing the trustee to apply to the state court for an order directing the receiver to transfer the fund to him for distribution among the creditors in the bankruptcy proceeding, and to that end, that the trustee may be substituted as plaintiff in the state suit in place of the bankrupt therein, and enter the appropriate decree adjudging the insolvency of the firm, and directing the payment of the funds in the receiver's hands to the trustee for distribution among creditors.

UNITED STATES v. BACHARACH et al.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 57.

CUSTOMS DUTIES—"PLATEAUX."

"Plateaux," which are braids or plaits of straw sewed or woven together into an oval form, and are used for making women's hats, but have to be manipulated into the form desired, and pressed or wired so as to retain that form, and are then trimmed, are properly classified, not under Tariff Act Oct. 1, 1890 (26 Stat. 567) par. 460, § 1, "as manufactures of * * * not specially provided for in this act," but under paragraph 518, § 2, exempting from duty "braids, plaits, laces, and similar manufactures composed of straw * * * suitable for making or ornamenting hats, bonnets and hoods."

Appeal from the Circuit Court of the United States for the Southern District of New York.

Henry C. Platt, for the United States.

Stephen G. Clarke, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The importations in controversy are commercially known as "plateaux," are braids or plaits of straw sewed or woven together into an oval form, are bought and sold by the dozen or piece, and are used for making women's hats. They are not complete hats, but require to be manipulated into the form desired, and pressed or wired so as to retain that form, and are then trimmed with ribbon or other materials. This appeal presents the question whether the importations were properly classified for duty under paragraph 460, § 1, of the tariff act of October 1, 1890 (26 Stat. 567), as "manufactures of * * * straw * * *, not specially provided for in this act," or whether they should have been classified under paragraph 518, § 2, of that act, which exempts from duty "braids, plaits, laces, and similar manufactures composed of straw * * * suitable for making or ornamenting hats, bonnets and hoods." We concur with the circuit court in the opinion that the importations were exempt from duty. They were not braids or plaits of straw, in a commercial sense, according to the testimony; but they were similar manufactures composed of straw, and suitable for making hats. Paragraph 518 supplies the more specific designation of the articles in controversy. The decision of the circuit court is accordingly affirmed.

WARREN FEATHERBONE CO. v. WARNER BROS. CO.

(Circuit Court, D. Connecticut. February 22, 1899.)

No. 966.

I. PATENTS—PLEADING IN INFRINGEMENT SUITS.

It is no ground of demurrer that the bill fails to allege that the inventions set forth and claimed in the patent sued on were not abandoned before the application therefor. The defense must be interposed by an answer showing the facts.

2. SAME—DRESS OR GARMENT STAYS.

The Warren patent, No. 389,993, for an improved dress or garment stay, constructed by taking two pieces of "any fabric or material * * * of any desired width," and, after inserting between them "any suitable elastic substance, * * * a row of stitching is made longitudinally in the center portion of the stay," is void on its face for want of novelty.

3. SAME.

The Warren patent, No. 327,626, for a method of attaching stiffenings for dress waists, is not void on its face for want of novelty and invention.

This was a suit in equity by the Warren Featherbone Company against the Warner Bros. Company for alleged infringement of two patents for improvements in dress or garment stays.

Fred L. Chappell and Sullivan & Cromwell, for complainant.

Seabury C. Mastick, for defendant.

TOWNSEND, District Judge. To the bill herein alleging infringement of letters patent Nos. 327,626 and 389,993, issued to E. K. Warren, and assigned to complainant, defendant demurs, assigning the following reasons, namely:

1. The bill fails to allege that the inventions set forth and claimed in said patents were not abandoned before the application therefor. This ground of demurrer is not well taken. Abandonment, not appearing on the face of the bill, is a defense which must be interposed by answer showing the facts. Walk. Pat. § 602; United States Electric Lighting Co. v. Consolidated Electric Light Co., 33 Fed. 869; Western Electric Co. v. Sperry Electric Co., 7 C. C. A. 164, 58 Fed. 192; Mast, Foos & Co. v. Dempster Mfg. Co., 71 Fed. 701, 705; Fruit-Jar Co. v. Wright, 94 U. S. 92.

2. The bill fails to show that the alleged inventions are capable of combined use, or of conjoint action, or that the defendant uses them conjointly. The conclusions hereafter stated dispense with the necessity of considering this point.

3. It appears on the face of the patents that each of them is invalid. The point of invalidity is well taken as to patent No. 389,993. The specifications describe an improved dress or garment stay, which is constructed by taking two pieces of "any fabric or material * * * of any desired width, * * * and, after inserting between them any suitable elastic substance, * * * a row of stitching is made longitudinally through the center portion of the stay," etc. The claim is as follows:

"A dress stay formed of a composite blade and separate covering pieces or faces of greater width than said blade, and stitched at opposite sides and intermediate the width thereof, thereby tightening the covering, and increasing the tension of the stay, the side edges of the covering strips forming selvages for securing the stay throughout its length to the garment, substantially as set forth."

The utter lack of possible novelty in a claim for a dress stay made in the same way as from time immemorial our coats, collars, and cuffs have been made or stiffened, namely, by sewing a stiffening material between the outer surface and inner lining, is self evident. See Bowman v. De Grauw, 60 Fed. 907.

Patent No. 327,626 is for a "Method of Attaching Stiffenings to Dress Waists." The patentee says: "The object of this invention is to provide the seams of a dress waist with a stiffening material con-

nected with the seam of the dress fabric or outside material, and the lining, without the formation of separate pockets;" and thereby it is claimed certain objections in the prior art are obviated, and certain advantages obtained. The claim is for:

"The method of attaching the stiffening material to seams by placing it in the open seam after the main seam is sewed, and attaching it to the fabric by stitching its sides to the inside portion of the open seam without connecting it with the main seam, substantially as described."

—That is, as explained by the specification, the patentee takes a dress waist having the ordinary seams therein, and opening the flaps of said main seams,—i. e. the portions of extra fabric on either side of the main seams,—inserts stiffening material therein, and so stitches it to the flaps independently of the main seam, preferably by diagonal lines of stitching, known as zigzag or feather stitch, that while it firmly supports the fabric, and conforms to the figure and its movements, it does not wrinkle the dress waist or cut through the ends. It would be obviously inexpedient, in passing on this demurrer, to express an opinion as to the merits of this alleged invention, except as to the question whether or not on the face of the patent it is void for want of patentable novelty. Whether or not this is the mere ordinary expedient of the dressmaker; whether or not this method would naturally occur to those skilled in the art; whether or not the invention of new kinds and forms of stiffening material would have suggested this attachment,—cannot be determined, except by such examination of the prior art as would naturally be presented upon final hearing. It is sufficient for the determination of this demurrer to say that the method is not necessarily upon its face so devoid of patentability that the court could not, upon evidence of novelty, utility, and universal adoption, find that it involved the exercise of the faculty of invention.

The demurrer is overruled as to patent No. 327,626, and sustained as to patent No. 389,993, without costs to either party.

BLUM et al. v. KERNGOOD.

(Circuit Court, D. Maryland. Feb. 5, 1898.)

PATENTS—INFRINGEMENT—WAISTBAND FASTENERS.

The Ewig patent, No. 408,300, for a waistband fastener for trousers, held to contain only one novel feature, namely, a slot having a straight edge across the plate, over which the two edges of the cloth can be stitched; and held, further, that this was not a pioneer invention, and was not infringed by defendant's device.

This was a suit in equity by Isaac Blum and William S. Wheatfield against Herman Kerngood, trading as the Alma Button Company, for alleged infringement of patent No. 408,300, issued to John Ewig, August 6, 1889, for waistband fasteners.

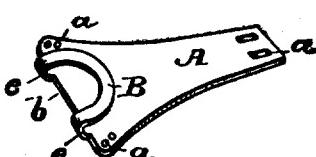
Isidor Rayner and Price & Stewart, for complainants.

Thos. G. Hayes and Louis B. Berner, for defendant.

MORRIS, District Judge. A defense relied upon is noninfringement. The specification of patent No. 408,300 describes a hook and eye

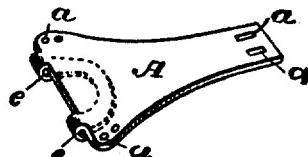
device, in which the hook is made of a broad, flat, thin piece of metal, turned back upon itself. It is designed to be placed between the two thicknesses of material of which the waistband of a pair of trousers is made. The specifications also describe a peculiar catch, but that is not infringed. It is only with the hook that we are concerned in this case. The novelty of the hook, and the invention which Ewig supposed he had discovered, can be quite clearly understood from the specification, when read in connection with the state of the art, and a previous patent (No. 375,699) to the same inventor, mentioned in the specification. A broad hook, made of thin sheet metal, inserted between the outer and inner thicknesses of the waistband, with a broad catch opposite to it, has the advantage of keeping the waistband flat, and of distributing the pull over considerable surface, and of counteracting the tendency of the pull to wrinkle the waistband. But the broad body plate of the hook inserted between the two thicknesses of cloth at their edges had this disadvantage: that the edges of cloth were free, and gave no support to the hook, and had a tendency to gape open, which was unsightly. The improvement of the patent was that a portion of the hook plate was cut away, so that through the slot thus left the edges of the cloth could be sewed together. But the mere cutting away of a portion of the metal, leaving a slot of any shape, was not new, as is shown by the French hooks in common use, illustrated by the exhibits. The novelty consisted in cutting a slot of the shape and for the purpose indicated by the patent. This was a slot having a straight edge across the plate, over which the two edges of cloth could be stitched, and which effected two beneficial results. One was that the edges, being stitched together just as if the hook was not there, did not gape open, and presented a neat appearance. The other was that the straight transverse edge of the slot presented to the straight stitching of the edges of the cloth a wide bearing, at right angles to the line of the pull, which tended to keep the hook firmly in its place, and to resist puckering in the waistband, and keep it flat and neat in appearance. The specification describes the slot as semicircular, because it was round in the hook, and straight like the diameter of a circle at the base of the hook. If the hook was turned back on itself just at the straight edge of its base, it is obvious that the body of the hook could not be inserted between the two layers of cloth far enough to permit the two edges of cloth to be brought together to be stitched; and for that reason the portion bent back to form the hook is bent over at a little distance from the straight edge, so as to leave what are, in the specification, called the "shoulders, e, e."

FIG. 2.



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FIG. 3.



Claim 1, as first submitted to the patent office, and rejected, was as follows:

"(1) In a garment fastening, the combination with a catch, C, of the hook, B, having slot, b, substantially as and for the purpose specified."

This claim was rejected, apparently for the reason that a slotted hook was old. The specification was then amended so as to more distinctly point out the improvement, by inserting this:

"Referring to the drawings, the letter A indicates one member of my fastening, consisting of a piece of sheet metal rounded at one end, and having a semicircular slot in said end. Said slotted and rounded end is bent over and back upon the body of the member, A, to form a hook, B, and is bent so as to leave shoulders, e, projecting beyond the edge of the body, A, for the purpose hereinafter described."

In the original specification it was said:

"I have found, in practice, that when the hook, B, is at all wide, the edges of the cloth are not sufficiently supported by threads; and, to remedy this defect, I cut away the center of the hook to form a slot, b, as shown in Figs. 1, 2, 3 of the drawing, which permits the cloth to be stitched through said slot, thus not only permitting the cloth to be stitched substantially along its entire edge, but also assisting in firmly securing the member, A, in place."

The original specification was amended by inserting in the clause above quoted the following:

"And the hook portion, B, is so bent over upon the body portion, A, as to leave the shoulders, e, e, projecting beyond said body, A, which allows the two layers of cloth on each side of the member, A, to meet slightly beyond the edge of the member, A, and permits," etc.

Claim 1, as amended and allowed, is as follows:

"(1) In a garment fastening, the combination with catch, C, of the plate, A, having the rounded hook, B, provided with a semicircular slot and the shoulders, e, e; said plate, A, being perforated at a, a, substantially as shown and described, and for the purposes specified."

It appears by the amended specification, as well as by the amended claim, that the patentee pointed out and claimed the semicircular slot, with the shoulders, e, e, as his invention or improvement. His original claim 1, which was, broadly, for the hook having a slot, was rejected, and the restricted claim for the semicircular slot with the shoulders was allowed. The patent examiners were clearly right in this restriction. A slot was old, but a semicircular slot made of that shape for the purpose of presenting a straight transverse edge to the stitching was new; and the bending of the hook so as to form the shoulders beyond the straight edge for the purpose of allowing space for the edges of the two layers of cloth to meet was new, as a device for that particular purpose, in connection with a solid body plate. There was nothing new in the projecting ears on each side, with perforations for threads. These ears appeared in the patent to Ewig, December 27, 1887 (No. 375,699), and are there called a "lip or projection provided with one or more perforations." In the patent in suit it is merely said in the specifications that the body of the hook is provided with perforations for the passage of the threads for securing it to the garment; and in claim 1, that plate, A, is perforated at a, a, as shown and described. The ears, therefore, which may be used for the perforations, are not covered by any-

thing in the specification and claim, and, in my opinion, in view of the state of the art, and Ewig's previous patent, could not rightly have been claimed. The defendant's hook, which is charged to be an infringement, is like the complainant's hook, except that it does not have the semicircular slot. It has an elliptical slot, which extends as far into the body of the metal as it does into the part which forms the hook; and while it permits the edges of the two layers of cloth to be stitched across, just as the old French hook did, it does not present to the stitching any bearing to resist the pull. It is urged that such an edge is presented by the ears on each side of the hook, and that they are the equivalent of the straight edge cut out in the center of the hook. It may be that on defendant's device the edge of the ears help to remedy the absence of the center straight edge, but it must be remembered that complainant's device, although it has proved highly successful, and has gone wonderfully into use by the trade, is not a pioneer invention. Haarvig's patent, No. 144,334, November 4, 1873, shows a waistband fastening for pantaloons, made of flat metal, attached by perforations in ears at each side; and the Weinberg patent, No. 60,600, December 18, 1866, exhibits a form of hook and eye fastener for the waistband of pantaloons; and Ewig's patent, No. 375,699, December 27, 1887, was a device for the same purpose. There was nothing, therefore, new in the substitution of a hook and eye device of any known form for buttons for this purpose. Patentable novelty was restricted to a new form of device, or an improvement on an old form, requiring invention. All forms had for their object to resist strain; to keep the device securely in place; to be slighty in appearance and moderate in cost. In the device now in suit, nothing distinguishes it from Ewig's prior patent but the semicircular slot made in the form, which remedies the difficulty which Ewig says he encountered when using a wide hook, viz. that the edges of the cloth were not sufficiently supported by the threads, and with the advantage, when used, that it resulted in the body plate of the hook being more securely held in place. This semicircular slot is all that I find that was patentable in complainant's device, and, treating the patent in suit as a good patent for that, I do not find that the defendant infringes; and the bill must be dismissed.

DODGE et al. v. FULTON PULLEY CO. et al.

(Circuit Court of Appeals, Second Circuit. December 7, 1898.)

No. 39.

PATENTS—INFRINGEMENT—SEPARABLE PULLEYS.

The Dodge and Philion patent, No. 260,462, for a separable pulley, designed to secure a larger surface of contact with the shaft, and a firmer adhesion thereto, when the separable halves are bolted together, is limited by the prior art to a pulley in which the parts, when placed together, come in contact at the rim while remaining separate at the hub, and is not infringed by a pulley so constructed that the meeting faces of the separate halves, when placed together, lie in the same plane and come in contact throughout their length.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This cause comes here upon appeal from a preliminary injunction order of the circuit court, Northern district of New York, restraining defendants from infringing claims 1 and 3 of the patent sued upon until final hearing. The execution of such order was, by the circuit court, stayed pending this appeal. The patent declared upon is No. 260,462, to Dodge and Phlion (July 4, 1882), for a separable pulley. The facts sufficiently appear in the opinion.

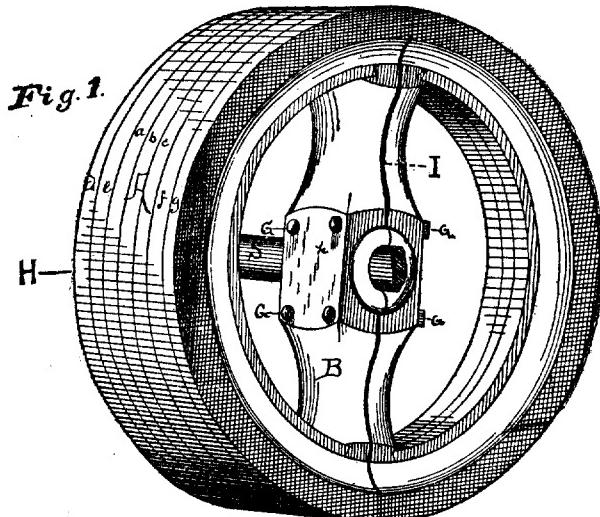
Edward Rector, for appellants.

Lysander Hill, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The specification for the patent sets forth that:

"Heretofore separable pulleys have been made in parts fitted and bolted together prior to being bored and turned, and therefore they were fitted to the shaft and secured thereon in ordinary way. Such pulleys are not interchangeable as to shafts of different diameters. Our improvement obviates, first, the old and imperfect mode of fastening the pulley in place on the shaft; and, second, renders the same pulley readily applicable to shafts of different diameters, or as a fast or loose pulley. In addition to the above, we propose to make our pulleys of wood, and in a structural way which will greatly cheapen and add to their efficiency. We are aware that wooden pulleys have heretofore been made, and therefore do not claim such broadly, but only with relation to the structural methods hereinafter described."



being turned, it is cut in halves transversely. The spoke and hub bar, B, is prepared either by properly fashioning a wooden stick in the lathe, and afterwards slitting it in two, as shown, or by fitting together properly two separate bars. These parts are secured at their ends to the ends of the ring segments in some proper and efficient manner, and for this purpose we prefer the dovetail, as shown. The parts of the bar, B, are so placed in the ring segments that they will not touch each other at the axis or hub of the wheel when the ring segments are placed in position. The clamping bolts, G, G, are then inserted with pieces of thin wood or veneering, I, between the parts of the bar, B, to prevent them from springing together under the action of the bolts while being turned in the lathe. The exterior ring segments, d, e, f, g, are then applied and secured by glue, nails, or other suitable means, and cut transversely in line with the previous cut. After this is done, the pulley is turned on its face and edges, and the central part of the spoke arm or hub, h, is bored truly central. This bore may be adapted exactly to a shaft, S, of some definite size, and the pulley may be applied thereon, the pieces of veneering being removed, so that the bolts, G, may then draw the parts, B, forcibly upon the shaft, and thereby clamp the pulley hub against said shaft, and in that way obtain an adhesion due to area of surface in contact. This is a much stronger adhesion than is possible where the area of contact is confined to the point of a set screw on one side and a small segment of the hub on the opposite side. * * * It is sometimes extremely inconvenient to properly fit a pulley to a shaft for which it is not adapted. To obviate this difficulty, we employ removable thimbles, H, made also in halves, and these can be provided in sets or quantities adapted to shafts of various sizes. * * * The tension of the same bolts, G, G, fastens and clamps the pulley to the split thimble and the thimble to the shafts," etc.

The claims in controversy are:

"(1) A separable pulley, whereof, when the meeting ends of the rim are in contact, the meeting faces of the spoke bar and hub are slightly separated, as described, combined with clamp bolts, G, whereby said hub is clamped upon the shaft, in the manner set forth."

"(3) A separable pulley, whereof, when the meeting ends of the rim are in contact, the meeting faces of the spoke bar are slightly separated, and the clamp bolts, G, combined with a separable split thimble, interposed between said shaft and pulley, substantially as set forth."

The patent was before the circuit court, Southern district of Ohio, Western division, in the case of Dodge v. Post, 76 Fed. 807, at final hearing on the merits. The state of the art was most exhaustively gone into by Judge Sage. In a record containing nearly 4,000 pages, 10 patents and 2 prior publications were set up as anticipations, and evidence was given of 29 instances of alleged prior use. The patent was sustained as to both claims. It was also considered in the following reported cases: Dodge v. Menasha Wood Split-Pulley Co. (preliminary injunction granted by circuit court, E. D. Wis., Seaman, D. J., Feb. 20, 1897); Pulley Co. v. Dodge, 29 C. C. A. 508, 85 Fed. 971 (a reversal of the above by circuit court of appeals, Seventh circuit, Oct., 1897, and rehearing denied, 30 C. C. A. 455, 86 Fed. 904); Dodge v. Prendergast Lumber Co.¹ (preliminary injunction granted by circuit court, N. D. Ohio, W. D., Aug. 29, 1898).

The invention described in the specifications and set forth in the first claim of the patent is certainly quite clearly expressed in that document. Separable wood pulleys were old, and the patentee's improvement was devised to obviate the old and imperfect methods of fastening

¹ Not reported, by request of Hammond, J., who rendered the opinion of the court.

the pulley in place on the shaft. This end is accomplished by the peculiar structural method described. It is apparent that if the central hole in the spoke hub is drilled while both spokes are in contact, and is made exactly the size of the shaft, its interior surfaces will rest upon the shaft without exerting any grip thereon when the spokes are drawn together under the action of the clamping bolts. If the hole in the spoke hub be drilled while both spokes are in contact, and is made smaller in diameter than the shaft, although its interior surfaces may be made to grip the shaft when the clamping bolts bring the spokes together, it cannot contact firmly with the shaft except at comparatively small areas of such surfaces, and thus its grip will not be efficient. If, however, the hole in the spoke hub be drilled when the two parts are slightly separated (as they are shown in Fig. 1, when the inserted strip of veneering prevents them from springing together under the action of the clamping bolts), and be drilled exactly the size of the shaft, it will come to pass, when the pulley is subsequently placed upon the shaft, that the entire interior surface of the hole will be in contact with the surface of the shaft; and, since there is a space left between the two blocks of wood (spokes) in which these interior surfaces are located, there will be an opportunity afforded for the clamping bolts to bring them together with great force, and so as to exert an efficient grip on the shaft, or, as the specification expresses it, "obtain an adhesion due to area of surfaces in contact." To obtain the clearance necessary to enable the clamping bolts to bring these interior surfaces together, the hub or spokes must be so arranged that they will not themselves come in contact, and thus prevent any further inward movement under the strain of the clamping bolts. Finally, it is apparently desirable that the segmental rims of the pulley should be brought into close contact, under strong pressure, thus securing a rigidity of the contacting parts as closely akin as practicable to an integral structure; thus increasing the power of the rim to resist the strains to which it is exposed, notably the so-called "yield and recover," every time that the belt passes from one half rim to the other. And it is further apparent that, if the pulley is so constructed that, when the meeting ends of the two segmental rings are brought in contact by placing them in position on the shaft, or at the first compression of the clamps, there is still a clearance left between the spoke hubs, each turn of the clamping bolt which promotes the grip of the interior surfaces of the hub hole will at the same time increase the rigidity of the rim structure.

Referring again to the patent, we see that such a structure as is above described is shown and claimed: "Pieces of thin wood or veneering between the parts of the bar, B, * * * prevent them from springing together * * * while being turned in the lathe." "The central part of the spoke arm or hub is bored truly central. This bore may be adapted exactly to a shaft of some definite size." "The parts of the bar, B, are so placed in the ring segments that they will not touch each other at the axis or hub of the wheel when the ring segments are placed in position." "The bolts, G, may then draw the parts, B, forcibly upon the shaft, and thereby clamp the pulley shaft against said shaft." "What we claim as new is: (1) A separable pulley, whereof, when the meeting ends are in contact the meeting faces of

the spoke bar and hub are slightly separated, as described, combined with clamp bolts, G, whereby said hub is clamped upon the shaft, in the manner set forth." And the drawing indicates this feature of rim contact and hub separation, since the strip of veneering, I, apparently does not extend into the rim. When a central hole, "adapted exactly to a shaft," is bored with the spokes separated by veneering, and the meeting rims in contact, and the hub is subsequently placed upon the shaft without the veneering, it is manifest that by the time the central hole has come into position over the shaft, and even before it is made to grip under the pressure of the clamp bolts, the rim will be in contact.

The first question presented here is whether the circuit court, to which application was made for a preliminary injunction, should have construed the above-quoted first claim as covering a structure in which the meeting ends of the rims do not come in contact before the operation of tightening the clamp bolts which run through the "slightly separated" spoke bar causes the inner surfaces of the hub hole to grip the shaft. As was before stated, the patent was most carefully considered, in the light of an apparently exhaustive record, and was construed at final hearing in Dodge v. Post, *supra*.

Certainly, none of the subsequent opinions referred to *supra* can be held to have extended or broadened the construction given to this claim in Dodge v. Post. Upon an application for preliminary injunction, it would be a most exceptional case which would warrant the court in expanding a claim beyond the limits fixed in an exhaustive opinion at final hearing. No such case is made out here. An examination of the opinion in Dodge v. Post, in which, as before stated, the prior art was so fully disclosed to the court, shows that the learned judge who construed the patent found it necessary to construe this claim narrowly, in order to avoid anticipations which the prior art contained. A single excerpt from Judge Sage's opinion is sufficient. He is discussing a prior use known as the "Erie Split Pulley":

"It appears from testimony of defendant's witnesses * * * that the pulley halves, held slightly apart, were bored with an auger the size of the shafts; that they would not come together on the shaft, but there would be an open space about an eighth of an inch wide between them throughout their entire diameter; * * * that the pulleys were fastened to their shafts by compression alone. * * * From complainant's evidence, it appears that it was the custom to use compression and set screws in combination. * * * The testimony for complainant is strongly fortified by the admitted fact that the pulleys were made with straight meeting edges, so that, if bored to the exact size, their halves would be in contact and no effective compression could take place. If bored smaller than the shaft, or when slightly separated from each other, their halves would not be in contact, either at rim or hub; and, even if compressed equally on each side of the shaft, they would not infringe complainant's patent, because the rims would still be separated. If compressed unequally,—that is, brought nearer together on one side than the other,—the rims on one side of the pulley might be in contact, but the rims on the other side would be correspondingly separated, and the result would be neither an infringement of complainant's patent nor an operative pulley. In short, the complainant's patented pulley is the only one shown in the record in which compression to the shaft to any required degree—a compression bringing the entire inner surface of the hub to bear upon the shaft, and so constructed that it may be increased whenever necessary by reason of change of shaft, or of wear, or of any other cause—is so

effected as to be superior to any other mode or means of fastening or attachment, and to impart to the pulley its greatest mechanical power, and yet leave it entirely separable into its own halves and from the shaft. To accomplish this result, there must be compression at the shaft, and contact at the rim, and the inner side of the divided spoke arm must be separated from rim to rim. Under such structural conditions, compression at the hub tightens the clamp upon the shaft, and at the same time makes firmer the contact at the rim; and the result is a union of pulley and shaft as nearly perfect as it can be made, the separated spoke bars acting in response to the action of the clamping bolts, not only without straining the pulley at any point, but actually making it firmer and stronger and more durable."

Referring to another alleged prior pulley, Judge Sage says:

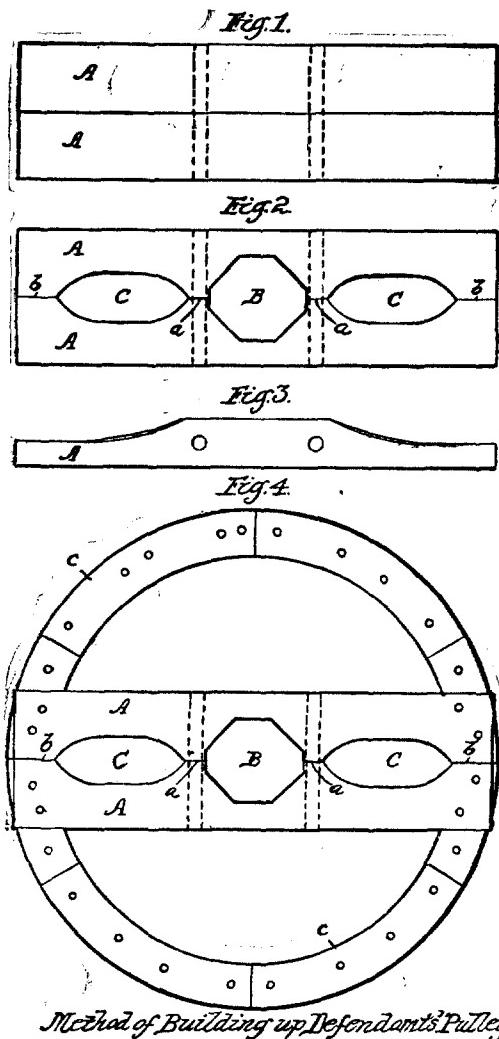
"Its meeting edges were intended to be parallel, and hence would be entirely—rim and hubs—in contact, or entirely out of contact, and not an anticipation of complainant's pulley."

These excerpts sufficiently show that the construction of this first claim, to be followed by the circuit court on motion for preliminary injunction upon ex parte affidavits, was the one naturally suggested by the specification and drawings, and quite clearly expressed in the language of the claim itself.

The method of making the defendants' pulleys is illuminative upon the question of infringement.

Method of Building up Defendants' Pulley.

The first step is to form the two parallel spoke arms or bars, A, A, shown in Fig. 1, their adjacent faces abutting closely against each other throughout their entire length. The bolt holes are bored through the bars as indicated by the dotted lines. The next step is to cut out the central polygonal opening, B, which forms the shaft hole of the pulley, and the two side openings, C, C, which are cut out merely to lighten by removing surplus material. After these three openings are formed in the spoke arms, it will be seen that the arms abut closely together, both at a, a, adjacent to the shaft opening, and at b, b, adjacent to their ends. Each of the bars is then tapered off upon its sides, and at opposite sides of the shaft hole, as indicated by the edge view of the bar in Fig. 3. This completes the two bars ready for insertion in the rim of the pulley as the latter is being built up,—an operation which is sufficiently indicated by Fig. 4. During all this time the pulley is being built up the spoke arms abut closely together at both the points, a, a, adjacent to the shaft hole, and at the points, b, b, adjacent to the rim, and continue so to abut when the pulley is completed. As a necessity of this method of construction, it happens that in each half pulley the meeting faces of the hub, x, and of the ring segments, lie in the same plane; and when both halves are assembled, whether in the shop, or on a shaft of a diameter smaller than the shaft hole, hubs and rims will be both in contact. It will be observed that defendants' shaft hole is octagonal, and of course could not be secured directly to the shaft. Defendants therefore use a "bushing" or "thimble" or "interchangeable center," the exterior surface of which contacts with the inner surface of the octagonal shaft hole, and the inner surface of which contacts with the shaft it is made to fit. In order to secure a grip, this bushing is apparently so arranged that when it is adjusted



on the shaft it will hold the hub spokes slightly separated, so as to afford clearance for the action of the clamp bolts, effecting compression of the bushing upon the shaft. What may be the extent of this clearance is most sharply disputed in the record, defendants insisting that it is only sufficient to steady the pulley in place, and that it is held to the shaft by set screws; complainants, on the other hand, insisting that the set screws are a sham, and that the pulley is really held in place on the shaft solely by compression thereon, such compression being induced by the clamp bolts and promoted by hub separation, such as is described in the patent. Whichever of these two contentions be correct, it is manifest, from the nature of the structure above described, that when the bushing operates to slightly separate the hubs it must

operate to separate the meeting faces of the ring segments to an equal extent. Therefore, when the clamping operation begins, the ring segments are not in contact, and when, under the clamping operation, the hubs come into contact, the ring segments come into contact at substantially the same time. In other words, we at no time find the relation of parts specified in the claim by the phrase, "When the meeting ends of the rim are in contact, the meeting faces of the spoke bar and hub are slightly separated." The defendants' pulley, therefore, when made as above described, does not infringe the first claim of the patent as above construed.

It is also quite plainly apparent that a very slight change will transform the noninfringing into an infringing structure. If the faces of the spoke hub adjacent the shaft hole are cut away, and a suitable bushing used, the mere placing of the two halves of the pulley upon the shaft, or a very slight tightening of the clamping bolts, will bring the rims into contact, while there is still hub separation, and the operation of the parts will be substantially that of the patent. From the affidavits presented by complainant, it appears that one of defendants' pulleys was purchased from a dealer in Boston, which, upon examination, was "found to be open at its hub members and closed at the rim before being placed on the shaft, and also found to be open at its hub members and closed at the rim when placed upon the shaft ready for operation." That another of defendants' pulleys, which was found in use in an office in Buffalo, was so constructed that when placed upon the shaft "the faces of the hub will not and cannot meet until after the clamping bolts passing through the hub have been tightened. * * * Such tightening brings the faces of the rim together before the faces of the hub meet at the shaft;" but affiant does not state how long before, nor whether there was any substantial difference between the two periods of contact. Another affiant swears that at the salesroom of a corporation at Niagara Falls, which deals in defendants' pulleys, he purchased one of said pulleys and inspected others, and that in some cases when on the shaft the edges of the hub did not quite come together while the faces of the rim met. We are unable, however, to see in those affidavits sufficient to discredit the direct, positive, exhaustive, and apparently frank affidavits presented by defendants, and showing precisely how their pulleys are made, when it is manifestly so easy for the purchaser or intermediate seller, with a few strokes of chisel or plane, to effect the structural change necessary to bring them within the scope of the claim. There is no evidence to show that the pulleys, as sold by defendants, present the characteristics of hub separation and rim contact. Indeed, one of complainants' affiants, who visited the salesroom of a dealer in defendants' pulleys, admits that as offered for sale—off the shaft—they met both at hub and rim.

The third claim of the patent calls for no discussion. It is simply the separable pulley, constructed in the manner already described, with the addition of "a separable split thimble interposed between said shaft and pulley." If the pulley itself be structurally different from the pulley of the first claim, it cannot be held to infringe the third claim, solely because it contains the single additional element of that claim. We are of opinion, therefore, that complainants did not make

out a case of infringement by defendants sufficiently strong to entitle them to a preliminary injunction. The order of the circuit court is therefore reversed.

SMITH v. MERIDEN BRITANNIA CO.

(Circuit Court, D. Connecticut. February 20, 1899.)

No. 982.

1. DESIGN PATENTS—PRELIMINARY INJUNCTION—PUBLIC ACQUIESCENCE.

The rule that public acquiescence must be shown when the patent sued on has not been adjudicated applies to the case of design patents as well as machine and other patents.

2. SAME—DESIGN FOR VESSEL.

A preliminary injunction against infringement of patent No. 29,571 for a design for a vessel denied, in the absence of any prior adjudication, or of proof of public acquiescence.

This was a suit in equity by Frank W. Smith against the Meriden Britannia Company for alleged infringement of a patent for a design for a vessel. The cause was heard on a motion for a preliminary injunction.

William Maynadier, for complainant.

Mitchell, Bartlett & Brownell and George A. Fay, for defendant.

TOWNSEND, District Judge. On January 3, 1898, complainant applied for, and on November 1, 1898, received, the patent in suit (No. 29,571), for a design for a vessel. The elements thereof claimed to be new and material were modified forms of what is known as the old "panel" or "colonial flute" design, ornamented by a scroll of elongated beads, constituting what is known as a "Rococo" border. The panels are in two double sets; the larger set being united near the middle of said vessel, and so disposed as to form the body thereof, while the smaller set furnishes a flaring base. Each of said panels curves inwardly, except possibly the lower panel of the base. The whole design is graceful in outline and harmonious in proportions. It appears from complainant's affidavits that he is a manufacturer of solid-silver ware; that he produced this design, and commenced the manufacture of vessels embodying the same in December, 1896, and offered them for sale in January, 1897; that he has been put to great expense in making said articles; that the defendant has manufactured plated ware which is practically identical in design with the drawings of the patent in suit; that this plated ware was extensively advertised by defendant in December, 1898, and is now on sale at various retail stores; that, inasmuch as it is practically impossible to sell this class of solid-silver goods when the same design is made in plated ware, the complainant will suffer irreparable loss, unless he can obtain the relief of a temporary injunction.

The vessels manufactured by defendant infringe complainant's patent. It appears from its affidavits that it commenced their manufacture about March 1, 1897, and their sale shortly thereafter; that it never had any notice of complainant's claim of right until Novem-

ber 5, 1898; that the validity of said patent has never been adjudicated or acquiesced in; that defendant made and publicly sold various articles resembling in pattern the patented design long before the date of said patent, and that there is nothing possibly new in the design of the patented vessel, except the base; that the base so resembles, in general outline and design, various covers old in the art, as to be substantially a reproduction thereof; that "it is common practice for * * * manufacturers generally to transport the essential features of the body of a vessel to its base"; and that the base of the patented vessel thus represents the double fluted panels of its body. It is inexpedient to discuss the question of patentable novelty on this motion. The foregoing evidence, fortified by the exhibits, raises a serious doubt as to validity, and therefore a preliminary injunction should not be granted. Apart, however, from the consideration of this point, there are other matters which are decisive of the present issue.

The patent in suit issued November 1, 1898, 3½ months ago. The bill was filed December 20, 1898. There has therefore been no opportunity for adjudication or acquiescence. Counsel for complainant attempts to meet this condition by the following quotation from Fenton (*Laws of Patents for Design*, p. 178):

"As designs differ from mechanical invention in being generally subjects of evanescent fancy, rather than of lasting utility, * * * the general requirement that the validity of the patent should have been acquiesced in by the public, or been judicially sustained, before granting a preliminary injunction in a clear case of infringement, should be very much relaxed in such cases, to prevent injustice."

In support of this contention the author cites *Foster v. Crossin*, 23 Fed. 400, and *Margot v. Schnetzer*, 15 Fed. 118. The opinion of Judge Carpenter in *Foster v. Crossin* is merely to the effect that while the production of the patent alone does not raise a presumption sufficient to justify a preliminary injunction, and while the most satisfactory basis therefor will be found in an adjudication, or in long, uninterrupted use, he is "not prepared to say that the presumption can arise in no other way." In the *Schnetzer* Case it does not appear that the question of adjudication or acquiescence was raised. The defendants admitted infringement, and were ready to refrain from further infringement. Furthermore, in *Dickerson v. Machine Co.*, 35 Fed. 144, Judge Lacombe refers to the view suggested in *Foster v. Crossin*, and states the general rule in this circuit to be that, where there has been no decision on the patent by a United States court on the merits, the party is driven to show that his patent went into use undisputed for a sufficient time to raise a *prima facie* case in his favor. That this is now the general rule in other circuits, see *Standard Elevator Co. v. Crane Elevator Co.*, 6 C. C. A. 100, 56 Fed. 718, and cases cited in *Palmer Pneumatic Tire Co. v. Newton Rubber Works*, 73 Fed. 219. In *Williams v. Manufacturing Co.*, 23 C. C. A. 171, 77 Fed. 287, where it was urged, on motion for preliminary injunction against infringement of a patent for a bicycle lamp, that the articles so change from year to year that, unless the injunction was granted, the lamp would be useless, the court held that this reason would not justify it in departing from the settled rules in chancery, and refused the writ,

and further expressed doubt whether there could be public acquiescence in four months. Furthermore, it appears that defendant is a large manufacturer, engaged in an extensive business, and abundantly able to respond in damages in the event of a final decree in favor of complainant. In these circumstances, the motion must be denied. It is not to be understood, however, that in denying the motion any opinion is indicated or expressed upon the question of patentable novelty.

PARSONS V. SEELYE.

(Circuit Court, D. Massachusetts. February 24, 1899.)

No. 927.

1. PATENTS—INVENTION—SUBSTITUTION OF EQUIVALENTS.

The substitution of direct driving for indirect driving by counter shaft and gearing is the substitution of a well-known equivalent, and there is no invention in applying to the main shaft of a machine the same mechanism that was formerly applied to the counter shaft.

2. SAME.

The substitution of a heavy or "momentum" pulley for a light pulley, though it may be of advantage in the particular case, involves the exercise of mere mechanical skill, and not of inventive faculty.

3. SAME—CONSTRUCTION OF CLAIMS.

The concluding words, "substantially as specified," must be *held* to import into the combination claim of a narrow patent a device which the patentee, in the specifications, describes as "one of the most important features of my invention."

4. SAME—LEATHER-CUTTING MACHINE.

The Parsons patent, No. 368,108, for a machine for cutting leather or other materials, construed, and *held* invalid as to claims 3 and 4, and not infringed as to claim 5.

This was a suit in equity by Henry Parsons against Nelson H. Seelye for alleged infringement of a patent.

Bowdoin S. Parker, for complainant.

James E. Maynadier and William Maynadier, for defendant.

BROWN, District Judge. This suit is for infringement of letters patent No. 368,108, issued August 9, 1887, to Henry Parsons, for a machine for cutting leather or other materials. The defenses are noninfringement and invalidity. The "invention relates to that class of leather-cutting, power-driven machines termed 'beam cutters' or 'beam cutting machines' or 'beam cutting presses,' in which the sides of leather, or sheets of leather board, or other material to be cut, are spread out upon a cutting block supported by a bed that is vertically adjustable; such material being cut by a die that is free to be placed by the operator in a new position after each cut; the die being forced through the material by a beam arranged above the bed, and which is vertically reciprocated to effect such result." The prior art is represented by British patents to Gimson, No. 430 (1863), to Bugg, No. 2,697 (1870), and defendant's Exhibit Hawkins Beam Die Press. Infringement is charged as to the third, fourth, and fifth claims. The third and fourth claims are obviously void, in view of the

Hawkins beam die press. The complainant, in his brief, says of the Hawkins beam die press:

"The power is applied to the countershaft through a light belt pulley loose on that shaft, in connection with a clutch secured to the countershaft by means of a spline, which permits a slight lateral movement of the clutch on the shaft, sufficient to allow it to contact with the belt pulley," etc.

In the machine of the patent in suit the loose pulley and clutch are upon the main shaft, there being no counter shaft or gearing. The substitution of direct driving for indirect driving by countershaft and gearing is a mere substitution of a well-known equivalent (see opinion of the circuit court of appeals for this circuit in *Heap v. Greene*, 91 Fed. 792, handed down January 30, 1899), and there is obviously no invention in applying to the main shaft the same mechanism that was formerly applied to the countershaft. Nor can the combinations described in claims 3 and 4 be distinguished from those in the Hawkins beam die press by comparing the respective weights of the pulleys. The substitution of a heavy pulley, or of what the complainant terms a "momentum pulley," for a light pulley, may be of advantage; but the advantage results from the use of ordinary mechanical skill, without the exercise of the inventive faculties.

The fifth claim, which is regarded by the complainant as of chief importance, is as follows:

"(5) The combination of beam, E, its supporting rods, e, cross-heads, F, pitman, f, eccentrics, h, shaft, i, and a driving mechanism on said shaft, substantially as specified."

It becomes unnecessary to decide whether, in view of the British patent to Bugg, No. 2,697 (1870), this claim is valid, since, if valid, it is nevertheless not infringed. It is conceded that the defendant's machine does not have the counterweighted clutch, or any equivalent therefor. If, therefore, this feature of counterweighting is an essential feature of the combination of claim 5, the defendant, not employing it, has not employed the combination of the patent in suit. The complainant lays stress upon the feature of the driving mechanism which he calls the "momentum pulley," but contends that the counterweighting features of the clutch may be disregarded, because not specifically referred to in the claim. The claim, however, contains the words "substantially as specified"; and, as said in *Westinghouse v. Boyden Power-Brake Co.*, 170 U. S. 537, 558, 18 Sup. Ct. 707, "These words have been uniformly held by us to import into the claim the particulars of the specification." It cannot be contended that this patent is for an invention of a primary character, nor that the patentee is entitled to claim broadly any form of driving mechanism. The patent, therefore, must be limited to the particular driving mechanism shown, or its known equivalent. The driving mechanism includes, at least, the pulley, G, and the clutch, H, which is not a simple clutch, but one so constructed as to have two functions; i. e., to engage the loose pulley, and to counterweight the vertically reciprocating beam, E. The clutch, H, is undeniably a part of the mechanism that drives the machine, and both functions of the clutch, viz., that of clutching and that of counterweighting, seem inseparably connected with the operation of driving the machine. The means of

avoiding "the violent shock and vibration that would otherwise result from rapidly reciprocating so heavy and inert a mass of metal as constitutes the beam and its direct co-acting parts" cannot be disregarded, as unimportant or unessential, or as not included in the combination of claim 5. This view is emphasized by the following language of the specification:

"One of the most important features of my invention is the method of counterweighting the vertically-reciprocating beam, E, which, more especially in the larger machines (nine-foot beams), is, by reason of the great strain to which it is subjected, necessarily very heavy, and should therefore be not only in perfect 'balance' but also in perfect 'cross balance' as well. To insure both such balance and cross balance, I form clutch, H, and brake wheel, I, each as much out of balance as equals one-half the weight moved vertically by eccentrics, h, so that the united counterweighting of said wheel and clutch equals the weight of the beam and its rods. Such counterweighting of the clutch and wheel is effected by forming one part skeleton-like, as at 4, while the opposite side, as at 5, is solid and continuous; such solid portions being arranged on shaft, i, diametrically opposite the throw of eccentrics, h, so that said solid portions are at the bottom of their circuit when the beam is at its highest point. Hence the machine performs its work without the violent shock and vibration that would otherwise result from rapidly reciprocating so heavy and inert a mass of metal as constitutes the beam and its direct co-acting parts."

We cannot disregard what the patentee terms one of the most important features of his invention without unduly extending the fifth claim. The defendant, as is conceded, does not employ the counterweighted clutch, or any equivalent therefor, and does not infringe the fifth claim, as properly interpreted. The bill will be dismissed.

THE HAVANA.

(Circuit Court of Appeals, Third Circuit. February 6, 1899.)

No. 25, September Term, 1898.

MARITIME LIENS—REPAIRS IN FOREIGN PORT—PRESUMPTIONS.

When repairs are made on the order of a managing owner, whether or not in the home port, the presumption is against the existence of a maritime lien; and the mere fact that the repairer understands the contrary is insufficient to create a lien, unless the owner expressly or impliedly consents thereto.¹

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This is a libel in rem by William E. Woodall & Co. against the steamboat Havana and another, to recover a balance due for repairs. The libel was dismissed (87 Fed. 487), and libelants appeal. Affirmed.

John F. Lewis and Arthur D. Foster, for appellants.

Henry R. Edmunds, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

¹ As to maritime liens for supplies or services, see note to The George Du-mois, 15 C. C. A. 679.

DALLAS, Circuit Judge. By the libel in this case it was sought to enforce an asserted lien against the steamship Havana for a balance due for repairs which were ordered by her managing owner, and were made by the appellants, at Baltimore, which was not her home port. The court below dismissed the libel upon the ground that the facts did not sustain the claim of lien (87 Fed. 487), and we think it was right. "In the absence of an agreement, express or implied, for a lien, a contract for supplies [or for repairs] made directly with the owner in person is to be taken as made on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived." The Valencia, 165 U. S. 264-271, 17 Sup. Ct. 323. There certainly was not in the present case an express agreement for lien, and the record discloses nothing which would warrant the implication of such an agreement. Our own examination of the evidence satisfies us, as the learned judge found, that this work was, in point of fact, done, not on the credit of the vessel, but on that of the owner. Where repairs are ordered by an owner, even in a foreign port, a lien for their cost is not presumed to have been contemplated, and cannot be created by any act of the party doing the work, which he may claim to be indicative of a design on his part to look to the vessel for his compensation, unless it also appear that the other party had so understood that act, and had, at least impliedly, assented to its purpose. There is nothing to show such understanding or assent by the owner in this instance, and his testimony is, in effect, that he at no time supposed that the Havana would be subject to a lien. The St. Jago de Cuba, 9 Wheat. 409; The Grapeshot, 9 Wall. 136; The Mary Morgan, 28 Fed. 196; Thomas v. Osborn, 19 How. 22; The Norman, 28 Fed. 383; The Pirate, 32 Fed. 486; The Aeronaut, 36 Fed. 497; The Now Then, 5 C. C. A. 206, 55 Fed. 523. The decree is affirmed.

THE SCOW NO. 15.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 101.

1. WHARFAGE—STATUTORY RATES—SCOWS.

Under Laws N. Y. 1882, c. 410, § 798, classifying vessels, and fixing the rates for wharfage accordingly, a scow engaged in carrying stone should be classed with the description "market boats and barges."

2. SAME—CUSTOM.

A customary rate of wharfage for scows cannot control the rates fixed by Laws N. Y. 1882, c. 410, § 798, since it includes all vessels engaged in carrying freight or passengers.

3. MARITIME LIENS—DOMESTIC VESSELS.

A maritime lien is created by the furnishing of wharfage to a domestic vessel.¹

Appeal from the District Court of the United States for the Southern District of New York.

¹ For maritime liens as to supplies and services, see note to The George Dumois, 15 C. C. A. 679.

This cause comes here upon cross appeals from a decree of the district court, Southern district of New York, awarding the libelant \$32.50 for 26 days' wharfage, for the use and occupation of a berth at the pier at foot of 134th street, North river. The determination of the cause involves the construction of Laws N. Y. 1882, c. 410, § 798, which reads as follows:

"Sec. 798. It shall be lawful to charge and receive, within the city of New York, wharfage and dockage at the following rates, namely: From every vessel that uses or makes fast to any pier, wharf, or bulk-head within said city, or makes fast to any vessel lying at such pier, wharf, or bulk-head, or to any other vessel lying outside of such vessel, for every day or part of a day, except as hereinafter provided, as follows: From every vessel of two hundred tons burden and under, two cents per ton, and for every vessel over two hundred tons burden, two cents per ton for each of the first two hundred tons, and one-half of one cent per ton for every additional ton, except that, save as hereinafter provided, vessels known as North river barges, market boats, and barges, sloops employed upon the rivers and waters of this state, and schooners exclusively employed upon the rivers and waters of this state, shall pay for every such vessel under the burden of fifty tons, at the rate of fifty cents per day; for every such vessel of the burden of fifty tons, and under the burden of one hundred tons, at the rate of sixty-two and a half cents per day; for every such vessel of the burden of one hundred tons, and under the burden of one hundred and fifty tons, at the rate of seventy-five cents per day; for every such vessel of the burden of one hundred and fifty tons, and under the burden of two hundred tons, at the rate of eighty-seven and a half cents per day; for every such vessel of the burden of two hundred tons, and under the burden of two hundred and fifty tons, at the rate of one hundred cents per day; for every such vessel of the burden of two hundred and fifty tons, and under the burden of three hundred tons, at the rate of one hundred and twelve and a half cents per day; for every such vessel of the burden of three hundred tons, and under the burden of three hundred and fifty tons, at the rate of one hundred and twenty-five cents per day; for every such vessel of the burden of three hundred and fifty tons, and under the burden of four hundred tons, at the rate of one hundred and thirty-seven and a half cents per day; for every such vessel of the burden of four hundred tons, and under the burden of four hundred and fifty tons, at the rate of one hundred and fifty cents per day; for every such vessel of the burden of four hundred and fifty tons, and under the burden of five hundred tons, at the rate of one hundred and sixty-two and a half cents per day; for every such vessel of the burden of five hundred tons, and under the burden of five hundred and fifty tons, at the rate of one hundred and seventy-five cents per day; for every such vessel of the burden of five hundred and fifty tons, and under the burden of six hundred tons, at the rate of one hundred and eighty-seven and a half cents per day; for every such vessel of the burden of six hundred tons and upwards, to pay twelve and a half cents, in addition for every fifty tons in addition to the rate last mentioned, for every day such ship or vessel shall use or be made fast to any of the said wharves; but no boat or vessel over fifty tons burden shall pay less than fifty cents for a day or a part of a day, and the class of sailing vessels now known as lighters shall be at one-half the first above rates. Every other vessel, making fast to a vessel lying at any pier, wharf, or bulk-head within said city, or to another vessel outside of such vessel, or at an anchor within any slip or basin, when not receiving or discharging cargo or ballast, one-half the first above rates; and from every vessel or floating structure, other than those above named, or used for transportation of freight or passengers, double the first above rates, except that floating grain elevators shall pay one-half the first above rates; and every vessel that shall leave a pier, wharf, bulk-head, slip or basin, without first paying the wharfage or dockage due thereon, after being demanded of the owner, consignee, or person in charge of the vessel, shall be liable to pay double the rates established by this section."

The opinion of the district court is reported in 88 Fed. 305.

Peter Alexander, for libelant.
Peter S. Carter, for claimants.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The section referred to (Laws N. Y. 1882, c. 410, § 798) is so ungrammatically phrased that it is not susceptible of any literal construction which would not lead to some inconsistency or absurdity. In such cases interpretation according to intent is peculiarly applicable. While we do not entirely agree with the reasoning by which the district court reached its conclusion, we do concur in that conclusion, which requires vessels like claimant's to pay the same rate as barges, which they resemble more nearly than they do any other vessel specifically enumerated in the section. The contention of the claimant that wharfage should be at the rate of 50 cents cannot be sustained, under section 800 of the same statute, since the evidence does not show that the vessel was "engaged in freighting brick on the Hudson river"; nor on any theory of a customary rate for scows of this description, since the statute is manifestly intended to be comprehensive of all vessels engaged in transporting freight or passengers.

There is no force in the suggestion that there is no general maritime lien against a domestic vessel for wharfage. The converse is held, upon sound reasoning, in *The Alianca*, 56 Fed. 609; *The Advance*, 60 Fed. 766; *The Kate Tremaine*, 5 Ben. 60, Fed. Cas. No. 7,622; and *Woodruff v. One Covered Scow*, 30 Fed. 269; and we find nothing to weaken the authority of those cases in the circumstance that in *Ex parte Easton*, 95 U. S. 68, the supreme court declined to pass upon a question not before it. Nor do we consider that *The Lottawanna*, 21 Wall. 558, is an analogous case, dealing as it did wholly with the question of materials and supplies. The decree of the district court is affirmed, but, since both sides appealed, without interest or costs.

In re CENTRAL R. R. OF NEW JERSEY.

(District Court, S. D. New York. March 3, 1899.)

1. COLLISION—STEAMERS MEETING HEAD AND HEAD—SIGNALS.

The Catskill and the St. Johns, side-wheel steamers, met in North river in the evening. The Catskill was going up at a speed of about 10 knots, and the St. Johns coming down at a speed of about 13 knots. Both carried the regulation lights. When about one-third of a mile apart, the Catskill gave the signal for passing to the left, which was at once contradicted by the St. Johns. Both vessels sheered to the westward, and the same signal was again given and contradicted. Both vessels then reversed, but a collision followed almost immediately, in which the Catskill was sunk. Each vessel claimed that when the signals were first given the other was further to the eastward. Held, that the evidence established that the vessels were approaching about head and head, and the Catskill was in fault for not passing to the right, as required by the rules, and also in further violating the rules by failing to reduce speed to bare steerageway at once, on the first contradiction of her signal, both of which faults were material.

2. SAME—DELAY IN GIVING SIGNALS.

The St. Johns was also in fault, as well as the Catskill, for failing to observe inspectors' rules 1 and 6, requiring signals to be given when the vessels were approaching within a half mile of each other; which fault, in view of the speed with which the vessels were approaching and under the other circumstances of the case, could not be excused nor held immaterial.

In Admiralty. Collision.

De Forest Bros. (Harrington Putnam, of counsel), for petitioners and the St. Johns.

Benedict & Benedict, for the Catskill and New York Steamboat Co.
G. Washbourne Smith and Avery Cushman, for Leonard R. Miller.

J. Newton Williams, for Nellie McCree, George F. Cook, and Catherine A. Timmerman.

Leon Abbott, for Michael F. Morris and Herman Klein, administrators, and Hannah Klein and Herman Klein.

Leroy S. Gove, for St. Paul Fire & Marine and Providence Washington Ins. Cos.

BROWN, District Judge. The above petition for a limitation of liability, arose from a collision between the petitioners' steamboat St. Johns and the steamer Catskill, which occurred in about the middle of the North river off Fifty-Seventh street, at about 7:10 p. m. of September 15, 1897, by which the Catskill was almost immediately sunk, and became a total loss, and some of the passengers were drowned and others wounded.

Both boats were side-wheel steamers; the night was clear, or nearly so; the time was an hour after sunset, so that it was nearly or quite dark, and both vessels had their regulation lights set. The Catskill had left Christopher street on one of her usual trips, bound for Catskill with passengers and freight; and soon after leaving her slip she rounded up in her usual course in the ebb tide in about mid-river. Although the tide had been making flood for nearly two hours, the current on the surface had still about an hour to run ebb; and at the time of collision the current was running down at the rate of about one knot per hour. See The Ludvig Holberg, 36 Fed. 917, note. Against this moderate ebb current, the Catskill was going up at the rate of about 10 knots by land. The St. Johns had on that day taken an excursion party of upwards of 1,200 passengers to Newburg, and was returning to New York. Most of the way down river she had had a two-knot ebb current in her favor; and reckoning from the time she left West Point to the time of collision, her average speed was nearly 16 statute miles; so that just prior to her reduction of speed, shortly before collision, I find she was going at the rate of about 15 statute miles or 13 knots per hour. Neither steamer checked her speed until the two were within less than a third of a mile of each other. Each vessel on seeing the other sheered to the westward, and the collision took place at an angle of about $2\frac{1}{2}$ points, the stem of the St. Johns striking the starboard bow of the Catskill about 10 feet from the latter's stem and penetrating obliquely into her hull about 30 feet, crossing the Catskill's keel by a few feet, and making a complete wreck of this portion of the steamer.

Many claims for loss and damage have been interposed; but upon the present hearing the only questions litigated have been whether the St. Johns or the Catskill, or both, were to blame for the collision. The testimony is extremely conflicting as respects the first signal whistles given, the lights first seen, and the relative positions of the two vessels in the river as they approached each other. The officers of each testify that their own steamer sheered to the westward, because the other steamer was more to the eastward, that is, nearer to the New York shore, so as to give more room to pass, and each kept her sheer until collision. The Catskill's officers affirm that the St. Johns' green light was seen from 1 to 2 points on the Catskill's starboard bow, and that the Catskill's green light ought to have been seen on the St. Johns' starboard bow; while the St. Johns' witnesses testify that the Catskill's red light was seen upon the St. Johns' port bow, so that the Catskill should have seen the St. Johns' red light on the Catskill's port bow.

The Catskill, again, contends that she first gave a signal of two whistles to the St. Johns, to which the latter replied with one; whereupon her signal of two whistles was repeated, to which the St. Johns again replied with one long whistle, followed immediately by several alarm whistles, whereupon the Catskill gave an alarm whistle, and collision speedily followed. The St. Johns contends that no whistle, previous to her whistle of one blast, was given by the Catskill, or that, if it was given, it was not heard; the subsequent whistles being substantially the same as above stated. The duties of the two steamers to each other depended, however, upon their relative positions and headings, rather than upon any mere priority of whistles; although doubtless upon the near approach of steamers their whistles become important. But upon careful consideration of the testimony I am satisfied that the Catskill gave her first signal of two whistles about a couple of seconds before the St. Johns gave her signal of one whistle; and that the Catskill's signal was not heard upon the St. Johns, for the reason that its sound reached the Catskill just at the moment when her own signal was sounded. All the other whistles were heard upon the St. Johns. There is no other apparent reason why the Catskill's first signal should not have been noticed as well, since the St. Johns was evidently observing the Catskill, as is evidenced by her own signal to the Catskill at about the same time. The evidence also indicates the above explanation. The distance of the steamers apart would require a little less than two seconds for sound to traverse it; and both the master and the pilot of the Catskill testify that the one whistle from the St. Johns was heard "one or two seconds" or a "couple of seconds" after the Catskill's first signal was given. If this is correct, the Catskill's signal would not have been audible on the St. Johns, because drowned by the St. Johns' whistle given just as the sound of the Catskill's signal reached her. Two other witnesses from the Catskill also testify that the St. Johns' one whistle was heard "right away" after the Catskill's first signal; and the pilot's testimony with reference to slowing down, plainly agrees with this. He says that he slowed down "when about quarter of a mile from the St. Johns. Q. Was that before the second two

whistles? A. Yes, right after I blew the first two whistles. They contradicted my whistles. I slowed her down right away and blew two whistles more."

I find, therefore, that no blame attaches to the St. Johns for not hearing the first signal from the Catskill.

A careful consideration of the independent testimony, as well as the cross-examination of the witnesses on board the two steamers, satisfies me that the collision was very nearly abreast off Fifty-Seventh street; that when the Catskill blew her first signal of two whistles her stem had reached Fifty-Fourth street, and the St. Johns' stem Sixty-First street, the vessels being then about 600 yards apart. That the Catskill must have been considerably above Fiftieth street when her first signal was blown, is evident from the testimony of her two witnesses from the tug Crosby, which passed about 100 feet astern of the Catskill in mid-river in crossing to Fiftieth street. The last alarm whistles were sounded when the steamers were within 200 or 250 yards of each other and when the Crosby had just reached the Fiftieth street dock; the Crosby had after crossing the stern of the Catskill in mid-river, about off Forty-Sixth street, traveled a distance of about 2,000 feet, and the Catskill, a faster steamer, must have traveled considerably more than that distance in the same time. This would have brought her stem nearly to Fifty-Sixth street when her alarm was sounded; and as the two steamers were then only about 600 feet apart, the Catskill traversed about 250 feet of it up to collision. The position off Fifty-Fourth street, when the Catskill's first whistle was given, is also the mean in the estimates given both by her pilot Turner, and by her wheelsman, Hitchcock. The position of the St. Johns at her first whistle is shown by the testimony of her witnesses from the shore at Sixtieth and Sixty-Fifth streets. Several witnesses moreover locate the collision off Fifty-Seventh street, and the above positions accord well with the relative speed of the steamers, as indicated by the testimony.

As respects the extreme conflict in regard to the relative positions of the two vessels in the river and as to which of them was to the eastward of the other, the conclusion to which I have come by going backwards from the collision itself, guided by what was done by each and by other circumstances established by the testimony, is that there was very little difference in the distances of the two vessels from the New York shore; that they were meeting virtually head and head, or nearly so, and fell within the first branch of rule 1 of the inspectors, which requires each vessel in such a situation to turn to the right.

The direct testimony as well as the damage to the St. Johns, shows that the angle of collision was about $2\frac{1}{2}$ points. This angle was produced by the sheer of both vessels to the westward from their previous courses about straight up and down river. Both turned to the westward at about the same time, and the sheer of each was maintained without any further change of her wheel up to the moment of collision. The angle of collision is so small that it is not very material whether each contributed to it equally, or whether the Catskill sheered a point and the St. Johns, a larger vessel, a point

and a half. As the St. Johns ran faster than the Catskill, her sheer was probably somewhat more than that of the Catskill. The latter ran the distance of less than three streets under a starboard wheel, while the St. Johns ran less than four streets under a port wheel. In making so small a change of heading as a point or a point and a half in running those distances, the difference in the distance that each would make to the westward of the line of her previous course would be less than 50 feet; so that when their first whistles were given they could not have been more than 50 feet out of line with each other. This is less than half the arc over which both colored lights are usually visible at a distance of 600 yards; and within that arc vessels are to be deemed nearly "head and head," since each would show both her colored lights to the other, if as each contends, and as the testimony shows, each was previously heading on a line up and down river.

Other circumstances in the testimony corroborate this position of the two steamers. The wheelsman on the Catskill who looked up very shortly after her first whistle, saw only the St. Johns' red light, while the pilot noticed her green light only. The inference is that both were visible, as the St. Johns had not had time during this short interval to change both her lights by porting. The testimony of Turner, the pilot of the Catskill, though much confused and inconsistent, states that he was intending to go to the eastward of the steamship New York, which was anchored on the edge of the anchorage ground near mid-river, off Sixty-Fifth street. The St. Johns coming down had passed within 100 feet east of that vessel. These courses would necessarily bring the two steamers nearly head and head. The Catskill could not have been heading materially to the westward of the St. Johns' course, nor enough to hide her red light, if she was going to the eastward of the anchored steamer. Turner, moreover, notwithstanding his statement that he saw the St. Johns' green light one or two points on his starboard bow, in placing the models to show the position of the two vessels, placed her, as appears in the testimony before the coroner, directly ahead of the Catskill; and again he gave the direction by compass of the St. Johns from him as N. N. E. and stated that that also was his own compass course. Had the St. Johns, moreover, been well over towards the New York shore as the pilot Turner and some others say, it would evidently have been impossible for her to reach the Catskill and strike her at the small angle of only a couple of points west of a line up and down river. Had she been as Turner says a couple of points on his starboard bow, she would have been, when 600 yards distant, more than 500 feet to the eastward of the Catskill's course; and in that case, or if a third of that distance to the eastward, the Catskill would not naturally have turned to the westward at all.

I have no doubt, therefore, that the St. Johns was heading for the Catskill, or at least not one-fourth of a point away from her; and that the red light of the Catskill was seen on the St. Johns as the three witnesses in her pilot house testify they were seen, though not off on the port bow, but head and head, or nearly so. The testimony of pilot Witherwax that the Catskill's red light was about two

points on his port bow, is as manifestly erroneous as the testimony of the pilot Turner that the St. Johns' green light was two points on his starboard bow; and Witherwax's location of the light is wholly inconsistent with his testimony in explanation of his giving one whistle and porting, viz.: "That is what two boats are supposed to do approaching head and head."

That situation I find to be the true one at the time when the whistles were given. It is possible that the situation of the two steamers as respects each other may have been a little different when they were first visible and really first noticed, that is, at a time more or less anterior to signaling.

1. I must find, therefore, that the Catskill was to blame for sheering to the westward when the two vessels were approaching nearly head and head; that she was further to blame for not reversing at once in order to conform to the intent of inspectors' rule 3, under such circumstances, so as to bring her speed immediately "to bare steerageway" after she heard the one whistle from the St. Johns so near, and contradicting her first signal of two whistles, instead of waiting until a further contradiction of whistles before reversing. The British Queen, 89 Fed. 1003, 1008. Her persistence in giving two whistles a second time is the more blamable, because the vessels were then plainly much less than a quarter of a mile apart; and the contradictory whistle of the St. Johns came so quickly after the Catskill's first signal that no important change by the Catskill could have intervened to prevent her going to the eastward under a port wheel, nor was there any circumstance that made persistence in her westward sheer necessary. She was still further to blame for giving no attention to the range lights of the St. Johns, which would have shown to the pilot that the St. Johns was approaching nearly head and head, and that he was, therefore, bound by rule 1 to go to the right, instead of to the left. These faults are all material, since they plainly brought on the collision. Had the Catskill simply kept her course, the collision would have been avoided through the St. Johns' sheer to the westward by the porting which she began at the time her first whistle was given.

2. Neither the St. Johns nor the Catskill observed the requirements of inspectors' rules 1 and 6, to signal each other when approaching within half a mile of each other. Instead of signaling as required when 1,000 yards apart, signals were delayed by each until the vessels were only 600 yards distant. On the Catskill's part this was not from any lack of earlier notice of the St. Johns' approach, as the pilot says he first noticed the latter's lights when she was much further up river. The pilot of the St. Johns also says that he first saw the Catskill when he was about off Sixty-Eighth or Seventieth street (pages 11, 21), which was a quarter of a mile above his position when he first signaled. He did not testify on the trial that his first whistle was blown immediately on seeing the Catskill. If he had so testified, it would have convicted the St. Johns of an insufficient lookout. The mate who was acting as lookout forward on the St. Johns, made no report of the Catskill, and in his testimony before the coroner he stated that he saw only her white light. Before me,

Witherwax testified that his first whistle was blown "a few seconds, I can't tell how long," after the Catskill's light was seen.

I do not find any other fault in the St. Johns than in not signaling earlier; since she saw the Catskill earlier, or ought to have done so, and I have no doubt did see her at least half a mile distant. She was proceeding in a proper place in the river; she gave the proper signal of one whistle, though it was much delayed. She turned, accordingly, to the right, and no collision would have happened but for the wrongful maneuver of the Catskill in turning to the left. But the Catskill's sheer was prior to the St. Johns' signal, and would doubtless have been prevented by an earlier signal from the St. Johns. Under these circumstances can the St. Johns' delay in signaling be held immaterial, and too remote to be considered as contributing to the collision?

As an excuse for not signaling earlier it is argued that the atmosphere was somewhat hazy, and that the Catskill's lights may have been poor. Upon the evidence, however, no weight can be allowed to these suggestions. The pilot says there was no trouble in seeing. Other lights were well seen, both on vessels and on both shores of the river. None of the pleadings charge any insufficiency in the Catskill's lights, nor state any obscurity of the atmosphere.

Common experience, however, shows that vessels navigating the North and East rivers continually disregard the requirement to give signals at a distance of half a mile from each other. In many cases it would doubtless be useless or impracticable to give signals at that distance, on account of the presence of so many other vessels intervening. In the present case there was no such excuse. Pilots often also give as a reason for omitting the required signals, that they consider signals unnecessary, as in *The City of Norwalk*, 55 Fed. 101. In this case no reason is assigned by the pilots for their delay. What can be said for the St. Johns here, and all that I think can properly be said for her in this regard is, that her signal was given soon enough provided the Catskill perceived immediately what she ought to do, and made no mistake in observation, nor any error in judgment or in understanding the requirements of the rule. The Catskill was not thus exact in observation, nor instant in a correct appreciation of the position, or in the performance of her duty; and collision resulted. Can the St. Johns' nonobservance of the rule be for that reason held immaterial and remote? A faithful application of the rule according to its true intent and purpose, seems to me not to permit this. The purpose of signals is to come to a common understanding and to prevent mistakes, whether slight or gross. *The Connecticut*, 103 U. S. 713; *The Ice King*, 52 Fed. 896, affirmed in 21 C. C. A. 49, 74 Fed. 656; *The T. B. Van Houten*, 50 Fed. 592; *The City of Norwalk*, 55 Fed. 101, affirmed in 9 C. C. A. 521, 61 Fed. 367. To be effective and to accomplish their purpose they must be timely, i. e. in season to permit such care and coolness in observation and judgment as are necessary to prevent or correct mistakes. The half-mile limit was here short at the best, for vessels approaching at such speed. The St. Johns was coming down at the rate of 15 statute miles, or about 13 knots per hour; the Catskill,

going up at the rate of 10 knots. They were approaching each other, therefore, at the rate of about 2,300 feet a minute. Collision happened within a minute after the first signals were given, and both lives and property were thereby lost. The first cross whistles occurred by accident, and not by design. The mistake should have been corrected, and doubtless would have been, had there been time for care and deliberation. But after the cross whistles were heard, the vessels were but a quarter of a mile from each other, and there was scant time for deliberation in observation or judgment. At the speed of these vessels, half a nautical mile would be covered in less than a minute and a half—an interval it would seem sufficiently brief for care and deliberation in the maneuvers necessary to avoid collisions at night. Some space limit is necessary to make the rule of any use at all. The half-mile limit has been prescribed, and that is of the essence of the rule. Had these same whistles been given by both vessels when half a mile apart, instead of but little above a quarter of a mile, there would not only have been time and space for the correction of errors, but the very maneuvers which were in fact taken by both boats in stopping and backing after the second contradiction in whistles, would have avoided the collision. This, as I understand, is the most exact test, whether a requirement is material or not. Here the delay in signaling was material, because it was this very delay that rendered those maneuvers ineffectual. As observed in *The Niagara*, 77 Fed. 329, affirmed in 28 C. C. A. 528, 84 Fed. 902, collision is the greatest peril to life and property in modern navigation; and if proper signals are not given, all freight and passenger traffic is put in peril. Considering the inevitable hazards that must attend navigation at such speed unless timely signals are given, I cannot feel justified in sustaining any such relaxation of the essential terms of this rule as would largely destroy its usefulness, and make its application always uncertain. In the absence of circumstances justifying delay, the safety of life and property seems to me absolutely to demand that vessels shall be held to the duty of signaling at the required distance whenever practicable, or else take the risk of making good the damage, if loss ensue. The other faults of the Catskill do not make this fault immaterial in either vessel.

Both vessels must therefore be held to blame. The owners of the St. Johns are entitled to the usual decree in limitation of liability.

MEMORANDUM DECISIONS.

In re AGINS (H. B. CLAFLIN CO., Appellant). (Circuit Court of Appeals, Second Circuit. February 7, 1899.) No. 130. Appeal from the District Court of the United States for the Southern District of New York. E. J. Myers, for appellant. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Order of circuit court affirmed.

ANDERSON et al. v. GIBBONS. (Circuit Court of Appeals, Sixth Circuit. March 7, 1899.) No. 670. Appeal from the Circuit Court of the United States for the Western District of Michigan. Fitzgerald & Barry and J. W. Champlin, for appellant. Fletcher & Wanty, for appellee. Dismissed on motion of appellant.

THE ASTRID. (Circuit Court of Appeals, Fourth Circuit. February 23, 1899.) No. 304. Appeal from the District Court of the United States for the Eastern District of Virginia. Whitehurst & Hughes, for appellant. Hughes & Little, for appellee. Appeal dismissed in open court, on motion of proctor for appellant.

BISBEE et al. v. BISBEE. (Circuit Court of Appeals, Fifth Circuit. February 15, 1898.) No. 580. Appeal from the Circuit Court of the United States for the Southern District of Florida. J. Ward Gurley, for appellant. Dismissed on motion of appellant.

THE BRITISH KING. (Circuit Court of Appeals, Second Circuit. March 15, 1899.) No. 97. Appeal from the District Court of the United States for the Southern District of New York. Eustace Conway, for appellant. J. Parker Kirlin, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Decree affirmed, with costs, on opinion of district court. 89 Fed. 872.

CHESAPEAKE & O. R. CO. v. LAMBERT. (Circuit Court of Appeals, Sixth Circuit. March 7, 1899.) No. 666. Simrall & Galvin and Wadsworth & Cochran, for plaintiff in error. J. A. Scott and Dinkle & Montague, for defendant in error. Dismissed per stipulation.

CINCINNATI, N. & C. R. CO. v. CLARK. (Circuit Court of Appeals, Sixth Circuit. March 20, 1899.) No. 644. In Error to the Circuit Court of the United States for the Southern District of Ohio. Bromwell & Bruce and Simrall & Galvin, for plaintiff in error. C. W. Baker, for defendant in error. No opinion. Affirmed, with costs.

CLAY v. SOUTHERN RY. CO. (Circuit Court of Appeals, Sixth Circuit. March 20, 1899.) No. 608. In Error to the Circuit Court of the United States

for the Eastern District of Tennessee. J. B. Cox and Isaac Harr, for plaintiff in error. Jourolmon, Welcker & Hudson, for defendant in error. No opinion. Affirmed, with costs.

CRYSTAL SPRINGS LUMBER CO. et al. v. NEW YORK & T. LAND CO. (Circuit Court of Appeals, Fifth Circuit. February 9, 1898.) No. 611. Appeal from the Circuit Court of the United States for the Eastern District of Texas. Hewes T. Gurley, for appellees. Dismissed, pursuant to the twenty-third rule, for failure to print record.

E. INGRAHAM CO. v. E. N. WELCH MFG. CO. et al. (Circuit Court of Appeals, Second Circuit. March 1, 1899.) No. 91. Appeal from the Circuit Court of the United States for the District of Connecticut. Edward H. Rogers, for appellant. John P. Bartlett, for appellees. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Decree of circuit court affirmed, with costs, on opinion of court below. 87 Fed. 1000.

ELLIOTT et al. v. HARRIS. (Circuit Court of Appeals, Sixth Circuit. March 7, 1899.) No. 687. Appeal from the Circuit Court of the United States for the Northern District of Ohio. Taggart, Knappen & Denison, for appellants. A. M. Austin, for appellee. Dismissed, on motion of appellants. See 92 Fed. 374.

FARMERS' NAT. BANK OF FINDLAY, OHIO, v. HOSLER et al. (Circuit Court of Appeals, Sixth Circuit. March 21, 1899.) No. 647. Appeal from the Circuit Court of the United States for the Northern District of Ohio. J. A. & E. V. Bope and Aaron Blackford, for appellant. John Poe and Theo. Totten, for appellees. No opinion. Affirmed, with costs.

FELTON v. SPIRO. (Circuit Court of Appeals, Sixth Circuit. March 31, 1899.) No. 662. In Error to the Circuit Court of the United States for the Eastern District of Tennessee. Richmond, Chambers & Head and Edward Calston, for plaintiff in error. Ingersoll & Peyton, for defendant in error. No opinion. Affirmed, with costs.

FIRST NAT. BANK OF FINDLAY, OHIO, v. HOSLER et al. (Circuit Court of Appeals, Sixth Circuit. March 21, 1899.) No. 646. Appeal from the Circuit Court of the United States for the Northern District of Ohio. J. A. & E. V. Bope and Aaron Blackford, for appellant. John Poe and Theo. Totten, for appellees. No opinion. Affirmed, with costs.

GILLIAM et al. v. SOUTHERN TERRA-COTTA WORKS. (Circuit Court of Appeals, Fourth Circuit. March 31, 1899.) No. 292. In Error to the Circuit Court of the United States for the Western District of Virginia. McDowell & Fulton, for plaintiff in error. Fulkerson, Page & Hurt, for defendant in error. No opinion. Judgment affirmed, with costs.

HIGHLAND AVE. & BELT R. CO. v. COLUMBIAN EQUIPMENT CO. (Circuit Court of Appeals, Fifth Circuit. February 7, 1898.) No. 595. Appeal

from the Circuit Court of the United States for the Northern District of Alabama. Alex. T. London, for appellant. John F. Martin, for appellee. Questions certified to supreme court June 16, 1897. 28 C. C. A. 683, 84 Fed. 1018. The mandate (18 Sup. Ct. 240) in answer to questions was filed here on February 5, 1898, and the appeal was dismissed, on motion of appellant.

THE JANE GRAY. (Circuit Court of Appeals, Ninth Circuit. February 28, 1899.) No. 522. Appeal from the District Court of the United States for the Northern District of California. Marshall B. Woodworth, Asst. U. S. Atty. Dismissed on motion of Marshall B. Woodworth, Asst. U. S. Atty., under subdivision 1 of sixteenth rule.

JOHNS HOPKINS UNIVERSITY v. BALTIMORE & O. R. CO. et al. (Circuit Court of Appeals, Fourth Circuit. December 1, 1898.) No. 252. Appeal from the Circuit Court of the United States for the District of Maryland. Bernard Carter, Arthur Geo. Brown, John J. Donaldson, and Geo. Gray, for appellant. John G. Johnson, William A. Fisher, and E. J. D. Cross, for appellees. Appeal dismissed, by agreement of counsel.

JOHNSON et al. v. FOLEY. (Circuit Court of Appeals, Eighth Circuit. February 13, 1899.) No. 1,170. W. S. Morris and Tyson S. Dines, for plaintiffs in error. George A. Smith, for defendant in error. Dismissed, with costs, pursuant to stipulation of the parties.

LOBDELL, FARWELL & CO. v. LEAHY. (Circuit Court of Appeals, Sixth Circuit. March 31, 1899.) No. 667. In Error to the Circuit Court of the United States for the Western District of Michigan. Smiley, Smith & Stevens and Thomas C. Clark, for plaintiff in error. Smith, Nyms, Hoyt & Erwin and James E. Munroe, for defendant in error. No opinion. Affirmed, with costs.

LOUISVILLE PUBLIC WAREHOUSE CO. v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. March 27, 1899.) No. 655. Appeal from the Circuit Court of the United States for the District of Kentucky. Helm, Bruce & Helm, for appellant. R. D. Hill, U. S. Atty. No opinion. Affirmed, with costs.

LOUISVILLE & N. R. CO. v. DUDLEY. (Circuit Court of Appeals, Sixth Circuit. March 31, 1899.) No. 705. In Error to the Circuit Court of the United States for the Middle District of Tennessee. Smith & Maddin, for plaintiff in error. Steger, Washington & Jackson and John Carruthers, for defendant in error. Dismissed, for failure to print record, pursuant to twenty-third rule.

MARTIN v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. February 6, 1899.) No. 1,168. In Error to the United States Court of Appeals in the Indian Territory. C. B. Stuart, Yancey Lewis, W. T. Hutchings, Preston C. West, J. H. Gordon, and S. M. Rutherford, for plaintiff in error. Pliny L. Soper, for defendant in error. Dismissed, without costs to either party, per stipulation of counsel.

MOSES v. HAMBURG-AMERICAN PACKET CO. et al. (two cases). (Circuit Court of Appeals, Second Circuit. March 10, 1899.) Nos. 127, 128. Appeals from the District Court of the United States for the Southern District of New York. De Lagnel Berier, for appellant. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Decree affirmed.

THE NEW YORK. (Circuit Court of Appeals, Second Circuit. March 1, 1899.) No. 50. Appeal from the District Court of the United States for the Southern District of New York. William Carpenter, for appellant. H. Galbraith Ward, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Decree affirmed, with costs, upon opinion of court below. 88 Fed. 556.

NORTHERN PAC. R. CO. v. AMACKER et al. (Circuit Court of Appeals, Ninth Circuit. February 7, 1898.) No. 386. In Error to the Circuit Court of the United States for the District of Montana. F. M. Dudley and Wm. Wallace, Jr., for plaintiff in error. Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. This case has once before been before this court, and is reported in 7 C. C. A. 518, 58 Fed. 850, where the judgment of the lower court was reversed, and the cause remanded for a new trial. The record in the present case shows the facts to be substantially the same as those appearing on the former hearing, and the judgment below, being in accordance with the ruling of this court when the case was then here, must be affirmed. The former decision has become the law of the case. Judgment affirmed.

THE OREGON. THE ROSEDALE. In re BROOKLYN & N. Y. FERRY CO. In re BRIDGEPORT STEAMBOAT CO. (Circuit Court of Appeals, Second Circuit. March 8, 1899.) Nos. 120, 121. Appeals from the District Court of the United States for the Southern District of New York. George B. Adams, for appellant Brooklyn & N. Y. Ferry Co., Samuel Park, for appellant Bridgeport Steamboat Co. Dudley R. Horton, for appellee Hourwich. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Affirmed, on opinion of court below. 88 Fed. 324.

PECK, STOW & WILCOX CO. v. FRAY et al.

(Circuit Court of Appeals, Second Circuit. November 15, 1898.)

PATENTS—INJUNCTION.

Appeal from the Circuit Court of the United States for the District of Connecticut.

This cause comes here upon appeal from a preliminary order of injunction made by the circuit court, district of Connecticut. The patent is No. 293,957 (February 19, 1884, to Robert E. Ellrich), for an improved pawl and ratchet, the claims declared upon being Nos. 2 and 3.

A. M. Wooster, for appellants.

W. E. Simonds, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. It would seem that the patent, if sustainable at all, must be construed as an extremely narrow one. Manifestly, defendant's device is not a Chinese copy of complainant's, and appellant has introduced sufficient evidence of the prior art, as disclosed in patents, to overcome the presumption

arising from the issuance of the patent,—at least, if it be construed so broadly as to cover defendant's device, which can be done only by a liberal application of the doctrine of equivalents. The patent has never been adjudicated, and its construction upon ex parte papers is too doubtful to warrant the issue of a preliminary injunction. The order for preliminary injunction (88 Fed. 784) is reversed, with costs of this appeal.

PERSON v. STANDARD LIFE & ACCIDENT INS. CO. (Circuit Court of Appeals, Sixth Circuit. March 31, 1899.) No. 632. In Error to the Circuit Court of the United States for the Western District of Tennessee. H. C. Warinner, for plaintiff in error. John R. Flippin, for defendant in error. Before TAFT and LURTON, Circuit Judges, and THOMPSON, District Judge.

THOMPSON, District Judge. This case was argued and submitted with the case of Person v. Casualty Co., 92 Fed. 965, and raises the same questions, upon the same state of facts; and the judgment rendered therein will be reversed, for the reasons stated in the opinion delivered in the latter case, and remanded for further proceedings consistent with that opinion. It is so ordered.

PONG TOY GUEN v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. February 23, 1899.) No. 464. Appeal from the District Court of the United States for the Northern District of California. Henry C. Dibble, for appellant. H. S. Foote, U. S. Atty. Dismissed, on motion of Edward J. Banning, Asst. U. S. Atty., under subdivision 5 of the twenty-fourth rule.

PROVIDENT SAVINGS LIFE ASSUR. SOC. OF NEW YORK v. CALKINS. (Circuit Court of Appeals, Ninth Circuit. February 16, 1899.) No. 483. In Error to the Circuit Court of the United States for the Western Division of the District of Washington. Walker & Fitch, for plaintiff in error. Stanton Warburton and John A. Shackleford, for defendant in error. Dismissed, without costs to either party, per stipulation.

SOUTHERN INDIANA EXP. CO. v. UNITED STATES EXP. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. March 28, 1899.)

No. 544.

CARRIERS OF GOODS—DUTIES OF CONNECTING LINES INTER SE.

Appeal from the Circuit Court of the United States for the District of Indiana.

This was a suit in equity by the Southern Indiana Express Company against the United States Express Company and others. A demurrer to the bill was sustained by the circuit court, and the bill dismissed (88 Fed. 659), from which order complainant appeals.

F. M. Trissal, for appellant.

Edward Daniels, for appellee.

PER CURIAM. A statement and sufficient discussion of this case will be found in the opinion of the circuit court as reported in Southern Indiana Exp. Co. v. United States Exp. Co., 88 Fed. 659. The decree sustaining the demurrer and dismissing the bill is affirmed.

STAPYLTON v. ETHERIDGE. (Circuit Court of Appeals, Fifth Circuit. February 21, 1898.) No. 578. In Error to the Circuit Court of the United States for the Southern District of Florida. John E. Hartridge, for plaintiff in error. S. J. Bowie and A. W. Cockrell, for defendant in error. Dismissed, per stipulation of counsel.

TANGYE v. CONNER et al. (Circuit Court of Appeals, Sixth Circuit. March 7, 1899.) No. 577. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. Brown & Spurlock, for appellant. Eakin & Goree and R. L. Bright, for appellees. Dismissed, per stipulation.

UNITED STATES v. HARSHA (three cases). (Circuit Court of Appeals, Sixth Circuit. March 7, 1899.) Nos. 592-594. In Error to the District Court of the United States for the Eastern District of Michigan. J. W. Finney, U. S. Atty. Dismissed, for want of jurisdiction, on motion of plaintiff in error's counsel.

UNITED STATES v. J. ALLSTON NEWALL & CO. (Circuit Court of Appeals, First Circuit. March 20, 1899.) No. 284. Appeal from the Circuit Court of the United States for the District of Massachusetts. Boyd B. Jones, U. S. Atty., and Albert H. Washburn, Asst. U. S. Atty. Dismissed. See 91 Fed. 525.

VON EMPERGER v. CITY OF DETROIT. (Circuit Court of Appeals, Sixth Circuit. March 7, 1899.) No. 657. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. Dickerson & Brown, for appellant. John J. Speed and Parker & Burton, for appellee. Dismissed, for failure to print record, pursuant to twenty-third rule.

WESTERN ELECTRIC CO. v. CITIZENS' TEL. CO. et al. (Circuit Court of Appeals, Sixth Circuit. March 27, 1899.) No. 674. Appeal from the Circuit Court of the United States for the Western District of Michigan. Barton & Brown, for appellant. Bundy & Travis, Stewart & Stewart, and Charles C. Bulkley, for appellees. Dismissed, on motion of appellant. See 89 Fed. 670.

WILSON TRANSIT CO. v. KINIRIE. (Circuit Court of Appeals, Sixth Circuit. March 31, 1899.) No. 691. In Error to the Circuit Court of the United States for the Eastern District of Michigan. Goulder & Holding, for plaintiff in error. Chadwick & McIlwain, for defendant in error. No opinion. Affirmed, with costs.

END OF CASES IN VOL. 92.